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SUPREME COURT OF INDIA

1982

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The Hon'ble Mr. Justice Y. V. Chandrachud.

PUISNE JUDGES :

The Hon'ble Mr. Justice P. N. Bhagwati.

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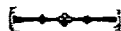
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 —Statutory Corporation — Ambit of powers — See Reserve Bank of India Act (1934), S. 58 (Apr) 917 C

All India Service (Leave) Rules (1955)

- R. 20-B — See High Court Judges (Conditions of Service) Act (1954), S. 3 (Sep) 1265

Andhra Pradesh Excise Act (17 of 1968)

- S. 34 (a) & (i) — See Criminal P. C. (1974), S. 401 (Nov) 1492

Andhra Pradesh Land Encroachment Act (3 of 1905)

- Ss. 6 (1), 7 — Power of Government to evict summarily a person committing encroachment — Duration of encroachment is not decisive. (1970) 1 Andh LT 88 and AIR 1971 Andh Pra 382, **Overruled**; Writ Petns. Nos. 905 and 796 and 922 of 1975. D/- 30-6-1977 (Andh Pra), **Reversed** (Jun) 1081 B

- Ss. 6 (1), 7 — Person in unauthorised occupation of Government land — Power of Government to evict summarily — Cannot be resorted to in cases where complicated questions of title arise for decision (Jun) 1081 A

- S. 7 — See Ibid, S. 6 (1) (Jun) 1081 A, B

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See under Tenancy Laws.

Andhra Pradesh State and Subordinate Service Rules

- R. 10 (a) (i) (1) — See Constitution of India, Art. 320 (3) Proviso (Dec) 1555

Arbitration Act (10 of 1940)

- S. 34 — "Taking any other step in the proceedings" — Does not include each and every step — Intention to waive benefit of arbitration agreement and to proceed with suit must be displayed — Defendant contesting interlocutory orders or filing application for setting aside ex parte interim injunction — Does not disentitle party from claiming stay, AIR 1943 Cal 484, AIR 1966 Cal 315, AIR 1949 Mad 582, AIR 1970 Mad 323, AIR 1977 Mad 189 and AIR 1978 Andh Pra 289, **Overruled**; C. R. No. 696 of 1981, D/- 20-11-1981 (Madh Pra), **Reversed** (Oct) 1302 A

- S. 34 — Stay of proceeding — Plea that application did not contain averment that applicant was ready and willing to do necessary things for proper conduct of arbitration — Cannot be raised for first time in revision (Oct) 1302 B

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- S. 2 — See Constitution of India, Article 5 (Nov) 1413 G

- S. 21 — See Constitution of India, Article 21 (Nov) 1413 B

- S. 130 — Army Rules, 1950, R. 44 — Constitution of Court-martial — Requirement of asking accused whether he objects to any officer of Court is mandatory (Nov) 1413 D

- S. 153 — Punishment under Act — No appeal or review provided under Act — It is serious lacuna — Confirmation proceeding under Section 153 is not sufficient (Nov) 1413 H

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- R. 19 — See Constitution of India, Article 21 (Nov) 1413 B

- R. 20 — See Constitution of India, Article 21 (Nov) 1413 B

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—R. 21 — See Constitution of India, Article 21 (Nov) 1413 B
 —R. 22 — See Ibid, R. 25 (Nov) 1413 E
 —R. 23 — See
 (1) Ibid, R. 25 (Nov) 1413 E
 (2) Ibid, R. 180 (Nov) 1413 F
 —R. 24 — See Ibid, R. 25 (Nov) 1413 E
 —Rr. 25, 22, 23, 24 and 37 — Trial of officer by Court-martial — Compliance of Rr. 22, 23 and 24 is not necessary unless there is request from officer — Rules are not violative of Art. 21 of Constitution (Nov) 1413 E

—R. 37 — See
 (1) Ibid, R. 25 (Nov) 1413 E
 (2) Ibid, R. 180 (Nov) 1413 F
 —Rr. 40 and 187 — Composition of Court-martial — Requirements — Word 'corps' — Restricted meaning has to be given — Word 'corps' does not mean 'army corps' (Nov) 1413 C

—R. 44 — See Army Act (1950), S. 130 (Nov) 1413 D
 —Rr. 180, 23 and 37 — Trial by court-martial — Prior inquiry by Court of Inquiry not obligatory (Nov) 1413 F
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—Ss. 4 and 7 (3) (b) — Land Acquisition Act (1894), S. 23 — Acquisition of land under State Act — Solatium must be paid as is payable in case of acquisition of land under Land Acquisition Act (Aug) 1214
 —S. 7 (3) (b) — See Ibid, S. 4 (Aug) 1214

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—Sch. 1, Item 1 — See Essential Commodities Act (1955), S. 3 (Jan) 58
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—S. 13 — See Bihar Home Guards Rules (1948), R. 5 (Nov) 1394

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—R. 5 — Applicability — Petitioner appointed as Company Commandant, Home Guards on 1-3-1949 — His removal from service by Commandant General — Whether amounted to removal by authority lower in rank than appointing authority (Nov) 1394

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Bombay Hereditary Offices Act (3 of 1874)

—S. 4 — See
 (1) Hindu Law — Impartible estate (Apr) 887 A
 (2) Tenancy Laws — Bombay Pargana and Kulkarni Watans Abolition Act (1950), S. 3 (Apr) 887 B
 —S. 15 — See Tenancy Laws — Bombay Pargana and Kulkarni Watans Abolition Act (1950), S. 3 (Apr) 887 B

Bombay High Court Appellate Side Rules (1960)

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Bombay Merged Territories Miscellaneous Alienation Abolition Act (22 of 1955)

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Bombay Pargana and Kulkarni Watans Abolition Act (60 of 1950)

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Bombay Rationing Organization (Fixation of Seniority) Rules (1968)

—R. 4 — See Constitution of India, Article 309 (Jan) 101

—R. 7 Proviso — See Constitution of India, Art. 309 (Jan) 101

Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947)

See under Houses and Rents.

Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act (16 of 1960)

See under Tenancy Laws.

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—R. 7 — Fixation of initial pay in revised scales — Petitioners, Radio Operators Grade III (Naik), exercised their option in favour of revised pay scales — They were paid a salary of Rs. 250/- with a special pay of Rupees 30/- — Refixation in revised pay scale of Rs. 225-308 and deduction of excess amount paid earlier — Valid (Sep) 1253

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—S. 5 (3) (ii) — Jagirdars of Timarni, not Ruling Chief under Peshwas or Scindias — British Government never recognised them as such — They were not entitled to pension under S. 5 (3) (ii) (Aug) 1201 A

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—S. 9 — See also
 (1) Co-operative Societies — U. P. Co-operative Societies Act (11 of 1966), S. 70 (Jan) 120
 (2) Merchant Shipping Act (1958), S. 119 (Jul) 1173

—S. 10 — See Constitution of India, Article 133 (Jan) 83

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—S. 51, O. 21, R. 35 (3) — Decree for eviction — Execution of — Auction sale by Court — Objections — Maintainability (Mar) 709

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—O. 6, R. 16 — Representation of the People Act (1951), S. 100 (1) (d) (iv) — Petition striking out of pleadings — Direction for deletion of certain paras of petition — Grounds for, being non-disclosure of material facts sufficient to give rise to cause of action (Dec) 1559 B

—O. 6, R. 17 — See also Ibid, S. 115 (Jan) 17

—O. 6, R. 17 — Application for amendment of written statement, allowed partly — Rejected part having bearing on question to be decided — Rejection of such part — Held, erroneous. 1980 (UP) RCC 599 Reversed (Jan) 24

—O. 9, R. 13, Explanation — Ex parte decree — Remedies of defendant — Impact of explanation, AIR 1982 Delhi 71. Reversed (Nov) 1397

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—O. 14, R. 1 (5) — See Houses and Rents — U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (1972), S. 20 (4) (Mar) 816 A

—O. 19, R. 3 — See Constitution of India, Art. 32 (Jan) 65 B

—O. 21, R. 29 — Court which has passed decree alone has power to stay its execu-

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tion — Suit for recovery of possession of property belonging to Math decreed by Munsif — Decree finally affirmed by Supreme Court — Order of Civil Judge allowing defendant's application for stay of execution, held, was nullity and violative of Art. 141 (Mar) 686

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—O. 21, Rr. 72, 92 and 94 — Auction-purchaser, decree-holder himself — Setting aside of decree in appeal — Auction-purchaser, if entitled to any protection (May) 989 E

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(1) Ibid, O. 21, R. 72 (May) 989 E

(2) Ibid, O. 22, R. 10 (May) 989 C

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—O. 22, R. 11 — See Ibid, O. 22, R. 4 (May) 948 (1)

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—O. 23, R. 4 — See Transfer of Property Act (1882), S. 105 (Mar) 813

—O. 34, R. 1 and O. 22, R. 4 — Suit for redemption — Legal representatives of co-mortgagee not brought on record in appeal — Appeal abates only in respect of that mortgagee when mortgagor is prepared to pay entire mortgage amount to surviving mortgagee (Jan) 121 B

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—O. 41, R. 33 — See Ibid, O. 41, R. 22 (Jan) 98

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—R. 73 (2) — See Representation of the People Act (1951), S. 100 (1) (d) (iii) (Dec) 1569 B

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—Pre. — See also

(1) Ibid, Art. 141 (Feb) 149 ZI

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—Pre. and Arts. 14, 16 and 39 (d) — Provisions contemplate the principle "equal pay for equal work" (Apr) 879

—Pre. and Arts. 14, 21 — Constitutional scheme — Object is the fullest development of individual and ensuring his dignity through rule of law (Oct) 1325 C

—Art. 3 — See States Reorganisation Act (1956), S. 51 (3) (Aug) 1198

—Art. 4 — See States Reorganisation Act (1956), S. 51 (3) (Aug) 1198

—Arts. 5, 21 and 32 — Citizen — Persons subject to Army Act do not cease to be citizens (Nov) 1413 G

—Art. 11 — See Merchant Shipping Act (1958), S. 119 (Jul) 1173

—Arts. 13, 123, 357, 367 — Power to issue Ordinances — Legislative and not executive in character (Mar) 710 A

—Arts. 13 (2), 14, 19, 21 and 123 — Power to issue Ordinance — Effect — Articles 14, 19 and 21 not reduced to dead letters (Mar) 710 F

—Art. 14 — See also

(1) Ibid, Pre. (Apr) 879; (Oct) 1325 C

• (2) Ibid, Art. 13 (2) (Mar) 710 F

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(3) Ibid, Art. 19 (1) (g) (Jan) 33 E

(4) Ibid, Art. 32 (Nov) 1473 F

(5) Ibid, Art. 309 (Jan) 19 A; (Jan) 101 (Jun) 1064 C, G

(6) Divorce Act (1869), S. 7 (Sep) 1261 A

(7) Life Insurance Corporation Act (1956), S. 48 (2) (cc) (Jun) 1126 A

(8) M. P. Land Revenue Code (1955), Section 149 (Apr) 872

(9) Municipalities — Gujarat Municipalities Act (1964), S. 233 (1) Cl. (b) (Mar) 781 A

(10) Panchayats — Gujarat Panchayats Act (1962), S. 193-A (Mar) 781 B

(11) Penal Code (1860), S. 302 (Oct) 1325 A

(12) Public Safety — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), S. 3 (Jan) 8 D

(13) Public Safety — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), S. 8 (Jul) 1178 C

(14) Punjab Foodgrains Dealers Licensing and Price Control Order (1978), Cl. 11 (1) Proviso 2 (Jan) 65 A

(15) Rajasthan Trade Articles (Licensing and Control) Order (1980), Cl. 18 (Feb) 130

(16) Sugarcane (Control) Order (1966), Cl. 4 (Apr) 902 B

(17) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act (1960), Pre. (Jun) 1090 A, B

(18) U. P. Public Lands (Eviction and Recovery of Rent and Damages) Act (1959), Pre. (Mar) 730

(19) U. P. Sheera Niyanttran Adhiniyam (1964), S. 8 (Mar) 786

—Art. 14 — Constitution (44th Amendment) Act (1978), Section 1 (2) — Not violative of Art. 14 on the ground that it confers uncontrolled power on the Executive (Mar) 710 K

—Arts. 14, 19, 21 and 22 — National Security Act (65 of 1980), Pre. — Constitutionality — Act is not unconstitutional on the ground that by its nature it is generally violative of Arts. 14, 19, 21 and 22 of Constitution (Mar) 710 N

—Arts. 14, 16 — Reserve Bank of India Administrative Circular No. 8 dated 7-1-1978 and Office Order No. 679 dated 27-4-1978 — Introduction of common seniority and inter-group mobility amongst different grades of Bank Officers of Groups I, II and III — Not violative of Arts. 14 and 16 — Giving retrospective effect to combined seniority list and choosing 22-5-1974 as relevant date held proper (Apr) 917 F

—Art. 14 — Sugar (Control) Order (1966), Cl. 5 — Central Govt. Order No. G.S.R.-410-E/Ess. Comm./Sugar dated 14-7-1980 — Fixation of limits for storing sugar in Calcutta and other places — Not arbitrary but is based on reasonable classification (May) 1016 C

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—Art. 14 — Sugar (Control) Order (1966), Cl. 5 — Central Govt. Order No. G.S.R. 410-E/Ess. Comm./Sugar dated 14-7-1980 — Order is not violative of Art. 14

(May) 1016 D

—Arts. 14, 16 — Tamil Nadu Abolition of Posts of part time Village Officers Act (3 of 1981), Pre. — Act is neither arbitrary nor colourable

(Jun) 1107 D

—Art. 14 — Tamil Nadu Abolition of Posts of part time Village Officers Act (3 of 1981), S. 2 (e) — Abolition of posts of officials appointed after 16-12-1970 — Art. 14 not violated

(Jun) 1107 E

—Arts. 14, 16 — Resolution dated 9-3-1976 issued by Govt. of Maharashtra — Recruitment Rules — Selection of candidates having aptitude to work in rural area — Classification

(Oct) 1301

—Arts. 14, 21 — "Law" and "Rule of Law" — Connotations of

(Oct) 1325 D

—Art. 14 — A statute challenged as arbitrary and discriminatory — Normally burden lies on petitioner to prove — In exceptional cases initial burden can be placed on State — Law providing death penalty — Burden lies on State to prove its reasonableness and justness

(Oct) 1325 G

—Arts. 15, 226 — Rules framed by M. P. Government for Admission to Medical, Dentistry and Ayurvedic Colleges (1979), Rr. 9, 20, 7 — Admission to medical college — Reservation for specific categories — Overall shortage of qualifying candidates — Minimum qualification statutorily lowered — Seats still vacant — Govt. by executive order further lowering minimum qualification — R. 9 could not be applied at this stage for finalising admissions. Misc. Writ Petn. No. 167 of 1980, D/- 4-11-1980 (Madh Pra), Reversed

(Apr) 827

—Art. 16 — See

(1) Ibid, Pre. (Apr) 879

(2) Ibid, Art. 14 (Apr) 917 F; (Jun) 1107 D; (Oct) 1301

(3) Ibid, Art. 309 (Jan) 101; (Jun) 1064 C, G

—Arts. 17, 23, 24, 226 — Violation of fundamental rights under Arts. 17, 23, 24 — Duty of State

(Nov) 1473 K

—Art. 19 — See also

(1) Ibid, Art. 13 (2) (Mar) 710 F

(2) Ibid, Art. 14 (Mar) 710 N

(3) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act (1980), Pre.

(Jun) 1090 A, B

—Art. 19 — A law challenged as violative of one or other sub-clause of Art. 19 (1) — Burden lies on petitioner to show that it imposes restrictions on freedom guaranteed under Art. 19 (1) — Burden discharged — Onus shifts on State to prove that restrictions are reasonable. AIR 1975 SC 1146 Not followed in view of AIR 1954 SC 728 and AIR 1964 SC 925

(Oct) 1325 E

—Art. 19 (1) (a) — See also Prisons Act (1894), S. 59

(Jan) 6

—Arts. 19 (1) (a), 32 — Procedure — Discussions by press on the merits and demerits of the grounds on which recommendations were made concerning the Judges

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or the truth or falsity of disclosed material — Amounts to holding a trial by Press — Such behaviour of the Press — Deprecated

(Feb) 149 ZB

—Art. 19 (1), (a) (c) — See Ibid, Art. 21 (Nov) 1413 B

—Art. 19 (1) (f) — See

(1) Municipalities — Gujarat Municipalities Act (1964), S. 233 (1) cl. (f) (Mar) 781 A

(2) Panchayats — Gujarat Panchayats Act (1962), S. 193-A (Mar) 781 B

—Art. 19 (1) (g) — See also

(1) Life Insurance Corporation (Amendment) Act (1981), Pre. (Jun) 1126 D

(2) Rajasthan Trade Articles (Licensing & Control) Order (1980), cl. 18

(Feb) 138

(3) Sugarcane (Control) Order (1966), Cl. 4A (Apr) 902 G

—Arts. 19 (1) (g), 14 — Essential Commodities Act (1955), S. 3 — U. P. Foodgrains (Procurement and Regulation of Trade) Order (1978), Cl. 4 — Clause 4 as amended is valid

(Jan) 33 E

—Art. 19 (1) (g) — Tamil Nadu Abolition of Posts of part time Village Officers Act (3 of 1981), Pre. — Act, not violative of Art. 19 (1) (g)

(Jun) 1107 A

—Art. 19 (1) (g) & (6) — See also

(1) Ibid, Art. 162 (Jan) 33 A

(2) Punjab Foodgrains Dealers Licensing and Price Control Order (1978), Cl. 11 (1), Proviso 2 (Jan) 95 A

(3) Sugarcane (Control) Order (1966), Cl. 4A (Apr) 902 D

—Arts. 19 (1) (g) and (6), 301, 302, 162 — Individuals right of freedom and freedom of inter-State trade as against national interest — Duty of Court — "Reasonable restriction" — Meaning of — Regulatory measure to prevent price rise in wheat and its outflow — Held, to be in interest of general public

(Jan) 31 E

—Art. 19 (1) (g) and (6) — Reasonable restriction — Meaning — Sugar (Control) Order (1966), Cl. 5 — Central Govt. Order No. G.S.R. 410-E/Ess. Comm./Sugar dated 14-7-1980 — Restrictions put by the Order is not unreasonable

(May) 1016 E

—Art. 19 (6) — See

(1) Essential Commodities Act (1955), S. 3 (Jan) 29 B, C

(2) Essential Commodities Act (16 of 1955), S. 3 (1) (d) (Jan) 29 A

—Art. 21 — See also

(1) Ibid, Pre. (Oct) 1325 C

(2) Ibid, Art. 5 (Nov) 1413 G

(3) Ibid, Art. 13 (2) (Mar) 710 F

(4) Ibid, Art. 14 (Mar) 710 N; (Oct) 1325 D

(5) Ibid, Art. 22 (5) (May) 1029 C

(6) Ibid, Art. 32 (Nov) 1473 F

(7) Army Rules (1954), R. 25 (Nov) 1413 E

(8) Life Insurance Corporation (Amendment) Act (1981), Pre. (Jun) 1126 E

(9) Penal Code (1860), S. 302 (Oct) 1325 A

(10) Prisons Act (1894), S. 59 (Jan) 6

—See also

(1) Public Safety — Conservation of Foreign Exchange and Prevention of

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- Smuggling Activities Act (1974), Section 3 (3) (Jan) 53 B
- (2) Public Safety — J. & K. Public Safety Act (1978), S. 16 (1) (May) 978
- Arts. 21, 123 (2), 367 (2) — Ordinance is "law" within meaning of Art. 21 (Mar) 710 B
- Arts. 21 and 22 — Preventive, detention of — Not basically impermissible under the Constitution (Mar) 710 G
- Arts. 21 and 32 — Speedy trial — Right of — Remedy in the event of denial of such right (Jul) 1167
- Art. 21 — Law providing death penalty — Burden lies on State to prove its reasonableness, fairness and justness (Oct) 1325 F
- Arts. 21, 19 (1) (a) (c), 33 and Sch. VII, List 1, Entry 2 — Army Act (1950), S. 21 — Army Rules, 1950, Rr. 19, 20 and 21 — Law prescribing procedure for trial of offence by Court martial — Requirement of Art. 21 need not be satisfied (Nov) 1413 B
- Arts. 21, 22 — Detention of a prisoner as criminal lunatic though he had become perfectly sane and fit for discharge, for a period over 16 years without any justification — Administration of State Govt. highly deprecated — Direction given that petitioner should be released from jail forthwith (Nov) 1470
- Art. 22 — See also
- (1) Ibid, Art. 14 (Mar) 710 N
- (2) Ibid, Art. 21 (Mar) 710 G; (Nov) 1470
- (3) Public Safety — Conservation of Foreign Exchange & Prevention of Smuggling Activities Act (1974), Section 3 (1) (Jan) 1 A
- (4) Public Safety — National Security Act (1980), S. 3 (Oct) 1315 C
- Art. 22 — National Security Act (65 of 1980), Ss. 10 and 11 — Procedure to be followed by Advisory Board — Legality — Rights available to detenu — Extent of (Mar) 710 U
- Art. 22 — Detention — Inquiry report not supplied to detenu along with grounds for detention — Counter affidavit filed by clerk in judicial section and not by District Magistrate — It cannot be proper explanation or return to rebut allegations made by detenu — Consequently order of detention set aside (Apr) 878
- Art. 22 (4) — See Public Safety — National Security Act (65 of 1980), S. 9 (Mar) 710 T
- Art. 22 (5) — See also
- (1) Ibid, Art. 32 (Jan) 8 E
- (2) Public Safety — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), S. 3 (Jan) 8 B; (Mar) 696; (Aug) 1221
- (3) Public Safety — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), Section 3 (1) (May) 1029 B; (Jul) 1165 C
- (4) Public Safety — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), Section 3 (3) (Jan) 53 B

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- (5) Public Safety — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), S. 8 (e) (Jan) 8 A
- (6) Public Safety — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), S. 11 (Jul) 1178 A
- (7) Public Safety — J. & K. Public Safety Act (1978), S. 8 (May) 1023 A; (Oct) 1297 A, C
- (8) Public Safety — National Security Act (1980), S. 3 (Feb) 146 A
- (9) Public Safety — National Security Act (1980), S. 8 (Feb) 146 B
- (10) Public Safety — J. & K. Public Safety Act (1978), S. 13 (May) 1023 B
- (11) Public Safety — National Security Act (1980), Section 3 (2) (Jun) 1143 A
- Arts. 22 (5), 21 — Right of representation — Scope (May) 1029 C
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- (1) Ibid, Art. 17 (Nov) 1473 K
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(3) Ibid, Art. 21 (Jul) 1167

(4) Ibid, Art. 216 (Feb) 149 I

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 - (2) Evidence Act (1872), S. 113 (Aug) 1201 C
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(5) Evidence Act (1872), S. 123 (Feb) 149 D

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(2) Ibid, Art. 17 (Nov) 1473 K

(3) Ibid, Art. 32 (Jan) 8 E;

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(4) Ibid, Art. 136 (May) 949 C

(5) Ibid, Art. 217 (1) (Feb) 149 ZC

(6) Ibid, Art. 224 (Feb) 149 J

(7) Ibid, Art. 224 (1) (Feb) 149 Z, F

(8) Ibid, Art. 309 (Jun) 1084 H

(9) Ibid, Art. 310 (Jun) 1107 B

(10) Life Insurance Corporation (Amendment) Act (1981), Pre. (Jun) 1126 D

(11) M. P. Land Revenue Code (2 of 1955), S. 149 (Apr) 872

(12) Merchant Shipping Act (1958), S. 119 (Jul) 1173

(13) Police Act (1861), S. 7 (May) 937

(14) Public Safety — Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), Section 3 (1) (Mar) 683 A; (Jul) 1165 C

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(2) U. P. Public Lands (Eviction and Recovery of Rent and Damages) Act (1959), Pre. (Mar) 780

—Art. 246 — See Municipalities — M. P. Nagar Tatha Gram Nivesh Adhiniyam (1973), S. 69 (d) (Mar) 697 E

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(1) C. P. & Berar Revocation of Land Revenue Exemptions Act (1948), Section 5 (3) (ii) (Aug) 1201 A

(2) Evidence Act (1872), S. 113 (Aug) 1201 C

—Art. 254 — See Municipalities — Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam (1973), S. 69 (d) (Mar) 697 A, E

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(1) Ibid, Art. 19 (1) (g) and (6)

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(2) Ibid, Art. 162

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(3) Punjab Foodgrains Dealers Licensing and Price Control Order (1978), Clause 11 (1), Proviso 2 (Jan) 65 A

—Art. 302 — See

(1) Ibid, Art. 19 (1) (g) & (6) (Jan) 33 B

(2) Essential Commodities Act (10 of 1955), S. 3 (1) (d) (Jan) 29 A

—Art. 309 — See also

(1) High Court Judges (Conditions of Service) Act (1954), S. 3 (Sep) 1265

(2) Naval Ceremonials, Conditions of Service and Miscellaneous Regulations (1954), Regn. 251 (June) 1064 D

(3) Released Emergency Commissioned Officers and Short Service Commissioned Officers (Reservation of Vacancies) Rules (1971), R. 4 (1) (Mar) 795

—Arts. 309, 311 and 14 — Delhi Police (Promotion and Confirmation) Rules (1980), R. 15

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— Rules for promotion to rank of Asstt. Sub-Inspectors — Rules apply to all Head Constables equally without discrimination with effect from 29-12-1980 — Delhi Administration is competent to modify existing rules — Held, that rules are constitutionally valid (Jan) 19 A

—Arts. 309 and 311 — Delhi Police (Promotion and Confirmation) Rules (1980), R. 15 — Selection by Departmental Promotion Committee — Admission of names to list for promotion to rank of Asstt. Sub-Inspectors — Standing Order No. 40-81 providing for awarding of five marks for representation at different levels in sports for purposes of selection — Standing Order whether inconsistent with R. 15 (Jan) 19 B

—Arts. 309, 14, 16, 311 — Bombay Rationing Organization (Fixation of Seniority) Rules (1968), R. 4 and R. 7 Proviso — Creation of Bombay Rationing Organization by merging employees of erstwhile Food Grains Distribution Organization and employees of various departments — Seniority lists prepared under Rules of 1968 — Validity — Petition challenging validity of Rules allowed by High Court though filed after long delay — Legality. (1979) 2 Serv LR 583 (Bom), Reversed (Jan) 101

—Arts. 309, 311 — Rules under Art. 309 framed by Ministry of Defence of Government of India issued in office Memo No. Pers/1860 RD Sel. BD 7971/D (R & D) dt. 23-11-1979, R. 16 — Seniority and promotion — Service Officers seconded to Organisation — Computation of seniority (June) 1034 A

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—Arts. 309, 311, 14, 16 — Rules under Article 309 framed by Ministry of Defence of Government of India issued in Office Memo No. Pers/1860/RD/Sel. BD/7971/D (R & D) dt. 23-11-1979, R. 16 — Lateral induction of officers higher than Major/equivalent to the Organisation — Does not amount to deprivation of existing service officers' chances to promotion (June) 1064 G

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—Arts. 309, 311, 226 — Rules under Article 309 framed by Ministry of Defence of Government of India issued in Office Memo No. Pers/1880 RD Sel BD 7971/D (R & D) dt. 23-11-1979, R. 16 — Statutory rule governing seniority — Its promulgation is legislative function and not quasi-judicial function (June) 1064 H

—Arts. 310, 311, 226 — Relative scope of — Power to abolish post — Justiciable — Person ceasing to be Government servant — Question of his rehabilitation — It is a matter of policy. AIR 1965 J & K 15 (FB), Overruled (Jun) 1107 B

—Arts. 310 and 311 — Seniority — Determination (Sep) 1244

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—Art. 311 — See also

(1) Ibid, Art. 32 (Mar) 776

(2) Ibid, Art. 32 (May) 1008

(3) Ibid, Art. 309 (Jan) 19 A, B; (Jan) 101; (Jun) 1064 A, C, E, F, G, H

(4) Ibid, Art. 310 (Jun) 1107 B;

(Sep) 1244; (Nov) 1407 B

(5) Bihar Home Guards Rules (1948), R. 5 (Nov) 1394

(6) Constitution of J. & K., Art. 109 (Dec) 1579 C

(7) Naval Ceremonials, Conditions of Service and Miscellaneous Regulations (1954), Regn. 251 (Jun) 1064 D

(8) Police Act (1861), S. 7 (May) 937

(9) Released Emergency Commissioned Officers and Short Service Commissioned Officers (Reservation of Vacancies) Rules (1971), R. 4 (1) (Mar) 795

—Art. 311 — Fundamental Rules, R. 56 (d) — Compulsory retirement — Validity — Officer promoted after dropping of charges framed on basis of adverse entry — Compulsory retirement shortly thereafter, is invalid. (1979) 1 Serv LR 258 (Mad), Reversed (Mar) 793

—Art. 311 — Suspension of employee after having been informed about dispensing of his services due to abolition of department in which he was serving — Departmental proceedings initiated against him dropped — Effect (Jul) 1176

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(1) Ibid, Art. 109 (Dec) 1579 B, C

(2) Constitution of India, Art. 136

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—S. 1 (2) — See also

(1) Constitution of India, Art. 14 (Mar) 710 K

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- (3) Constitution of India, Art. 368 (1)
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(1) Ibid, S. 374 (Jul) 1175

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(1) Ibid, S. 433-A (Jul) 1163

(2) Constitution of India, Art. 32 (Oct) 1391 A, B, C, D

—S. 432 (7) — See Ibid, S. 385 (May) 1052 A

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(1) Ibid. S. 204 (Jul) 1181

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—Ss. 7, 10 — Divorce — Grounds for — "Mutual consent" not contemplated — Section 1 (2) (d) of the British Matrimonial Causes Act (1973) cannot be read into S. 7 of the Divorce Act — Expression "principles and rules" in S. 7 does not mean grounds (Sep) 1261 A

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—S. 3 — See also

(1) Ibid, S. 2 (a) (v) (Mar) 788
 (2) Constitution of India, Art. 14 (May) 1016 C, D

(3) Constitution of India, Art. 19 (1) (g) (Jan) 33 E

(4) Constitution of India, Art. 19 (1) (g) and (6) (May) 1016 B

(5) Constitution of India, Art. 32 (Jan) 33 C

(6) Constitution of India, Art. 162 (Jan) 33 A

(7) Punjab Foodgrains Dealers Licensing and Price Control Order (1978), Cl. 11 (1) Proviso 2 (Jan) 85 A

(8) Rajasthan Trade Articles (Licensing and Control) Order (1980), Cl. 18 (Feb) 130

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—S. 2 (16) — See Ibid, S. 64 (Jul) 1153

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—S. 3 — See also

(1) Ibid, S. 9 (Apr) 839 B

(2) Constitution of India, Art. 134 (Oct) 1299

(3) Constitution of India, Art. 138 (Aug) 1216

(4) Penal Code (1860), S. 299 (Jul) 1157

(5) Penal Code (1860), S. 300 (Aug) 1227 C

(6) Penal Code (1860), S. 302 (Aug) 1217

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—S. 3 — Fact that the witness is wife of the deceased is no ground for rejecting her evidence — Her evidence should be scrutinised with care (Jun) 1076 B

—S. 3 — Approver evidence — Evidentiary value of (Aug) 1227 A

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- (2) Ibid, S. 300, Cls. 1, 3 (Jan) 55
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(2) Constitution of India, Art. 32

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(3) Public Safety — J. & K. Public Safety Act (1978), S. 8 (May) 1023 A

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(3) Constitution of India, Art. 22 (5) (Mar) 146 B

(4) Public Safety — J. & K. Public Safety Act (1978), S. 8 (May) 1023 A

(5) Public Safety — J. & K. Public Safety Act (1978), S. 13 (May) 1023 B

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(1) Ibid, S. 9 (Mar) 710 X, Y

(2) Constitution of India, Art. 22 (Mar) 710 U

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1982 Cri LJ 817 (Delhi) — Revers. AIR 1982 SC 1181 (Jul).

GAUHATI

1982 Cri LJ NOC 127 (Gau) — Revers. AIR 1982 SC 1595 B C (Dec).

GOA

AIR 1970 Goa 11 — Revers. AIR 1982 SC 1268 C (Sep).

GUJARAT

(1980) 21 Guj LR 7 — Over. AIR 1982 SC 1439 (Nov).

(1980) Spl. Criminal Appln. No. 185 of 1979, D/- 16-1-1980 (Guj) — Revers. AIR 1982 SC 683 A (Mar).

JAMMU & KASHMIR

AIR 1965 J & K 15 (FB) — Over. AIR 1982 SC 1107 B (Jun).

KARNATAKA

AIR 1976 Kant 187 — Revers. AIR 1982 SC 836 (Apr).

KERALA

(1978) M.F.A. No. 145 of 1976, D/- 13-11-1978 (Ker) — Revers. AIR 1982 SC 1497 (Nov).

1979 Lab IC 1399 (Ker) (FB) — Revers. AIR 1982 SC 854 A (Apr).

MADHYA PRADESH

(1964) First Appeal No. 14 of 1959, D/- 5-3-1964 (Madh Pra) — Revers. AIR 1982 SC 939 B (May).

1974 MPLJ (Notes) 102 — Over. AIR 1982 SC 800 A (Mar).

(1974) Misc. Criminal Case No. 786 of 1974, D/- 16-10-1974 (Madh Pra) — Revers. AIR 1982 SC 800 A (Mar).

(1980) Misc. Writ Petn. No. 187 of 1980, D/- 4-11-1980 (Madh Pra) — Revers. AIR 1982 SC 827 (Apr).

1981 C. R. No. 696 of 1981, D/- 20-11-1981 (Madh Pra) — Revers. AIR 1982 SC 1302 A (Oct).

MADRAS

AIR 1949 Mad 582 — Over. AIR 1982 SC 1302 A (Oct).

AIR 1970 Mad 323 — Over. AIR 1982 SC 1302 A (Oct).

AIR 1977 Mad 189 — Over. AIR 1982 SC 1302 A (Oct).

(1979) 1 Serv LR 258 (Mad) — Revers. AIR 1982 SC 793 (Mar).

1980 Lab IC 372 (Mad) — Revers. AIR 1982 SC 82 (Jan).

PATNA

(1981) C. W. J. C. No. 3032 of (1980), D/- 29-7-1981 (Pat), 1982 BLJ 35 — Revers. AIR 1982 SC 882 (Apr).

(1982) Writ Jurn. Case No. 40 of 1982 (R), D/- 7-4-1982 (Pat) — Revers. AIR 1982 SC 1539 A (Dec).

PUNJAB

(1961) 2 SCR 371 (Punj) — Over. AIR 1982 SC 149 D (Feb).

(1965) 1 Delhi LT 362 (Punj) — Over. AIR 1982 SC 1511 D (Dec).

(1978) 2 Rent LR 601 (Punj) — Revers. AIR 1982 SC 1043 B (May).

AIR 1980 Punj 278 — Revers. AIR 1982 SC 1106 (Jun).

(1981) Habeas Corpus Petn. No. 33 of 1981 (Punj) — Revers. AIR 1982 SC 792 (Mar).

(1981) Criminal Appeal No. 452-DB of 1981 (Punj) — Revers. AIR 1982 SC 1466 A, B (Nov).

RAJASTHAN

(1969) Civil Writ Petn. No. 365 of 1962, D/- 28-8-1969 (Raj) — Revers. AIR 1982 SC 979 (May).

1974 Raj LW 543 : (1974) WLN 882 — Revers. AIR 1982 SC 933 (May).

1976 Raj LW 240 : 1977 Cri LJ NOC 143 — Revers. AIR 1982 SC 1057 A, B (Jun).

1980 WLN (UC) 457 (Raj) — Revers. AIR 1982 SC 1493 (Nov).

COMPARATIVE TABLE

AIR 1982 Supreme Court

AIR = Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	(1981) 4 S O C 481 1981 Cri App R (SQ) 847 1982 Bihar Ori O 70 1982 Cri L J 148 1981 S O C (Ori) 853 1981 Cri L R (SQ) 852 1982 Chand L R (Ori) (SQ) 318 1982 All Cri L J (SQ) 1 1982 Mad L J (Ori) 245 (1982) 1 S O C 164 1982 (UP) Cri C (SQ) 70 1982 I J R (Ori) (SQ) 1 (1982) 1 S O R 1010 3 (1981) 4 S O C 517 1981 All L J 1841 1982 Hindu L R 180 1981 All W O 738 1981 (7) All L R 603 1982 T L N J (SQ) 2 1982 B B O J (SQ) 31 (1982) 1 S O C 186 1982 U J (SQ) 67 1982 Marriage L J 1 1982 Mat L R 16 1982 All O J 84 (1982) 1 S O R 1003 4 (1982) Cri L J 143: (1982) 1 S O C 1 1982 Mad L J (Ori) 311 (1982) 1 S O C 169 1981 U J (SQ) 843 1982 S O C (Ori) 41 1982 All Ori C (SQ) 1 1982 Cri App R (SQ) 3 (1982) 34 Bom L R 65 1982 I J R (Ori) (SQ) 56 (1982) 1 S O R 1184 8 1982 Cri L J 150 (1981) 4 S O C 647 1981 Cri L R (SQ) 644 1982 S O C (Ori) 16 1982 (2) Bom O R 218 (1982) 1 S O R 1028 1982 S O Cri R 258 28 (1981) 131 I T R 538	16con(1981) 2 Rent L R 603 1981 U J (SQ) 717 1982 Tax L R 1 (1981) 4 S O C 578 (1981) 7 Taxman 51 (SQ) 1982 S O C (Tax) 1 1982 U P T C 223 17 1982 L S (SQ) 8 (1982) 3 S O C 217 18 (1981) 3 S O C 122 1981 Leg Serv (SQ) 2 1981 Mah L R (SQ) 195 1981 A O J 469 1981 All O J 401(2) 1981 All L J 1844 (1981) 2 S C W R 253 1981 T A O 497 (1982) 14 Lawyer 32 19 1982 Lab I C 25 (1982) 1 Lab L N 233 (1981) 3 Serv L R 248 (1982) 8 S O C 281 20 (1982) 1 S O C 4 1982 Mah L J 1 1982 Mah L R (SQ) 68 1982 Rev L R (SQ) 92 1982 U J (SQ) 1 (1982) 1 A P L J (SQ) 1 (1982) 1 Ren O R 381 1982 M P L J 1 1982 (2) Bom O R 137 1982 B B O J (SQ) 88 1982 Guj L H 92 (1982) 2 Civ L J 108 (1982) 1 S O R 1178 (1982) 14 Lawyer 48 (1982) 2 S C W R 53 24 1982 L S (SQ) 1 1982 All Rent Oas 218 (1982) 3 S O C 283 25 1981 U J (SQ) 779 (1981) 4 S O C 544 (1982) 1 Rent L R 87 (1982) 1 Ren O R 188 (1982) 1 Ren O J 654 29 1981 Cri L R (SQ) 522	23con(1981) 4 S O C 550 1981 S O C (Ori) 883 1981 U J (SQ) 845 1982 Cri App R (SQ) 51 1982 S O Cri R 104 1982 E F R 367 31 1982 Cri L J 157 1982 Guj L H 70 1982 (2) Bom O R 258 (1982) 3 S O C 225 32 1982 Tax L R 2 (1982) 2 S O C 542 33 (1982) 1 S O C 89 1982 S O C (Ori) 58 1982 Cri App R (SQ) 9 1982 E F R 183 1982 Ori L R (SQ) 99 1982 All Ori L J (SQ) 87 (1982) 1 S O R 1137 1982 I J R 67 1982 U J (SQ) 802 51 (1982) 1 S O C 411 1982 Guj L H 68 1982 Cri L J 826 (1) 1982 S O C (Ori) 239 1982 All Ori L J 99 (2) 1982 Bihar Ori C (SQ) 120(1) 1982 (UP) Cri C (SQ) 120(1) 1982 I J R 99(2) 52 (1981) 3 S O C 827 53 1982 Cri L J 193 55 1981 Cri L R (SQ) 648 (1981) 4 S O C 484 1983 All Ori L J (SQ) 2 1981 Cri App R (SQ) 856 1983 Cri L J 195 1981 S O C (Ori) 858 1981 U J (SQ) 850 1982 S O Cri R 168 1981 Chand Ori C (SQ) 28 1981 Guj L H 500 1982 Bihar Ori C (SQ) 28 1982 Chand L R (Ori) 813 1982 (UP) Ori C (SQ) 28 1982 I J R (Ori) (SQ) 5 57 1982 Cri L J 197 1982 Rajdhani L R 113	57con(1982) 1 F A O 345 1982 F A J 154 1982 E F R 348 (1982) 3 S O C 220 1982 Ori L O 497 (SQ) 58 (1981) 4 S O C 248 1981 S O C (Ori) 827 1982 B L T (Rep) 187 1982 Bihar Ori C (SQ) 76 1982 Cri L J 198 1982 B L J 11 1982 Cri L R (SQ) 24 1982 E F R 1 (SQ) 1982 U P (Cri) C (SQ) 55 1982 Cri App R (SQ) 248 1982 Ori L C 450 1982 Pat L J R (SQ) 12 1982 Bihar Ori C (SQ) 66 59 1982 Cri L J 199 1982 Guj L H 68 1982 (2) Bom O R 147 (1982) 3 S O C 222 60 1982 B L J 150 1982 Guj L H 168 1982 Pat L J R (SQ) 22 (2) 61 (1982) 3 S O C 227 62 1982 Cri L J 828 (2) (1982) 3 S O C 213 63 ... 64 1982 Ori L J 999 (1982) 3 S O C 229 65 (1982) 1 S O C 31 1982 U J (SQ) 113 1982 S O Cri R 119 1982 E F R 257 70 1982 Ori L J 886 1982 All Ori C 115 (2) (1982) 3 S O C 221 71 (1982) 1 S O C 148 (1982) 21 D L T 194 1982 Rajdhani L R 138 (1982) 1 Ren O R 124 1982 U J (SQ) 90 (1982) 1 Ren O J 431 1982 M P R O J 117 78 1982 Lab I C 35 (1982) 1 S O C 117 (1982) 1 S C W R 235			

AIR Other Journals
710con 1982 Mad L J
 (Cri) 524
756 (1981) 4 SCC 248
 1982 All LJ
 270 (1)
 (1982) 8 Tax-
 man 1 (SC)
 (1982) 2 SCJ 128
757 1982 Tax LR 311
 (1982) 1 SCC 384
 183 ITR 756
 (1982) 12 Tax
 Law Rev 1
 (1982) 28 Our Tax
 Rec (SC) 411
 1982 UPTC 493
 1982 SCC
 Tax) 67
 1982 UJ (SC) 189
 1982 Taxation
 84 (3) 201
760 1982 Tax LR 314
 (1982) 8 Tax-
 man 5 (SC)
 (1982) 1 SCWR
 179
 1982 UPTC 509
 133 ITR 690
 1982 All
 L J 270 (2)
 (1982) 14 Law-
 yer 34
 (1982) 12 Tax
 Law Rev 7
 (1982) 1 SCC 447
 (1982) 28 Our Tax
 Rec (SC) 415
 1982 S C C
 (Tax) 73
 1982 Taxation
 84 (3) 185
 1982 UJ (SC) 751
773 1982 Lab I C 441
 (1982) 2 Serv
 L J 7
 (1982) 1 SCC 421
 1982 S C C
 (Lab) 108
 (1982) 44 Fac
 L R 270
 1982 IJR (Civ)
 (SC) 12
774 1982 Cri L J 624
 (1982) 1 SCC 417
 1982 Mad L J
 (Cri) 327
 (1982) 1 SCJ 188
 1982 Cri L R
 (SC) 59
 1982 S C C
 (Cri) 284
 1982 UJ (SC) 176
 1982 BBQJ
 (SC) 101
 1982 All Cri L J
 (SC) 65
 1982 Cri App R
 (SC) 101
 1982 IJR 65
775 (1981) 4 SCC 154
 1982 BLJ
 (Rep) 161
 1982 BLJ 555
 1982 Pat L J R
 (SC) 11

AIR Other Journals
776 (1981) 4 SCC 160
 1981 S C
 (Lab) 588
 1982 Lab I C 442
 1982 Rajdhani
 L R 255
 44 Fac L R 267
 (1982) 1 Lab
 L N 281
 (1981) 1 SCJ 197
 (1982) 2 Serv
 L J 20
 (1981) 3 Serv
 L R 808
777 (1982) 1 SCC 602
 1982 UJ (SC) 162
 (1982) 1 SCJ 198
 (1982) 21 D L T
 801
 (1982) 1 Rent
 L R 279
 1982 Delhi Rep
 J 165
 1982 Rajdhani
 L R 257
 1982 MPROJ 80
 1982 All C J 249
 (1982) 1 Ren
 C R 405
 (1982) 1 Ren
 C J 674
 1982 All Ren
 Cas 529
778 (1981) 4 SCC 153
779 1981 S C C
 (Ori) 602
 1981 Cri L R
 (SC) 518
 1981 Cri App R
 (SC) 327
 1982 Mad L J
 (Cri) 825
 1982 Cri L J 827
 1982 UP/ Ori C
 (SC) 58
 1982 Bihar Cri
 C (SC) 58
 (1982) 1 SCJ 185
 1982 JSCTL 124
 1981 Supp
 SCC 12
780 (1981) 4 SCC 144
 1982 All LJ 284
 1982 All Rent
 Cas 307
 1982 Land
 L R 418
 (1982) 1 SCJ 187
 1982 UJ (SC) 32
 (1982) 1 SCC 370
 1982 (1) 23 Guj
 L R 456
 (1982) 1 SCJ 217
 (1982) 2 Rent
 L R 122
 1982 Guj LH 542
 1982 Mah L R
 (SC) 164
782 1982 Cri L J
 628 (1)
 1982 FAJ 321
 1982 FAC 118 (1)
 (1982) 3 SCC 254
783(1) 1982 LS (SC) 21
 (1982) 1 SCJ 190
 (1982) 3 SCC 239

AIR Other Journals
783(2) 1982 Cri L J
 628 (2)
 1982 LS (SC) 22
 1982 Guj L H
 348 (2)
 (1982) 3 SCC 224
784(1) 1981 SCC
 (Cri) 678
 1982 Cri LR
 (SC) 16 (1)
 1982 Mad L J
 (Cri) 328
 (1982) 1 S C J
 191 (1)
 1981 Cri App R
 (SC) 430 (1)
 1982 Guj L H
 348 (1)
 1982 BLJR 380
 1982 Cri L J
 629 (1)
 1982 All Cri
 C 203
 1982 EFR 30 (SC)
 1982 Chand Cri
 C (SC) 31
 1982 (1) 23 Guj
 L R 497
 (1982) 1 APLJ
 (SC) 20
 1982 (UP) Ori C
 (SC) 95 (1)
 1982 Bihar Cri
 C (SC) 95 (1)
 1981 Supp
 S C C 42
784(2) 1982 All L J
 385(1)
 1982 Mad L J
 (Ori) 329(1)
 1982 Cri L J
 629(2)
 (1982) 1 S C J
 191(2)
 (1982) 3 S C C 218
784(3) (1981) 4 S C C 132
 1981 All Rent
 Cas 884
 1981 All C J 548
 1982 All L J
 285(2)
785 1982 Cri L J 625
 1982 Mad L J
 (Cri) 329(2)
 (1982) 1 A P L J
 (SC) 16
 (1982) 1 S C J
 192(1)
 (1982) 3 S C C 219
786 1982 All L J 286
 (1982) 1 S C C 589
 1982 EFR 230
 1982 U J (SC) 157
 (1982) 8 All
 L R 250
 1982 UP Cri
 L R 132
 (1982) 1 S C J
 192 (2)
789 (1981) 4 S C C 209
 (1982) 1 S C C 136
790 1982 All L J
 290(1)
 1982 All Rent Cas
 880(2)

AIR Other Journals
790con (1982) 2 Ren
 C R 474
 (1982) 3 S C C 215
791 1982 Ori L J 612
 1982 Mad L J
 (Cri) 334
 1982 B B C J
 (SC) 102
 1982 All Cri C 155
 (1982) 1 S C C 507
 1982 U J (SC) 168
 1982 Bom
 C R 325
 (1982) 1 S C C 200
 1982 Cri L R
 (SC) 61
 1982 S C C
 (Cri) 265
 1982 Guj L H 800
 (1982) 1 A P L J
 (SC) 13
 1982 Cri App R
 (SC) 86
792 (1981) 3 S C C 92
 1981 S C C
 (Cri) 650
 1982 Cri L R
 (SC) 11(2)
 1982 Mad L J
 (Cri) 336
 1982 Bihar Cri C
 (SC) 114
 1982 Ori L J 580
 (1982) 1 A P L J
 (SC) 19
 (1982) 1 S C C 202
 1982 (UP) Cri C
 (SC) 114
 (1982) All Cri
 C 205
793 1982 Lab I C 443
 (1982) 1 Serv
 L J 194
 (1982) 1 Serv
 L R 690
 (1982) 1 S C C 510
 (1982) 60 FJR 140
 1982 UJ (SC) 154
 44 Fac L R 247
 (1982) 1 Lab
 L J 349
 (1982) 1 Lab
 L N 230
 1982 S C C
 (Lab) 115
 (1982) 1 S C C 203
 (1982) 14 Lawyer
 41
 (1982) 2 Serv
 L R 1
795 1982 Lab I C 446
 1982 UJ (SC) 148
 (1982) 1 S C C 497
 1982 S C C
 (Lab) 109
 (1982) 1 S C C 205
 (1982) 2 Serv
 L R 88
798 1982 UJ (SC) 178
 (1982) 1 S C C 610
 1982 Cri L R
 (SC) 83
 1982 LS (SC) 17
 1982 EFR 297
 1982 Cri App R
 (SC) 93

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals		
788con	1982 S O C (Ori) 327 1982 Chand Ori O 53 (1982) 1 S O J 208 1982 B B C J (SO) 145 1982 SO Cri R 311	815con	1982 U J (SO) 251 1982 All W C 278 (1982) 1 S O J 233 1982 M P R C J 71 1982 B B C J (SO) 111 1982 All Rent Cas 415 1982 Jab L J 245 (1982) 1 Ren O R 402 (1982) 2 Ren O J 359	859con	1982 All Ori R 156 1982 Chand Ori O 45 (1982) 2 A P L J (SO) 15 1982 Ori L R (SO) 77 1982 All W C 242 (1982) 1 S O C 700 1982 SO Cri R 188 1982 Cri App B (SO) 77 1982 S O C (Ori) 334 1982 Mah L R (SO) 117 1982 All Ori C 163 1982 (2) Bom O R 318 1982 Mad L J (Ori) 481 1982 All Ori L J 215 (1982) 1 S O J 380 1982 I J R 215	853con	1982 Chand Ori C (SO) 123 1982 Ori L C 544 1982 U P Ori R 272 854 1982 Lab I C 411 (1982) 60 FJR 144 (1982) 1 Serv L J 319 (1982) 1 Serv L R 364 1982 U J (SO) 344 (1982) 1 S O C 645 1982 Guj L H 327 (1982) 1 S O W R 268 44 Fac L R 250 (1982) 1 Lab L J 330 (1982) 1 Lab L N 257 1982 S O C (Lab) 124 (1982) 2 S O J 29		
800	1982 Ori L J 814 (1982) 1 S O C 552 1982 U J (SO) 169 1982 Ori L R (SO) 64 1982 S O C (Ori) 275 (1982) 1 S O J 210 1982 Mad L J (Ori) 341 1982 Chand Ori C (SO) 91 1982 All Ori L J 223(2) 1982 Cri App R (SO) 202 1982 I J R 228(2) 1982 S O Ori R 298 (1982) 2 Chand LR (Ori) 580 (SO) 1982 Ori L C 534 (SO)	816	1982 All L J 202 1980 Que L J (Ori) 357 1980 All W C 395 (1980) 2 Rent L R 412 1980 U J (SO) 725 1980 (UP) R C C 470 1981 All Rent Cas 1 (1981) 1 Ren O R 870 (1981) 2 Ren O J 665 (1981) 3 S O C 667 (1982) 1 S O J 235	843	(1982) 2 S O C 368 1982 U P L B E C 417 1982 I J R 50	865	1982 U J (SO) 273 1982 Mah L J 329 (1982) 1 S O C 680 1982 (2) Bom O R 372 (1982) 2 S O W R 38 1982 Mah L R (SO) 151 (1982) 2 S O J 143		
806	1982 Ori L J 620 1982 All Ori O 157 1982 Mad L J (Ori) 351 1982 U J (SO) 143 1982 All Ori L J 59 (1982) 1 S O C 545 1982 S O C (Ori) 269 1982 All W C 295 1982 All Ori R 190 (1982) 1 S O J 225 1982 I J R (Ori) (SO) 59 1982 (2) Chand L R (Ori) (SO) 555	818	1982 All L J 845 (1982) 1 S O C 525 (1982) 3 All L R 258 (1982) 1 A P L J (SO) 23 (1982) 1 S O J 294 1982 U J (SO) 493 (1982) 2 Civ L J 132 1982 Guj L H 954	844	(1982) 1 S O C 637 1982 U J (SO) 193 1982 (2) Bom O R 383 (1982) 1 S O J 324	872	(1982) 1 S O C 627 1982 U J (SO) 254 1982 Mah L R (SO) 125 (1982) 2 S O J 151		
810	1982 All L J 290 (2) 1982 U J (SO) 182 (1982) 1 S O C 520 1982 All W C 196 (1982) 1 All Rent L R 351 (1982) 1 Rent Cas 299 (1982) 8 All L R 247 (1982) 1 Ren O R 398 1982 M P R C J 89 (1982) 1 S O J 229 (1982) 2 Ren O J 200	827	(1982) 1 S O C 614 1982 U J (SO) 242 (1982) 1 S O J 322 1982 I J R 18	849	1982 Ori L J 795 1982 U J (SO) 181 1982 Ori L R (SO) 71 (1982) 2 S O C 101 1982 Cri App R (SO) 88 1982 S O C (Ori) 361 1982 Chand L R (Ori) 719 1982 S O Ori R 192 & 198 1982 All Ori L J 157 (1982) 1 S O J 340 1982 Mad L J (Ori) 409 1982 I J R 157	876	1982 All L J 361 1982 L S (SO) 24 1982 Land LR 415 (1982) 2 S O C 382 (1982) 2 S O J 156		
813	(1982) 1 S O C 683 (1982) 1 Rent L R 289 (1982) 8 All L R 325 1982 B L J 258	831	1982 All L J 354 (1982) 1 S O C 671 1982 U J (SO) 282 1982 Land LR 380 1982 U P L B E C 271 (1982) 1 S O J 528 (1982) 18 Co-op L J 141	853	1982 All L J 380 1982 All W C 289 1982 L S (SO) 28 1982 Guj L H 365 (1982) 2 S O C 373 1982 All Ori R 196 1982 (2) A P L J (SO) 13 1982 S O C (Ori) 439 1982 Mad L J (Ori) 421 1982 All Ori L J 176 (1982) 1 S O J 345 1982 Cri App R (SO) 278 1982 I J R 176	877	(1982) 2 S O C 374 (1982) 2 S O J 157	878	1982 Ori L J 630(1) 1982 All W C 232 (1982) 2 S O J 159(1) 879 (1982) 1 S O C 618 (1982) 60 FJR 201 1982 S O C (Lab) 119 (1982) 1 Serv L R 758 1982 U J (SO) 193 1982 Delhi Rep J 187 44 Fac L R 299 1982 (1) Serv L J 490 1982 Lab I C 806 1982 L S (SO) 26 1982 B L J R 276 1982 B B C J (SO) 195 (1982) 1 Lab L J 344 (1982) 1 Lab L N 327
		838	(1982) 1 S O C 613 1982 U J (SO) 248 1982 A C J 191 44 Fac L R 271 1982 Cri App R (SO) 83 1982 S O C (Ori) 830 1982 Guj L H 345 (2) 1982 T A C 353 (1982) 1 S O J 377 1982 (2) Civ L J 233	839	1982 Ori L J 630(3)				

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
878con	(1982) 1 S C W R 260	923con	(1982) 14 Lawyer 54	948(2)	1982 Cri L J 818	1021con	1982 Cri L R (SO) 8
	(1982) 1 S C J 288		1982 I J R 39		(1982) 2 S C C 445		1982 Bihar Cri C (SO) 97
	(1982) 14 Lawyer 55	927	1982 A L L J 452		1982 U P Cri R 184		1982 Cri L J 986
882	(1982) 1 S C C 684		(1982) 2 S C C 376		1982 S C C (Cri) 469		1982 (UP) Cri C (SO) 97
	1982 U J (SO) 203		1982 Lab I C 1284	949	1982 Cri L J 819		1982 Chaud Cri C 61 (SO)
	(1982) 1 Serv L J 580		(1982) 1 S C J 228		(1982) 1 S C C 561		1981 Supp S C C 25
	(1982) 1 S C W R 252		1982 S C C (Lab) 253		1982 S C C (Cri) 283	1022	1981 S C C (Cri) 682
	1982 S C C (Lab) 142		(1982) 2 Lab L J 180		1982 (1) Com L J 217		1981 Cri App R (SO) 325
	44 Fac L R 281		(1982) 2 Lab L N 408		1982 All Cri L J 108		1983 Cri L R (SO) 16 (2)
	(1982) 1 S C J 503		(1982) 2 Serv L R 285		(1982) 1 S C J 251		1982 Cri L J 987
	1982 B B C J (SO) 114		45 Fac L R 289		1982 Mad L J (Cri) 859		1982 (UP) Cri C (SO) 89
	(1982) 1 Serv L R 883		(1982) 14 Lawyer 81		1982 I J B 103		1982 Bihar Cri C (SO) 89
	(1982) 1 Lab L N 587		(1982) 2 Serv L J 259	978	(1982) 1 S C C 174		1982 Supp S C C 46
	1982 B L J 374		(1982) 2 S C W R 118		1982 Cri App R (SO) 7		
	1982 B L J R 447	988	1982 Cri L J 855		1982 S C C (Cri) 128	1023	1982 Cri L J 988
	1982 Pat L J R (SO) 75		(1982) 2 S C C 444		1982 Chand Cri C (SO) 35		1982 U J (SO) 223
	(1982) 14 Lawyer 56		1982 S C C (Cri) 468		1982 U J (SO) 87 (2)		1982 S C C (Cri) 348
897	(1982) 2 S C C 79	989	(1982) 2 S C C 886		1982 Cri L J 848		(1982) 2 S C C 43
	(1982) 1 S C J 346	940	(1982) 1 S C C 419		1982 (2) Chand L R (Cri) 21		1982 Cri App R (SO) 129
	(1982) 2 Civ L J 46		1982 U J (SO) 469		1982 All Cri L J 154		1982 Cri L R (SO) 245
	1982 U J (SO) 784	941	1982 Cri L J 849		1982 I J R 164		1982 Chand Cri C 69 (SO)
902	(1982) 2 S C C 150	942	1982 Cri L R (SO) 27	979	1982 U J (SO) 218		(1982) 1 S C C 407
	1982 U J (SO) 503		(1982) 1 S C C 178		1982 W L N 37		1982 Mad L J (Cri) 471
	(1982) 2 S C J 13		1981 Cri App R (SO) 431		(1982) 2 S C C 86		1982 Chand L R (Cri) 693
913	1982 U J (SO) 204		1982 E F R 42 (SO)	983	1982 U J (SO) 188	1039	1982 Cri L J 789
	(1982) 2 S C C 1		1982 S C C (Cri) 149		(1982) 1 S C C 691		(1982) 2 S C C 222
	1982 L S (SO) 32		1982 Chand Cri C (SO) 27		(1982) 1 S C J 245		1982 Cri L R (SO) 157
	(1982) 2 A P L J (SO) 1		1982 Cri L J 813	989	(1982) 1 S C C 237		1982 Cri App R (SO) 163
917	(1982) 1 Serv L J 466		1982 All W o 191		1982 (1) Civ L J 875		1982 S C C (Cri) 403
	(1982) 1 Serv L R 731		1982 B B C J (SO) 89		1982 B B C J (SO) 147		(1982) 1 S C J 413
	44 Fac L R 317		1982 All Cri R 145		(1982) 1 S C J 588		1982 S C C (Cri) 318
	(1982) 2 S C C 7		1982 Mad L J (Cri) 358	1008	1982 Ori L J 982	1043	(1982) 2 S C C 258
	1982 S C C (Lab) 147		1982 Bihar Cri C (SO) 79		1982 Ori L R (SO) 152		(1982) 1 Rent L R 591
	(1982) 1 Lab L J 465		1982 (UP) Cri C (SO) 79		1982 U J (SO) 301		1982 M P R O J 102
	1982 Lab I C 1217		(1982) 1 S C J 237		(1982) 2 S C C 195		1982 U J (SO) 394
	(1982) 1 Lab L N 584		(1982) 2 Chand L R (Cri) 15 (SO)		1982 B L J R 287		(1982) 1 Ren C R 615
	(1982) 2 S C W R 6				1982 S C C (Lab) 194		(1982) 1 S C J 382
	(1982) 14 Lawyer 38	945	1980 All L J 651		1982 B L J 425		(1982) 2 Ren C J 205
938	1982 Lab I C 614		1980 All W o 333	1012	1982 S C C Ori R 285		1982 East L R 309
	1982 W L N 42		(1980) 3 S C C 452		(1982) 2 S C C 168	1052	1982 Cri L J 977
	1982 B L J R 292		1980 (UP) R C C 419		1982 U J (SO) 263		(1982) 2 S C C 171
	(1982) 1 S C J 219		1980 (6) All L R 359		(1982) 2 S C J 48		1982 SC Ori R 170
	(1982) 1 Serv L J 416		1980 U J (SO) 601	1016	1982 U J (SO) 936		1982 All Ori R 233
	(1982) 1 Serv L R 677		1980 All Rent Gas 466		1982 E F R 300		1982 Cri App R (SO) 138
	(1982) 1 S C W R 294		1980 S C R 1034		(1982) 8 All L R 236		1982 B B C J (SO) 135
	44 Fac L R 308		(1982) 1 S C J 241		1982 S C C (Ori) 341		1982 S C C (Cri) 379 (2)
	(1982) 2 S C C 35		(1982) 1 Ren C R 687		(1982) 2 S C C 53		1982 Cri L R (SO) 267
	1982 S C C (Lab) 169				1982 B L J 249		
	(1982) 1 Lab L N 582	948(1)	(1982) 1 S C J 244	1021	(1982) 2 S C J 66		
			(1982) 2 S C C 455		1981 S C C (Cri) 645		
			1982 All C J 495		1981 Cri App R (SO) 319		

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1052	con(1982) 1 S O J 872 1982 Mad L J (Ori) 426 1982 All Ori L J 195 1982 UP Ori R 114 1982 I J R 195	1085	con1982 S O C (Tax) 97 1090 1982 (2) 23 Guj L R 128 1091 (1982) 1 Rent L R 741 (1982) 2 S O C 210 1982 Rajdhani L R 500 1982 U J (SQ) 405 (1982) 2 Ben C J 98 (2) (1982) 22 DLT 280 1982 Delhi Rep J 764 1982 L S (SO) 47 (1982) 2 Ben C R 183 (1982) 2 S O J 193 1095 1982 Ori L J 1241 1982 F A J 407 (1982) 2 F A C 60 1982 UP Ori R 202 (1982) 22 DLT 277 (1982) 2 S O J 198 1096 1982 Ori L J 1242 (1982) 2 S O C 347 1982 S O C (Ori) 427 1982 All Ori L J 188 1982 I J R 188 (1982) 2 S O J 193 1982 UP Ori R 277 (1) 1097 (1982) 2 S O C 244 (1982) 1 Rent L R 759 1982 Mah L J 484 1982 U J (SQ) 434 1982 Mah L R (SO) 136 (1982) 2 Ben C J 173 (2) (1982) 2 Bom C R 402 (1982) 2 Ben C R 54 (1982) 18 Co-op L J 77 1108 1982 Tax LR 3121 (1981) 4 S O C 148 1107 1982 Lab I C 876 (1982) 1 Serv L J 604 (1982) 2 S O C 273 1982 S O C (Lab) 208 (1982) 2 Lab: L N 26 1982 U J (SQ) 445 (1982) 2 Serv L R 186 (1982) 2 Lab L J 258 (1982) 2 S O W R 160 1126 1982 Lab I C 161 (1982) 1 S O C 205 (1982) 80 FJR 99 (1982) 1 Lab L J 110 (1982) 1 Lab L N 65	1126	con1982 S O C (Lab) 58 (1982) 1 S O W R 203 1137 (1982) 2 S O C 337 1982 U J (SQ) 411 1982 Ori App R (SQ) 185 1982 E F R 470 1143 1982 Ori L J 1191 (1982) 2 S O C 403 1982 Ori App R (SQ) 191 1982 Ori L R (SO) 289 1982 U J (SQ) 485 1982 All Ori C 262 1982 S O C (Ori) 451 1982 All Ori L J 177 (1982) 2 S O W R 215 1982 Delhi Rep J 411 1982 I J R 177 1149 1982 U J (SQ) 30 (1981) 3 Serv L R 403 1150 1982 Lab I C 897 (1981) 4 S O C 168 1981 U J (SQ) 705 1981 S O C (Lab) 595 (1982) 43 Fac L R 326 (1982) 2 Lab L N 23 1153 1982 U J (SQ) 281 (1982) 185 I T R 139 (1982) 27 Our Tax Rep (SQ) 314 (1982) 9 Taxman (SQ) 1 (1982) 2 S O C 303 1982 Taxation 65 (3) 81 1982 B L J 291 1982 East L R 60 1982 U P T C 896 1982 Pat L J R (SQ) 86 1982 S O C (Tax) 91 1157 1982 Ori L J 1248 (1982) 2 S O C 351 1982 Ori App R (SQ) 157 1982 Ori L R (SO) 275 1982 S O Ori R 177 1982 S O C (Ori) 431 1982 All Ori L J 168 1982 (2) Chand L R (Ori) 221 1982 U J (SQ) 475 1982 Mad L J (Ori) 398 (1982) 1 S O C 307 1982 Chand Ori C (SO) 77	1157	con1982 (2) Bom C R 471 1982 Mah L R (SO) 167 1982 I J R 168 1165 1982 Ori L J 1249 1982 B B O J (SQ) 141 1982 Ori App R (SO) 186 1982 U J (SQ) 422 (1982) 2 S O C 433 1982 Ori L R (SO) 255 1982 S O Ori R 200 1982 S O C (Ori) 482 1982 All Ori L J 185 1982 Mad C J (Ori) 394 (1982) 2 A P L J (SO) 28 (1982) 1 S O J 314 1982 I J R 185 1165 (1982) 2 S O C 310 1982 Ori L J 1251 1982 All Ori C 179 1982 U J (SQ) 389 1982 Ori App R (SO) 145 1982 Ori L R (SO) 252 1982 S O C (Ori) 423 1982 All Ori L J 199 (1982) 1 S O J 316 1982 All Ori C 259 1982 Mad L J (Ori) 417 1982 I J R 190 1982 S O Ori R 350 1982 U P Ori R 274 1167 (1982) 1 S O J 320 (1982) (2) A P L J (SO) 22 1170 1982 U J (SQ) 392 1982 Ori L J 1296 (1982) 2 S O C 380 1982 Ori App R (SJ) 161 1982 S O C (Ori) 440 1982 All Ori C 254 1171 (1981) 4 S O C 429 1981 S O C (Ori) 849 1982 Ori L R (SO) 39 1982 All Ori L J (SQ) 13 1982 Ori L J 1397 1982 I J R (Ori) (SQ) 13 1982 Ori App R (SO) 240 1172 (1982) 22 DLT 215 (1982) 2 Ben C J 191 (1982) 2 Ben C R 99

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1230	1982 UJ (SC) 213	1248	1982 Cri App R (SC) 228	1268	(1982) 2 S C O 482	1597	1982 UJ (SC) 594
(2)	1982 All W C 228		1982 B B C J (SC) 179		1982 U J (SC) 561		1983 All W C 681
	1982 (8) All L R 242		1982 S C O Cri R 358		(1982) 3 Com L J 117		(1982) 2 DMC 330
	(1982) 1 Rent L R 355		1982 Chaud Cri C (SC) 113	1276	1982 L S (SC) 80		(1982) 2 S C O 696
	1982 All Rent Cas 391		1982 Lab I C 1334		(1982) 2 S C O 544		1982 East L R 471
	1982 All C J 250	1253	(1982) 2 Serv L J 232		(1932) 2 DMC 288		1982 Marriage L J 574
	(1982) 2 S C O 61		(1982) 2 S C O 458		1982 Cri App R (SC) 281		1932 B B C J (SC) 192
	1982 M P R C J 95		(1982) 2 Lab L N 408		1982 Marriage L J 610	1407	(1982) 2 Lab L J 281
	(1982) 2 Ren C J 93		1982 U J (SC) 575	1297	1982 Cri L J 1777		1982 Cri L J 1975
	(1982) 2 Ren C R 383		45 Fac L R 283		(1932) 2 S C O 538		45 Fac L R 272
1284	1982 All L J 582		(1982) 2 Lab L J 399		1982 Cri App R (SC) 241		1982 B B C J (SC) 183
	1982 U J (SC) 307		1982 All L J 628		1932 S C O (Ori) 502		(1982) 2 S C W R 148
	(1982) 2 S C O 365	1256	(1981) 4 S C O 558		1982 Chaud Cri C (SC) 118		(1982) 8 All L R 685
1238	1982 All L J 507		1981 S C O (Ori) 870	1299	1982 S C O (Cri) 138		(1982) 3 S C O 200
	(1982) 1 S C O 466		1982 Ori L R (SC) 33		1982 All L J 1079		(1982) 2 Lab L N 663
	1982 S C O (Ori) 249		1982 All Ori L J (SC) 4		1981 Supp S C O 62		(1982) 2 Serv L J 551
	1982 Cri L R (SC) 126		1982 Ori L J 1741 (1)	1801	1982 Lab IO 1587		1982 S C O Cri R 357
	1982 All Rent Cas 348		1982 I J R Ori (SC) 4		(1932) 2 Serv L J 549		1982 Cri App R (SC) 327
	1982 All W C 251	1257	1982 Ori L J 1737	1802	(1932) 3 S C O 313	1413	1982 U J (SC) 695
	1982 Cri App R (SC) 85		(1982) 2 S C O 489		1982 East L R 250		(1982) 3 S C O 140
	1982 All Cri R 170		1982 Ori L R (SC) 332		1982 U J (SC) 605		(1982) 2 Serv L J 582
	1982 (2) Chaud L R (Cri) 46		(1982) 22 DLT 422		1982 44 DLT 396	1439	1982 Cri L J 1772
	(SC) 81		1982 S C O (Cri) 484		(1982) 2 S C O 499		1982 (2) 18 Guj L R 421
	(1982) 14 Lawyer 47		1982 Cri App R (SC) 237		1982 Jab L J 874		1982 U J (SC) 621
	(1982) 2 A P L J (SC) 34		1982 All Ori L J 252		1982 Mah L J 803		(1982) 3 S C O 1
	(1982) 2 Ren C J 479	1280	(1982) 1 S C O 438		1982 M P L J 876		1982 East L R 449
1244	(1982) 2 S C O 319		1982 S C O (Ori) 248		1982 B B C J (SC) 205		(1982) 2 Chaud L R (Ori) 613
	1982 U J (SC) 374		1982 Jab L J 217	1814	1982 U J (SC) 588		(SC) 788
	(1982) 44 Fac 3a0		1982 All Ori L J (SC) 26		(1982) 22 DLT 416		1982 All Cri C 274
	1982 (8) All L R 368		1982 Ori L J 1740		(1981) 2 S C O 536		1982 All Ori R 458
	(1982) 2 Lab L N 14		1982 I J R 96		(1982) Delhi Rep J 573		1982 S C O (Ori) 522
	(1982) 2 Serv L J 37	1281	(1982) 2 S C O 474	1815	1982 Cri L J 1779		1982 Cri L R (SC) 414
	(1982) 2 Serv L R 31		(1982) 2 DMC 268		(1982) 2 S C O 521	1444	1979 All L J 280
	1982 S C O (Lab) 241		1982 East L R 304		1982 S C O (Cri) 488		(1979) 1 S C W R 357
	1982 All L J 1080		1982 U J (SC) 570		1982 U J (SC) 695		(1979) 2 S C O 511
	(1982) 2 Lab L J 161		1982 (8) All L R 649		1982 Cri App R (SC) 265		(1979) 2 S C R 757
	1982 U P L B E C 259		1982 Marriage L J 498		1982 Cri L R (SC) 337	1455	(1982) 3 S C O 375
	(1982) 2 S C W R 73	1265	(1982) 2 S C O 314		1982 S C O (Ori) 535	1456	...
1248	1982 All L J 1139		1982 U J (SC) 364	1891	(1982) Cri App R (SC) 312	1457	1982 Cri L J 1937
	(1982) 3 S C O 315		(1982) 44 Fac L R 391		(1982) 3 S C O 209		(1982) 2 S C O 577
1249	1982 Cri L J 1581		(1982) 1 Serv L J 680	1894	1982 U J (SC) 284		(1982) 2 DMC 320

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1463	1982 Cri L J 1943 1982 B B C J (SC) 35 1982 B L J 241 1982 Cri L C 499 (SC)	1473	1982 Lab I C 1646 (1982) 45 Fac L R 140 1982 U J (SC) 558 (1982) 2 S C C 494 1982 B L J R 401 (1982) 2 Lab L N 410 1982 East L R 487 (1982) 2 S C W R 202 (1982) 14 Lawyer 57 (1982) 2 Lab L J 454	1483	con(1982) 45 Fac L R 382 (1982) 3 S C C 331 1487 (1982) 3 S C C 359 1500 1511 1982 Cri L J 1 1982 East L R 528 1518 1982 U J (SC) 631 1982 Bajdhani L R 781 (1982) 2 Sen C J 643 (1982) 3 S C C 270 1982 Delhi Rsp J 418	1552	1982 All L J 1341 1982 Lab I C 1790 (1982) 2 Serv L J 532 (1982) 3 S C C 346 1982 East L R 580 (1982) 2 Lab L J 472 1555 1982 Lab I C 1793 (1982) 3 S C C 341 1558 1982 Cri L J 1244 (1982) 1 S C C 561 1982 S C C (Cri) 238 1559 ... 1569 ... 1579 ... 1585 1983 Cri L J 149 (1982) 3 S C C 352 1598 1983 Cri L J 158 1599 ...
1465	1982 Cri L J 1945 1982 (8) All L R 645 1982 Cri App R (SC) 817	1482	1982 Cri L J 2354 1982 East L R 525 (1982) 3 S C C 223 1982 All Cri R 487 1982 All W C 798 1493 1982 Lab I C 1789 1982 U J (SC) 820	1539	1983 Cri L J 2854 (1982) 3 S C C 322 1543 1982 Cri L J 2357 (1982) 3 S C C 301 1548 1982 Cri L J 2363 (1982) 3 S C C 328 1550 (1982) 3 S C C 338	1552	1982 All L J 1341 1982 Lab I C 1790 (1982) 2 Serv L J 532 (1982) 3 S C C 346 1982 East L R 580 (1982) 2 Lab L J 472 1555 1982 Lab I C 1793 (1982) 3 S C C 341 1558 1982 Cri L J 1244 (1982) 1 S C C 561 1982 S C C (Cri) 238 1559 ... 1569 ... 1579 ... 1585 1983 Cri L J 149 (1982) 3 S C C 352 1598 1983 Cri L J 158 1599 ...
1466	1982 Cri L J 1946 1982 B B C J (SC) 174 (1982) 3 S C C 185 1982 All Cri R 441 1982 Cri App R (SC) 318						
1470	1982 Cri L J 1933 (1982) 3 S C C 131 1982 Pat L J R (SC) 97						

(1979) 2 S C R			(1981) 3 S C C			1981 Supp S C C			(1982) 1 S C C			(1982) 2 S C C		
SCC	AIR		SCC	AIR		Supp SCC	AIR		SCC	AIR		SCC	AIR	
757 1982 SC 1444			92 1982 SC 792			12 1982 SC 779			421 1982 SC 773			1 1982 SC 913		
			122 " " 18			25 " " 1021			428 " " 1217			7 " " 917		
			129 " " 1194			38 " " 1177			433 " " 1223			38 " " 1016		
			172 " " 678			42 " " 784(1)			438 " " 1230			43 " " 1023		
(1980) 3 S C R			627 " " 52			48 " " 1022			439 " " 1214			55 " " 985		
SCC	AIR		635 " " 1076			54 " " 1216			447 " " 760			61 " " 1230		
1034 1982 SC 945			687 " " 816			58 " " 1239			466 " " 1238			(2)		
						(1)			477 " " 1236			86 " " 979		
						62 " " 1299			486 " " 1228			78 " " 897		
						68 " " 1227			489 " " 1234			101 " " 849		
						87 " " 149			495 " " 1213			118 " " 1064		
(1982) 1 S C R			SCC	AIR					497 " " 795			134 " " 1091		
SCC	AIR		129 1982 SC 1215						500 " " 1173			150 " " 902		
1003 1982 SC 3			144 " " 780						501 " " 1558			168 " " 1012		
1010 " " 1			147 " " 100			(1982) 1 S C C			502 " " 777			177 " " 1052		
1014 " " 683			148 " " 1108			SCC	AIR		505 " " 1178			184 " " 1185		
1028 " " 8			149 " " 685			1 1982 SC 6			507 " " 791			195 " " 1008		
1137 " " 33			150 " " 778			4 " " 20			510 " " 793			202 " " 1057		
1176 " " 20			152 " " 784			20 " " 133			514 " " 827			210 " " 1031		
1184 " " 6			(3)			27 " " 127			520 " " 810			222 " " 1029		
1188 " " 133			153 " " 778			31 " " 65			525 " " 813			244 " " 1097		
1197 " " 127			154 " " 775			39 " " 33			539 " " 788			259 " " 1043		
			157 " " 877			116 " " 692			545 " " 806			273 " " 1167		
			158 " " 119			117 " " 78			552 " " 800			303 " " 1153		
			168 " " 1150			125 " " 697			581 " " 948			310 " " 1185		
(1979) 2 S C C			209 " " 783			143 " " 673			608 " " 1228			314 " " 1265		
SCC	AIR		245 " " 123			149 " " 71			(2)			319 " " 1944		
511 1982 SC 1444			246 " " 758			159 " " 137			810 " " 793			326 " " 1174		
			247 " " 82			174 " " 878			813 " " 866			328 " " 1062		
			248 " " 53			178 " " 943			818 " " 879			330 " " 1085		
			421 " " 685			180 " " 679			828 " " 1280			337 " " 1137		
			429 " " 1171			185 " " 84			(1)			347 " " 1096		
			431 " " 120			205 " " 1126			827 " " 872			350 " " 1192		
			481 " " 1			223 " " 121			833 " " 814			351 " " 1157		
(1980) 3 S C C			484 " " 55			232 " " 88			837 " " 844			360 " " 1193		
SCC	AIR		510 " " 1212			257 " " 989			845 " " 854			363 " " 843		
452 1982 SC 945			517 " " 3			271 " " 710			864 " " 893			365 " " 1234		
			544 " " 25			284 " " 767			871 " " 831			373 " " 853		
			550 " " 29			370 " " 781			880 " " 865			374 " " 877		
			554 " " 130			377 " " 709			881 " " 983			378 " " 937		
(1981) 2 S C C			558 " " 1358			411 " " 51			700 " " 859			380 " " 1170		
SCC	AIR		578 " " 12			417 " " 774						382 " " 878		
372 1982 SC 1175			609 " " 683			419 " " 940						388 " " 939		
			647 " " 8									389 " " 1178		

Continued on next page

(1982) 2 S C J			1982 I J R (Civ)			1982 Cri App E			1982 Cri L R			1982 U J (SC)		
SOJ		AIR	IJR(Civ)(SO)	AIR		CriAppB(SO)	AIR		Cri LR(SO)	AIR		UJ (SO)	AIR	
29 1982	SO	854	12 1982	SO	773	37 1982	SO	146	18(1) 1982	SO	784	23 1982	SO	127
43 "	"	1042	13 "	"	1213	51 "	"	29	(1)	"	"	28 "	"	146
58 "	"	1018	17 "	"	1173	59 "	"	877	16(2) "	"	1022	80 "	"	1149
68 "	"	710	18 "	"	827	60 "	"	885	19 "	"	1215	82 "	"	781
128 "	"	758	29 "	"	873	62 "	"	1215	20 "	"	685	87 "	"	3
129 "	"	1201	39 "	"	933	66 "	"	1238	21 "	"	877	67(2) "	"	878
148 "	"	865	50 "	"	843	77 "	"	889	23 "	"	128	69 "	"	679
151 "	"	872	55 "	"	940	83 "	"	836	24 "	"	68	73 "	"	673
158 "	"	878	57 "	"	983	88 "	"	781	26 "	"	682	79 "	"	73
157 "	"	877				88 "	"	849	27 "	"	942	86 "	"	88
159(1) "	"	878				98 "	"	798	28 "	"	1258	90 "	"	71
159(2) "	"	1217				101 "	"	774	29 "	"	1171	100 "	"	137
164 "	"	1221				104 "	"	1185	31 "	"	691	113 "	"	65
165 "	"	1222	1982 I J R (Cri)			129 "	"	1023	37 "	"	1175	120 "	"	121
166 "	"	1223	(SC)			135 "	"	1192	39 "	"	774	139 "	"	757
167 "	"	1234	IJR(Cri)(SO)	AIR		136 "	"	1163	41 "	"	791	143 "	"	806
173 "	"	1091	1 1982	SO	1	138 "	"	1053	64 "	"	800	148 "	"	795
198 "	"	1095	4 "	"	1256	145 "	"	1163	71 "	"	849	152 "	"	777
199 "	"	1098	5 "	"	65	148 "	"	1057	77 "	"	839	154 "	"	793
200 "	"	1192	13 "	"	1171	155 "	"	1157	83 "	"	798	157 "	"	788
			26 "	"	239	161 "	"	1170	90 "	"	38	162 "	"	810
			56 "	"	6	163 "	"	1039	126 "	"	1238	168 "	"	791
			59 "	"	806	179 "	"	1195	142 "	"	1185	169 "	"	800
			85 "	"	774	180 "	"	1191	152 "	"	1008	176 "	"	774
(1979) 1 SCWR			67 "	"	38	182 "	"	1183	157 "	"	1029	178 "	"	788
SCWR		AIR	98 "	"	1280	184 "	"	1222	176 "	"	710	181 "	"	849
337 1982	SO	1444	99(2) "	"	51	185 "	"	1187	245 "	"	1023	182 "	"	983
			100(2) "	"	1217	191 "	"	1143	253 "	"	1175	198 "	"	879
			108 "	"	949	198 "	"	1178	255 "	"	1168	198 "	"	844
(1981) 2 SCWR			157 "	"	849	202 "	"	800	258 "	"	1182	204 "	"	913
SCWR		AIR	184 "	"	978	223 "	"	1261	259 "	"	1087	209 "	"	882
253 1982	SO	18	166 "	"	1157	228 "	"	1248	267 "	"	1052	213 "	"	1330
			178 "	"	853	237 "	"	1257	275 "	"	1167	(2)		
			177 "	"	1148	240 "	"	1171	282 "	"	1183	218 "	"	979
			185 "	"	1183	241 "	"	1297	284 "	"	1195	223 "	"	1023
			188 & 223(1) "	"	1096	243 "	"	58	285 "	"	1222	229 "	"	1062
(1982) 1 SCWR			190 "	"	1185	260 "	"	180	287 "	"	1181	231 "	"	1153
SCWR		AIR	195 "	"	1062	265 "	"	1315	289 "	"	1148	236 "	"	1016
179 1982	SO	780	203 "	"	1185	278 "	"	853	298 "	"	1178	243 "	"	827
203 "	"	1126	215 "	"	839	279 "	"	126	328 "	"	1249	248 "	"	836
225 "	"	1217	223(2) "	"	800	281 "	"	1276	332 "	"	1257	251 "	"	813
235 "	"	78	233 "	"	1178	306 "	"	1467	337 "	"	1325	254 "	"	872
243 "	"	873	252 "	"	1257	312 "	"	1391	414 "	"	1439	259 "	"	1081
252 "	"	882	258 "	"	146	317 "	"	1465	420 "	"	1315	264 "	"	1324
260 "	"	879				318 "	"	1466				268 "	"	1019
268 "	"	854				327 "	"	1407				278 "	"	865
294 "	"	933				334 "	"	1461				282 "	"	831
						337 "	"	1224				292 "	"	1185
												301 "	"	1008
												307 "	"	1234
												312 "	"	1174
												318 "	"	1084
												326 "	"	84
												344 "	"	854
												359 "	"	1085
												364 "	"	1265
												368 "	"	1198
												374 "	"	1244
												380 "	"	1196
												389 "	"	1165
												392 "	"	1170
												394 "	"	1043
												405 "	"	1091
												411 "	"	1137
												422 "	"	1163
												425 "	"	1192
												428 "	"	1057
												434 "	"	1097
												445 "	"	1107
												469 "	"	940
												471 "	"	1181
												473 "	"	1195
												475 "	"	1157
												482 "	"	1188

1932 U J (SC)		1932 All Cri L J (SC)		1930 All Rent Cas		1932 E F R		1932 (UP) Cri C (SC)	
UJ (SC)	AIR	All Cri LJ (SC)	AIR	All Rent Cas	AIR	EFR	AIR	(UP) Cri C	AIR
484	"	1222	"	468	1932	181	1932	26	1932
485	"	1143	13	1932	SC	250	"	50	SC
493	"	818	59	"	"	257	"	51	"
503	"	902	65	"	"	297	"	54	"
517	"	1358	87	"	"	300	"	55	"
524	"	1201	98	"	"	343	"	58	"
553	"	1473	92(1)	"	"	387	"	58	"
555	"	1178	100(2)	"	"	420	"	70	"
561	"	1268	108	"	"	470	"	78	"
570	"	1281	157	"	"			79	"
575	"	1253	164	"	"			83	"
583	"	1457	166	"	"			89	"
588	"	1314	176	"	"			98(1)	"
590	"	1461	177	"	"			97	"
594	"	1397	185	"	"			114	"
605	"	1302	188	"	"			120(1)	"
621	"	1439	190	"	"			140(2)	"
626	"	1493	195	"	"				
631	"	1518	201	"	"				
683	"	1815	215	"	"				
695	"	1413	223(1)	"	"				
751	"	780	233	"	"				
784	"	887	252	"	"				
802	"	38	256	"	"				
1931 All C J		1932 All Cri R		1930 All W C		1932 E F R		1932 (UP) Cri C (SC)	
All C J	AIR	All Cri R	AIR	All W C	AIR	EFR	AIR	(UP) Cri C	AIR
401(2)	1932	145	1932	333	1932	181	1932	26	1932
543	SC	158	SC	395	SC	250	"	50	SC
		170	"		"	257	"	51	"
		190	"		"	297	"	54	"
		196	"		"	300	"	55	"
		233	"		"	343	"	58	"
		270	"		"	387	"	58	"
		387	"		"	420	"	70	"
		441	"		"	470	"	78	"
		458	"		"			79	"
		467	"		"			83	"
								89	"
								98(1)	"
								97	"
								114	"
								120(1)	"
								140(2)	"
1932 All C J		1932 All Cri R		1930 All W C		1932 E F R		1932 (UP) Cri C (SC)	
All C J	AIR	All Cri R	AIR	All W C	AIR	EFR	AIR	(UP) Cri C	AIR
84	1932	145	1932	333	1932	181	1932	26	1932
249	SC	158	SC	395	SC	250	"	50	SC
250	"	170	"		"	257	"	51	"
		190	"		"	297	"	54	"
		196	"		"	300	"	55	"
		233	"		"	343	"	58	"
		270	"		"	387	"	58	"
		387	"		"	420	"	70	"
		441	"		"	470	"	78	"
		458	"		"			79	"
		467	"		"			83	"
								89	"
								98(1)	"
								97	"
								114	"
								120(1)	"
								140(2)	"
1932 All Cri C		1932 All Cri R		1930 All W C		1932 E F R		1932 (UP) Cri C (SC)	
All Cri C	AIR	All Cri R	AIR	All W C	AIR	EFR	AIR	(UP) Cri C	AIR
1	1932	145	1932	333	1932	181	1932	26	1932
114	SC	158	SC	395	SC	250	"	50	SC
115(2)	"	170	"		"	257	"	51	"
145	"	190	"		"	297	"	54	"
155	"	196	"		"	300	"	55	"
157	"	233	"		"	343	"	58	"
163	"	270	"		"	387	"	58	"
173	"	387	"		"	420	"	70	"
186	"	441	"		"	470	"	78	"
205	"	458	"		"			79	"
209	"	467	"		"			83	"
								89	"
								98(1)	"
								97	"
								114	"
								120(1)	"
								140(2)	"
1932 All Cri L J (SC)		1932 All Cri R		1930 All W C		1932 E F R		1932 (UP) Cri C (SC)	
All Cri LJ (SC)	AIR	All Cri R	AIR	All W C	AIR	EFR	AIR	(UP) Cri C	AIR
1	1932	145	1932	333	1932	181	1932	26	1932
4	SC	158	SC	395	SC	250	"	50	SC
5	"	170	"		"	257	"	51	"
		190	"		"	297	"	54	"
		196	"		"	300	"	55	"
		233	"		"	343	"	58	"
		270	"		"	387	"	58	"
		387	"		"	420	"	70	"
		441	"		"	470	"	78	"
		458	"		"			79	"
		467	"		"			83	"
								89	"
								98(1)	"
								97	"
								114	"
								120(1)	"
								140(2)	"
1932 All Cri L J (SC)		1932 All Cri R		1930 All W C		1932 E F R		1932 (UP) Cri C (SC)	
All Cri LJ (SC)	AIR	All Cri R	AIR	All W C	AIR	EFR	AIR	(UP) Cri C	AIR
1	1932	145	1932	333	1932	181	1932	26	1932
4	SC	158	SC	395	SC	250	"	50	SC
5	"	170	"		"	257	"	51	"
		190	"		"	297	"	54	"
		196	"		"	300	"	55	"
		233	"		"	343	"	58	"
		270	"		"	387	"	58	"
		387	"		"	420	"	70	"
		441	"		"	470	"	78	"
		458	"		"			79	"
		467	"		"			83	"
								89	"
								98(1)	"
								97	"
								114	"
								120(1)	"
								140(2)	"

[illegible]

1982 Bihar Cri C (SC)

Bih CriC(SC)	AIR
70 1982 SC	1
78 " "	682
79 " "	843
83 " "	146
89 " "	1023
95(1) " "	784
97 " "	1021
114 " "	792
120(1) " "	51
120(2) " "	1317

1982 B L J

BLJ	AIR
11 1982 SC	58
155 " "	98
160 " "	60
241 " "	1463
249 " "	1016
256 " "	813
286 " "	1083
291 " "	1153
335 " "	775
374 " "	882
395 " "	1394
425 " "	1008

1982 B L J R

BLJR	AIR
176 1982 SC	98
275 " "	879
287 " "	1008
292 " "	933
380 " "	784
381 " "	1195
382 " "	1181
401 " "	1473
423 " "	1178
438 " "	1394
447 " "	882

1982 B L T (Rep)

BLT (Rep)	AIR
161 1982 SC	775
162 " "	58
164 " "	710
287 " "	93

1982 Pat L J R (SC)

Pat LJR(SC)	AIR
3 1982 SC	1238
11 " "	775
12 " "	58
15 " "	98
22(2) " "	60

1982 Pat L J R (SC)

Pat LJR(SC)	AIR
55 1982 SC	1334
75 " "	833
86 " "	1158
97 " "	1470

1981 Chand Cri C (SC)

ChandCriC(SC)	AIR
178 1982 SC	45

1982 Chand Cri C (SC)

ChandCriC(SC)	AIR
27 1982 SC	942
81 " "	784
82 " "	632
85 " "	878
42 " "	877
45 " "	839
58 " "	798
64 " "	1021
69 " "	1023
77 " "	1157
86 " "	1181
91 " "	800
113 " "	1949
118 " "	1397
123 " "	853

1982 Chand L R (Cri)

ChandLR(Cri)	AIR
14 1982 SC	942
21 " "	978
40 " "	1238
179 " "	1131
218 " "	1195
221 " "	1157
318 " "	55
318 " "	1
333 " "	710
513 " "	1439
517 " "	682
555 " "	806
580 " "	800
593 " "	1023
719 " "	849

1980 Cur L J (Civ)

CurLJ(Civ)	AIR
357 1982 SC	816

1982 Hindu L R Hindu LB AIR

130 1982 SC	3
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1982 Land L R

Land LR	AIR
242 1982 SC	120
380 " "	831
415 " "	876
418 " "	780

1982 Marriage L J

Marri LJ	AIR
1 1982 SC	3
498 " "	1261
574 " "	1397
610 " "	1278

(1981) 1 Ren C R

Ren CR	AIR
670 1982 SC	816

(1982) 1 Ben C R

Ben CR	AIR
124 1982 SC	71
188 " "	26
285 " "	127
371 " "	709
384 " "	20
398 " "	810
402 " "	813
405 " "	777
615 " "	1043
637 " "	845

(1982) 2 Ren C R

Ren CR	AIR
54 1982 SC	1097
99 " "	1172
133 " "	1091
246 " "	1213
272 " "	1230
293 " "	1280
425 " "	1338
474 " "	790

(1980) 2 Rent L R

Rent LR	AIR
412 1982 SC	816

1981 (2) Rent L R

Rent LR	AIR
803 1982 SC	16

1982 (1) Rent L R

Rent LR	AIR
87 1982 SC	25
279 " "	777
298 " "	813
351 " "	810
355 " "	1230
581 " "	1043
741 " "	1091
759 " "	1097

1982 (2) Rent L R

Rent LR	AIR
122 1982 SC	781
139 " "	127

1982 Rev L R

Rev LR	AIR
92 1982 SC	20

1982 Rev L R (ST)

Rev LR(ST)	AIR
40 1982 SC	1194

(1981) 3 Serv L R

Serv LR	AIR
89 1982 SC	82
175 " "	678
243 " "	19
280 " "	101
402 " "	1149
602 " "	776

(1982) 1 Serv L R

Serv LR	AIR
677 1982 SC	933
683 " "	842
680 " "	723
692 " "	1394
715 " "	1064

(1982) 1 Serv L R

Serv LR	AIR
731 1982 SC	917
768 " "	879
864 " "	854

(1982) 2 Serv L R

Serv LR	AIR
1 1982 SC	793
31 " "	1244
88 " "	795
131 " "	1265
198 " "	1107
285 " "	897

(1982) 26 Cur Tax Rep

CTR	AIR
411 1982 SC	757
415 " "	780

(1982) 27 Cur Tax Rep

CTR	AIR
314 1982 SC	1159

(1982) 30 Cur Tax Rep

CTR	AIR
375 1982 SC	1085

(1982) 12 Tax Law Review

TaxLawRev	AIR
1 1982 SC	757
7 " "	760
821 " "	1085

(1982) 3 S T L

STL	AIR
56 1982 SC	1194

1982 W L N

WLN	AIR
37 1982 SC	979
42 " "	983
200 " "	1175

CORRIGENDUM

A. I. R. 1982 S. C. 149 (Feb.)

(TRANSFER OF JUDGES' CASES)

<i>Page.</i>	<i>Col.</i>	<i>Line</i>	<i>Correction</i>
177	2	37	At the end of the first para after the words "with these prefatory words we may now proceed to state the facts of these writ petitions." add "We propose to take up these writ petitions in a slightly different order than that given in the cause-title."
180	1	28	For 'petitions' read "petition".
181	2	15	For "appointed a permanent judge" read "appointed as a permanent judge".
182	2	12	After the words 'High Court' for ',' read ';
182	2	10 (from bottom)	For 'Art. 124A' read 'Art. 139A'.
184	1	6	For 'Art. 124A' read 'Art. 139A'.
197	2	32	For 'Judge' read "Judges".
199	1	25 (from bottom)	For "It is singularly" read:"It is a singularly"
201	1	7 to 10 Lines	For the words "it may become vulnerable to attack on the ground that it is mala fide or based on irrelevant grounds", read "if may prima facie be vulnerable to attack on the ground that it is mala fide or based on irrelevant grounds. The same position would obtain if an appointment is made by the Central Government contrary to the unanimous opinion of the Chief Justice of the High Court and the Chief Justice of India."
202	2	1	After the words "opinion of the Chief Justice of India." omit the full stop after the words "India" and add "though it is entitled to great weight as the opinion of the head of the Indian Judiciary."
208	2	4 to 7 Lines	Underline the sentence :— "The number of additional judges to be fixed for this purpose should be such as to enable the arrears to be cleared within a period of two years."
208	2	24	Omit the asterisk mark after the word "underlined" and also the corresponding footnote.
208	2	42	After the quotation ending with the words "Courts with some degree of assurance" add 'it would thus seem that on a true interpretation of Cl. (1) of Art. 224 it was never intended that additional judges should go on being appointed and re-appointed term after term."
212	1	10-11	After the words "in the light of the material then available." add "save and except material which was already with the Central Government at the time of original appointment."
212	1	40-41	After the words "moral fitness and suitability of the additional judge" add "based on material other than that which was the Central Government at the time of original appointment."
212	2	2	After the words "or, that it was based on irrelevant considerations," Add "Where such a challenge is made, the burden is on the Central Government to show that there was full and effective consultation and the decision was based on relevant consideration. In fact where an additional judge is not appointed as an additional judge for a further term or as a permanent judge despite unanimous opinion of the Chief Justice of the High Court and the Chief Justice of India, the decision of the Central Government would prima facie be liable to attack and the burden would lie heavy on the Central Government to show that it had cogent reasons to disagree with the Chief Justice of the High Court and the Chief Justice of India".

Editor's note —

The corrigenda are printed on one side only so that pasting the same at relevant pages is possible. Inconvenience is deeply regretted.

1982 (S C) Indexes/4 (2) & 5 (1)

<i>Page.</i>	<i>Col.</i>	<i>Line</i>	<i>Correction</i>
216	2	24	For '1973' read '1979'.
219	1	14,15 (from bottom)	For "first step required to be taken after the willingness" read "first step required to be taken and it was only after the willingness."
228	2	20 (from bottom)	For "full and detailed facts" read "full and identical facts".
229	1	4-5	For "full and detailed facts" read "full and identical facts".
229	2	8	After the words 'Central Government' add "or the State Government."
229	2	13	For 'rendering' read "recording."
229	2	3J	For "did not form" read "formed".
238	1	4 (from bottom)	For (vide; Re Grosvenor Hotel, London) read (vide: Re: Grosvenor Hotel London (1964) 3 All ER 354 (CA)).
244	1	9	For "inspect the document li" read "inspect the document if".
251	2	25	For "in" read "on".
254	2	8	For "of such facts, whatsoever" read "of such facts whatever".
255	1	25	After the words "person holding high offices" add "and such persons are not impleaded as respondents in the Writ Petition".
264	2	6-7 (from bottom)	For 'circulated" read "circulating"
265	1	7 (from bottom)	After the words "was or was not justified" add "The effect of going into this question would be to expose the opinions of the Chief Justice of the High Court and the Chief Justice of India to judicial scrutiny, inviting possible examination and cross-examination of these two high functionaries which would be disastrous to the institution of the judiciary. Moreover, it is difficult to see how the correctness of the opinion of the Chief Justice of Delhi and of the facts on which it was based could be tested in his absence when he was not joined as a respondent in the Writ petition".
273	1	8 (from bottom)	For "relief" read "reliefs".
277	2	20	For "India, I" read "India, I".
278	2	13-14	For "transfer Chief Justice" read "transfer of Chief Justice".
279	2	4	For "blaim" read "blame".
280	1	32	For "at any time before 20th Dec." read "at any time before 7th Dec. (when the first proposal was made)."
283	1	18-19 (from bottom)	For "Chief Justice of the High Court" read "Chief Justice of the Delhi High Court."
285	1	32	For 'conscience' read 'conscious'.
286	1	8	For "Chief Justice" read "Chief Justice of India".
286	1	31	For "responsible persons" read "responsible members".
290	1	16	For 'the particulars of the suits' read 'that the particulars of the suits.
291	2	20-21	For "is situated, the Law Minister" read "is situated, The Law Minister".
291	2	29	For "future likely" read "future was likely".
315	1	28 (from bottom)	For "Art. 124 (2)" read "Art. 124 (4)".
315	2	17	For "S. 101" read "S. 102".
318	1	24	For "setting Art. 222" read "setting, Art. 222."
322	1	23 (from bottom)	For "only" read "also"
324	2	2	For "deal" read "deal with".
324	2	23-24	For "men and men" read "man and man".

Page	Col.	Line	Correction
325	2	9	For "powers" read "power".
326	2	5-6	For "instruments" read "instrument".
330	1	20 (from bottom)	For "Reports" read "Report".
331	2	15	For "is" read "are".
339	1	1	For "statements" read "statement".
339	2	14	For "matter. With," read "matter, with".
344	1	17	For "dealt above" read "dealt with above".
346	2	1	For "the C. J. I." read "the CJs".
350	1	10	For "English Court that" read "English Courts stated that."
355	2	16	For "Articles 2 and 3" read "Articles II and III."
355	2	17 (from bottom)	For "vests" read "vest."
362	1	15, 16 (from bottom)	For "Australia or America read" Australia nor America"
364	1	8, 9	For "proper selection" read "improper selection."
379	1	3 (from bottom),	For "seems" read "seem."
381	1	27 to 29	For "Special Leave Petition (Civil) No. 1508/81 has already been dismissed as withdrawn before the hearing closed" read "Special Leave Petition (Civil) No. 1509/81 is already dismissed as withdrawn."
389	1	28	in on
392	1	10, 11 (from bottom)	— words Suitability Art. 217' into bracket
394	1	7	loose lose
396	1	3	vide wide
397	1	8 (from bottom)	stages Judges
399	1	15	" must hold must be held
399	1	7	" choosing lesser choosing the lesser
402	1	24	" sahib saheb
403	2	14	" in the case in a case
406	1	21	" is not referred is referred
406	1	10	" directions or reliefs directions or grant reliefs
406	2	9	" to another." to any other High Court.'
408	1	22 (from bottom)	quoting passage. quoting a passage
424	1	15	" "reputation for integrity was " "reputation for integrity is
427	1	19	" facts and material facts and materials.
437	1	4	" refer is refer to is
437	1	19, 20	" Press before Press, before
441	1	7	" of under
442	1	17 (from bottom)	High Court Judges Judges of High Court and Supreme Court and Art. 121
442	1	12 (from bottom)	Parliament save and Parliament respectively save and
444	1	23	" concerning converging
444	2	10	" acting Judges and acting Chief Justice. And
445	2	32, 33	" makes envisaged makers conferred
447	1	20	" recollects recalls
454	2	11 (from bottom)	indicia indicium
455	1	1	of High Court is of a High Court Judge is

Page	Col.	Line	Correction	
457	1	28, 29	man for the time being	man at the relevant time.
458	2	28 (from bottom)	differ	differs.
459	1	16	Art. 224 (2)	Art. 224 (3)
459	2	20	Insert after word, Court after reading comma as full-stop "It seems indeed desirable that the election petitions, should ordinarily, if possible, be entrusted for trial to a permanent Judge, of the High Court	
459	2	28	question	case
461	1	31	of	to
462	1	15, 16	should not be foisted (to be foisted ?)	to be foisted
464	1	5 (from bottom)	inserting	substituting
465	1	6, 7	adoring	adorning
465	1	15	adoring	adorning
465	2	last line	than used	than when used.
469	1	21	vacancy.	vacancy occurs.
470	2	19	(see p. 72)	(see S. 72)
471	2	20	contrary indication	contrary indication,
473	1	8 (from bottom)	same only	same, only
473	2	9	High Court	High Courts
473	2	20 (from bottom)	and	or
475	1	16 (from bottom)	discussion there	discussion if there
483	2	16	" details	detail
484	2	20, 21	" as is desired	as desired
497	2	3, 4	" paragraph (c) of sub-section (2)	Paragraph (c) of proviso to sub-section (2)
497	2	11, 12	" Proviso by the	proviso to sub-section (2) by the
498	1	10 (from bottom)	and that it	and therefore it
498	2	31 (from bottom)	actual service the	'actual service in clause 11 (b) of the second schedule to the Constitution the
500	2	9	Insert after words 'executive authority' Salmond on Jurisprudence by Fitzgerald, 7th Edn., Pp. 229, 230	
501	1	22	purposes	purpose
502	2	21	example the	example for the
515	1	20	consideration	consideration;
521	1	25	that next	that the next
521	2	17 (from bottom)	has come	had reached
522	1	2	therefore, punitive	therefore, is punitive
523	1	25	one in	the
557	2	11	For "Sarv Shri" read "Sarva Shri."	

<i>Page</i>	<i>Col.</i>	<i>Line</i>	<i>Correction</i>
588	2	24	For "High Court" read "High Courts."
585	2	6 (from bottom)	For "Chief Justice" read "Chief Judge."
598	1	12 (from bottom)	For "is such that there" read "are such that there."
599	1	11 (from bottom)	For "way different" read "way in a different."
600	1	(from bottom)	For 'had' read 'has.'
601	2	5 (from bottom)	For "much more the" read "much more than the."
602	2	10, 11	For "seen that from the language of that Article that" read "seen from the language of that Article that."
607	2	31	For "proviso, to" read "proviso to."
618	1	18 to 21 (from bottom)	For "or a High Court can be removed from Office under proviso (b) to Art. 217 (1) of the Constitution" read "or of a High Court can be removed from office."
635	1	11, 12 (from bottom)	For "the court said that if" read "the Court said that if."
635	2	2, 3 (from bottom)	For "in Beatson v. Skane" read "in Beatson v. Skane (5 H & N 838.)"
644	2	22	For "without giving an opportunity" read "without giving him an opportunity."
650	1	5, 6	For "enclosed to" read "enclosed with."

A. I. R. 1982 S. C. 887 (April)

<i>Page No.</i>	<i>Line No.</i>	<i>For</i>	<i>Read</i>
890 Col. 1	23 (from top)	Which has now merged in the then province of Bombay. The	Which later merged in the then province of Bombay and is now in the State of Karnataka. The
890 Col. 2	1 (from top)	Deshgat Estate. The first	Deshgat Estate, which was partly located within the territory of former feudatory State of Jhamkhandi and partly in the territories of the then British India. The first
890 Col. 2	18-19 (from top)	"Gundopanth"	"Gundopant"
890 Col. 2	27 (from top)	"Bhimaji"	"Bhimrao"
891 Col. 1	21 (from top)	"Bhimaji"	"Bhimrao"
891 Col. 1	27 (from top)	"Bhimaji"	"Bhimrao"

<i>Page No.</i>	<i>Line No.</i>	<i>For</i>	<i>Read</i>
891 Col. 2	10 (from top)	"Gundopanth"	"Gundopant"
891 Col. 2	20 (from top)	"Gundopanth"	"Gundopant"
891 Col. 2	13 (from top)	"Gundappa"	"Gundopant"
892 Col. 1	1 (from top)	"Gundappa"	"Gundopant"
893 Col. 1	20 (from top)	"whole of the evidence both the oral and documentary, led by both the parties on the question of custom, and having considered the evidence come to a definitive finding that"	"whole of the evidence, both oral and documentary, led by both the parties on the question of custom, and have come to a definitive finding that"
898 Col. 2	20-28	"The Court then dealt with the relevant provisions of Act No. 60 of 1950 and observed that in the light of these features of the watan and the property granted for remuneration of the watandar that the relevant feature of Act No. 60 of 1950 were considered with respect to the right of the watandar to a regrant of the watan lands".	"The Court then dealt with the scheme of the Act No. 60 of 1950 and observed that in the light of the incidents of the watan and the property granted for remuneration of the watandar, that the relevant provisions of the Act had to be considered in regard to the right of the watandar to re-grant of the watan lands".
899 Col. 2	3 (from top)	"sub.s. (3)"	"sub-s. (1)"
900 Col. 1	4 (from bottom)	"Clause (1)"	"Clause (i)"
900 Col. 2	20-21 (from top)	"cls. (1) to (3)"	"sub-sections (1) to (3)"
900 Col. 2	21 (from bottom)	"cl. (1)"	"cl. (i)"
900 Col. 2	14 (from bottom)	"S. 2 (i) (iii)"	"S. 2 (1) (iii)"

A. I. R. 1982 S. C. 933 (May)

At Page 936, Col. 2.

For the lines 4 to 7 from top.

Substitute the following lines —

".....should be a corresponding qualification that can be earned by virtue of passing an examination or test conducted by the concerned University. There can be declaration of equivalence only as between a degree etc. awarded by the concerned University and one obtained from a body different from the one awarded by the concerned University. When the"

Corrigendum
A. I. R. 1982 S. C. 949 (May)

69

<i>Page.</i>	<i>Col.</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
962	1	11	"13th of December"	"13th of December 1980"
965	2	35	"appellant"	"appellants"
970	1	9 (from bottom)	"any event of contingency"	"any event or contingency"
970	2	13	"statement of objects"	"statement of objects and reasons"
971	2	25, 26	"interest of justice"	"interests of justice"
973	1	6	"to Court"	"to the court"
973	1	16 (from bottom)	"examining the depth"	"examining in depth"
973	2	18 (from bottom)	"S. 2 (e)"	"S. 2 (c)"
974	1	25 (from bottom)	"S. 2 (c) (ii)"	"S. 2 (e) (ii)"
975	1	19 (from bottom)	"cl. 2"	"S. 2"
975	2	31, 32	"(i) money"	"(i) 'money'"
975	2	32, 33	"a scheme by"	"any scheme by"
975	2	34, 35	"money, (ii) or money circular scheme means any scheme"	"money, or (ii) 'money circular scheme' means any scheme"
975	2	38	"the"	"a"
975	2	40	"section"	"clause"
975	2	40, 41	"commas,, one"	"commas, one"
975	2	12 (from bottom)	"from"	"from the"
975	2	12, 11 (from bottom)	"of such scheme or periodical subscriptions"	"of the members of such scheme or periodical subscriptions"
975	2	10 (from bottom)	"namely, money"	"namely, 'money'"
975	2	9 (from bottom)	"scheme 'means'"	"scheme' means"
975	2	6, 5 (from bottom)	"money, is not sound."	"money", is not sound."
975	2	4 (from bottom)	"Chatterjee,"	"Chatterjee"
975	2	3, 2 (from bottom)	"namely, 'money circular scheme means any scheme' by"	"namely," 'money circular scheme' means any scheme, by"
975	2	1 (from bottom)	"called for"	"called, for"
976	1	1	"money' will"	"money" will"
976	2	9	"Cl. 2 (g)"	"Rule 2 (g)."
977	2	4, 3 (from bottom)	"judgment, Krishna Iyer, J."	"judgment, Krishna Iyer, J."

A. I. R. 1982 S. C. 1057 (June)

<i>Page</i>	<i>Col.</i>	<i>Para.</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
1062	2	30	2.6	"while upholding the conviction of the accused we set aside the sentence awarded by the Sessions Judge as affirmed by the High Court and direct."	"while setting aside the judgment of the Sessions Judge, as affirmed by the High Court, we direct."
1062	2	30	7	"Jaipur to forward the accused."	"Jaipur, to try the accused and if he gives a finding that the accused is guilty, he shall forward the accused."

A. I. R. 1982 S. C. 1097 (June)

1097	1	—	Last line of Head-note from bottom	he could plead	he could not plead
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A. I. R. 1982 S. C. 1178 (July)

1179	2	35, 36		We have	I have
1181	2	2 (from bottom)		Petition is	Petitions are

A. I. R. 1982 S. C. 1497 (Nov.)

1498	1	17	"estimated goods"	"estimated cost of goods"
1499	1	18	"Bank contended"	"Electricity Board contended"

A. I. R. 1982 S. C. 1500 (Nov.)

1503	1	16	Original	Regional
1504	1	24 (from bottom)	Original	Regional

A. I. R. 1982 S. C. 1413 (Nov.)

The name of the Chief Justice of India did not get printed inadvertently in this case. The omission is deeply regretted. The subscribers are requested to paste the following slip in the place of names of judges.

To be pasted on p. 1413 (S. C. Section).

Y. V. Chandrachud, C. J.

D. A. Desai and A. N. Sen, JJ.

THE All India Reporter

1982

Supreme Court

AIR 1982 SUPREME COURT 1
Y. V. CHANDRACHUD, C. J.,
A. VARADARAJAN AND
AMARENDRA NATH SEN, JJ.

Writ Petns. Nos. 3614 and 3647 of 1981, D/- 22-10-1981.

Rattan Singh and another, Petitioners v State of Punjab and others. Respondents.

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), Sections 3 (1) and 11 (1) — Detention under Section 3 (1) — Representation by detenu — Failure on part of either Jail Superintendent or State Government to forward detenu's representation to Central Government — Detention is illegal. (Constitution of India, Art. 22.)

The failure on the part either of the Jail Superintendent or the State Government to forward the detenu's representation to the Central Government deprives the detenu of the valuable right to have his detention revoked by that Government. As a result the continued detention of the detenu is rendered illegal. AIR 1980 SC 1361 and AIR 1980 SC 789 Rel. on. (Para 4)

Section 11 (2) confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply the right in a de-

tenu to make a representation to the Central Government against the order of detention. (Para 4)

Cases Referred : Chronological Paras
 AIR 1980 SC 789 : (1980) 2 SCC 346 : 5
 1980 Cri LJ 555
 AIR 1980 SC 1361 : (1980) 2 SCC 321 : 5
 1980 Cri LJ 1015

Mr. Harjinder Singh, Advocate, for Petitioners; Mr. N. S. Das Bahl and Mr. M. S. Dhillon, Advocates, for Respondent No. 1.

CHANDRACHUD, C. J. :— By this petition under Article 32 of the Constitution the petitioner challenges the validity of an order dated March 27, 1981 passed by respondent 1, the State of Punjab, under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

2. On April 19, 1981, while the petitioner was in detention, his advocate, Shri Harjinder Singh, wrote a letter to the Superintendent of Central Jail, Amritsar, enclosing therewith two representations drafted on behalf of the petitioner, one of which was addressed to the Joint Secretary, Department of Home, Government of Punjab, Chandigarh, and the other to the Secretary, Union Ministry of Finance, Department of Revenue, New Delhi. The Jail Superintendent was requested by the aforesaid letter that the representations be forwarded to the State Government and the Central Government after obtaining the signatures of the detenu thereon. The contention of the peti-

tioner is that in spite of the long passage of time, the representation to the Central Government has not so far been considered by it, rendering his detention illegal.

3. In his Counter-affidavit dated July 29, 1981, the Under Secretary to the Government of India, Ministry of Finance (Department of Revenue), COFE-POSA Unit, New Delhi says that "no representation by or on behalf of the detenu relating to his detention has been received by the Central Government. As such, the question of any delay in the disposal of such a representation does not arise". In his affidavit dated July 21, 1981 the P. P. S. (I), Superintendent, Central Jail, Amritsar says that the representation of the detenu Rattan Singh was forwarded to the Punjab Government. The affidavit of Smt. Shyama Mann, Joint Secretary to Government Punjab, Home, Department, Chandigarh shows that the representation of the detenu was considered by the Government of Punjab and was rejected on April 28, 1981.

4. There is no difficulty in so far as the representation to the Government of Punjab is concerned. But the unfortunate lapse on the part of the authorities is that they overlooked totally the representation made by the detenu to the Central Government. The representations to the State Government and the Central Government were made by the detenu simultaneously through the Jail Superintendent. The Superintendent should either have forwarded the representation separately to the Governments concerned or else he should have forwarded them to the State Government with a request for the onward transmission of the other representation to the Central Government. Some one tripped somewhere and the representation addressed to the Central Government was apparently never forwarded to it, with the inevitable result that the detenu has been unaccountably deprived of a valuable right to defend and assert his fundamental right to personal liberty. Maybe that the detenu is a smuggler whose tribe (and how their numbers increase!) deserves no sympathy since its activities have paralysed the Indian Economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them and if freedom and

liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus. Section 11 (1) of COFE-POSA confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply the right in a detenu to make a representation to the Central Government against the order of detention. The failure in this case on the part either of the Jail Superintendent or the State Government to forward the detenu's representation to the Central Government has deprived the detenu of the valuable right to have his detention revoked by that Government. The continued detention of the detenu must therefore be held illegal and the detenu set free.

5. In *Tara Chand v. State of Rajasthan*, (1980) 2 SCC 321 : (AIR 1980 SC 1361) it was held by this Court that even an inordinate delay on the part of the Central Government in consideration of the representation of a detenu would be in violation of Art. 22 (5) of the Constitution, thereby rendering the detention unconstitutional. In *Shyam Ambalal Siroya v. Union of India*, (1980) 2 SCC 346 : (AIR 1980 SC 789) this Court held that when a properly addressed representation is made by the detenu to the Central Government for revocation of the order of detention, a statutory duty is cast upon the Central Government under Section 11, COFEPOSA to apply its mind and either revoke the order of detention or dismiss the petition and that a petition for revocation of an order of detention should be disposed of with reasonable expedition. Since the representation was left unattended for four months, the continued detention of the detenu was held illegal. In our case, the representation to the Central Government was not forwarded to it at all.

6. These then are our reasons for the order dated October 1, 1981 whereby we directed that the detenu be released.

7. Writ Petition No. 3647 of 1981.

For the reasons given above in Writ Petition No. 3614 of 1981, this Petition must also succeed and the detenu set at liberty as directed in our Order dated October 1. It was on July 2, 1981 that the detenu made a representation to the

Central Government through the Superintendent of Jail, Amritsar, and it is not denied that the representation has still not been considered by that Government. The counter-affidavit of the Under Secretary to the Government of India shows that the representation made by the detenu was not forwarded at all to the Central Government which explains the statement in the affidavit that no representation was received by the Central Government and that therefore the question of delay in consideration of the representation did not arise.

Petition allowed.

AIR 1982 SUPREME COURT 3

(From: Allahabad)*

A. P. SEN AND A. VARADARAJAN, JJ.
Civil Appeal No. 2754 of 1981. D/-
20-10-1981.

Smt. Jeewanti Pandey, Appellant v.
Kishan Chandra Pandey, Respondent.

Hindu Marriage Act (25 of 1955), Sections 12, 19 cl. (ii) — 'Residence' — Meaning of — Parties to marriage belonging to village within jurisdiction of District Judge, Almora married in Delhi and residing there — Petition for nullity of marriage under Section 12 filed in court of District Judge, Almora — District Judge would have no jurisdiction to try the petition, Civil Revision No. 1904 of 1978, D/- 6-8-1979 (All.), Reversed. (Words and Phrases — 'Residence').

The context of cl. (ii) of Section 19 that the word "resides" must mean the actual place of residence and not a legal or constructive residence; it certainly does not connote the place of origin. The word "resides" is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. (Para 13)

Where the parties to marriage who originally belonged to a village within the territorial jurisdiction of District Judge, Almora got married in New Delhi and the wife resided with her uncle in Delhi ever since the marriage and the husband also was a resident of Delhi being employed there the petition for nullity of

marriage under Section 12 filed by the husband in the court of the District Judge, Almora on the ground that the parties were residents of a village within the territorial jurisdiction of that Court would not be maintainable as that District Judge, would have no jurisdiction to try the petition. Civil Revn. No. 1904 of 1978, D/- 6-8-1979, (All.) Reversed. (Para 13)

In order to give jurisdiction on the ground of "residence", something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the Court in which the respondent is sued, is his natural forum. The word "reside" is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense "residence" is more or less of a permanent character. The expression "resides" means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. Where there is such fixed home or such abode at one place the person cannot be said, to reside at any other place where he had gone on a casual or temporary visit, e.g., for health or business or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides.

(Para 12)

Mr. M. K. Garg, Advocate for Appellant; Mr. K. K. Mahrotra, for Respondent.

SEN, J. :— The short point involved in this appeal by special leave from a judgment of the Allahabad High Court, is whether the Court of the District Judge, Almora had jurisdiction to entertain the petition for nullity of marriage filed by the respondent under Section 12 of the Hindu Marriage Act 1955 (hereinafter referred to as 'the Act').

*Civil Revn. No. 1904 of 1978. D/- 6-8-1979, (All.).

2. To bring out the point, it is necessary to state a few facts. It appears that the parties originally belonged to village Bagyan, District Pithoragarh, in the State of Uttar Pradesh. The appellant's case is that they fell in love and she became enceinte, as the respondent had access to her during the period of courtship. Her case is that she wanted to marry the respondent, but her father was opposed to the alliance as her elder brother and sister were unmarried. She was therefore brought in an advanced stage of pregnancy to Delhi and through the intervention of her uncle Basant Kumar, the marriage was solemnised on Jan. 24, 1976 according to Arya Samaj rites at the Arya Samaj Mandir, Hanuman Road, New Delhi. Three days after the marriage, i.e. on January 27, 1976, the respondent left the residence of Basant Kumar on the pretext that he had to fetch his belongings from the residence of his uncle Dharm Nand Pant who also lives at Delhi, and never returned. On February 6, 1976, he served a notice on the appellant alleging that the marriage was a nullity as she got pregnant through someone else, that fraud was practised on him by her uncle Basant Kumar and that he had been coerced to marry her against his will. On February 17, 1976 she sent a reply denying the allegations made therein. On March 2, 1976 she filed a petition for restitution of conjugal rights under Section 9 of the Act in the Court of Subordinate Judge, Class I, Delhi.

3. It may here be stated that although the appellant is a resident of Delhi as she lives with her uncle Basant Kumar at Lajwanti Garden, and the respondent was also a resident of Delhi being employed, at all material times, as Radio-Technician in the Ministry of Home Affairs, Rail Bhawan, New Delhi, he started the present proceedings not at Delhi but at Almora.

4. On March 18, 1976 the respondent filed a petition for nullity of marriage under Section 12 of the Act in the Court of the District Judge, Almora alleging that the parties were residents of village Bagyan, District Pithoragarh, i.e. within the territorial jurisdiction of the Court of District Judge, Almora. On March 23, 1976 i.e. just after five days of the filing of the petition under Section 12 of the Act the appellant delivered a dead child at Delhi.

5. On Feb. 25, 1977 the Subordinate Judge, Class I, Delhi decreed the appellant's suit for restitution of conjugal rights under Section 9 of the Act. In decreeing her claim for restitution of conjugal rights, the learned Subordinate Judge observed :

"That to sum up the evidence adduced by petitioner proves that the petitioner and respondent were known to each other and had developed sexual intimacy. It is further proved that the respondent married the petitioner at Delhi on 24-1-1976 of his own sweet free will according to Hindu rites. The petitioner delivered a dead child on 23-3-1976 would show that on the date of marriage, the petitioner was running in 7th month of pregnancy. Such advanced stage of pregnancy could not be hidden from the vision of any person. The plea of respondent that he did not know on 24-1-1976 that the petitioner was pregnant cannot be believed. The respondent thus knew at the time of marriage that the petitioner was pregnant. The very fact that he married her of his own free will would justify the conclusion corroborated by other evidence and circumstances discussed above that the petitioner had conceived from the respondent and the respondent thus married her of his own free will." The judgment of the learned Subordinate Judge decreeing the appellant's claim for restitution of conjugal rights under Section 9 of the Act was not appealed from and has, therefore, become final.

6. Upon these facts, it is quite evident that the Court of the District Judge, Almora had no jurisdiction to try the petition for nullity of marriage filed by the respondent under Section 12 of the Act. The appellant by her written statement filed on August 23, 1976 challenged the jurisdiction of the District Judge, Almora to try the suit. The learned District Judge, accordingly framed a preliminary issue as to jurisdiction. By his order dated April 8, 1978 he negatived the objection raised by the appellant holding that since the parties were originally resident of village Bagyan, District Pithoragarh, that is a place within the territorial jurisdiction of the Court of the District Judge, Almora, he was competent to entertain and try the suit.

7. The appellant being aggrieved by the order of the learned District Judge preferred an appeal before the High

Court. The High Court by its judgment dated Aug. 6, 1979 upheld the finding of the learned District Judge observing :

"The allegations made in the written statement do unmistakably show that the respondent was ordinarily residing at village Bagyan which was within the limits of the territorial jurisdiction of the Court of District Judge, Almora. Even if she happened to be in Delhi on the date when the petition was presented, she must have gone to Delhi only on a temporary visit as she had no place of residence at Delhi and the respondent could not be said to have been residing at Delhi when the petition was presented in the District Court."

8. In arriving at that conclusion, the High Court was obviously influenced by the fact that the parties never had any permanent residence. While it is true that mere casual or temporary visits do not constitute 'residence' within the meaning of cl. (ii) of Section 19 of the Act, it cannot be said that the parties came to Delhi on a temporary sojourn for a day or two. The appellant's case is that she had left her parental home at village Bagyan as her father did not consent to the marriage. If that be so, the irresistible conclusion is that she came to reside with the respondent at Delhi. It was frankly conceded before us that the finding of the High Court that she should be so regarded as having her residence at village Bagyan in the district of Pithoragarh is based on no evidence. It is agreed on all hands that ever since the marriage the appellant has been residing with her uncle Basant Kumar at Lajwanti Garden, New Delhi.

9. Section 19 of the Act, insofar as material, reads as follows :

"19. Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction—

- (i) the marriage was solemnised, or
- (ii) the respondent, at the time of the presentation of the petition, resides, or
- (iii) the parties to the marriage last resided together....."

10. It is common ground that the marriage was solemnised on January 24, 1976 at New Delhi. The fact that the parties last resided together at the residence of the appellant's uncle Basant Kumar at Lajwanti Garden, New Delhi

is not in dispute. It is, therefore, clear that the conditions laid down in cls. (i) and (iii) of Section 19 of the Act are not present to invest the Court of the District Judge, Almora to entertain the petition for annulment of marriage filed by the respondent under S. 12 of the Act.

11. The question that arises is whether the learned District Judge was invested with jurisdiction by reason of cl. (ii) of Section 19 of the Act, i.e. whether, at the time of presentation of the petition, the appellant was a resident of village Bagyan within the territorial jurisdiction of the Court of District Judge.

12. In order to give jurisdiction on the ground of 'residence', something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum. The word 'reside' is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense 'residence' is more or less of a permanent character. The expression 'resides' means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. In Webster's Dictionary, 'to reside' has been defined as meaning 'to dwell permanently or for any length of time', and words like 'dwelling place' or 'abode' are held to be synonymous. Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g. for health or business or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides.

13. It is plain in the context of cl. (ii) of Section 19 of the Act, that the word 'resides' must mean the actual place of residence and not a legal or construc-

tive residence; it certainly does not connote the place of origin. The word 'resides' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. It follows that it was the actual residence of the appellant, at the commencement of the proceedings, that had to be considered for determining whether the District Judge, Almora, had jurisdiction or not. That being so, the High Court was clearly in error in upholding the finding of the learned District Judge that he had jurisdiction to entertain and try the petition for annulment of marriage filed by the respondent under Section 12 of the Act.

14. In the result, the judgment of the High Court is set aside and the District Judge, Almora, is directed to return to the respondent the petition filed by him for nullity of marriage under Section 12 of the Hindu Marriage Act, 1955 for presentation to the proper court, i.e. the Court of the District Judge, Delhi. There shall be no order as to costs.

Order accordingly.

AIR 1982 SUPREME COURT 6

Y. V. CHANDRACHUD, C. J.,

A. P. SEN AND BAHARUL ISLAM, JJ.

Writ Petn. No. 8193 of 1981. D/- 7-11-1981

Smt. Prabha Dutt, Petitioner v. Union of India and others, Respondents.

Prisons Act (9 of 1894), Section 59 — Manual for the Superintendence and Management of Jails (as applicable to Delhi), Rr. 549 (4), 559A, 552A — Right of Press to interview convicts, sentenced to death — Rejection of petitions of convicts for commutation of their death sentence by President — Prisoners willing to give interview — Press should be allowed to interview them unless weighty reasons to contrary exist. (Constitution of India, Arts. 19 (1) (a), 21).

Where the President of India rejected the petitions filed by the prisoners for commutation of their death sentence to imprisonment of life and the prisoners are willing to be interviewed by the Press which wants to interview them, the right of the Press to interview the

prisoners should not be denied. If in any given case, there are weighty reasons, for denying the opportunity to interview a condemned prisoner, the same should always be recorded in writing and the interview may be refused. (Paras 2, 6, 7)

R. 549 (4) provides that every prisoner under a sentence of death shall be allowed such interview and other communications with his relatives, friends and legal advisers as the Superintendent thinks reasonable. Journalists or newspapermen are not expressly referred to in cl. (4) but that does not mean that they can always and without good reasons be denied the opportunity to interview a condemned prisoner. R. 559A also provides that all reasonable indulgence should be allowed to a condemned prisoner in the matter of interviews with relatives, friends, legal advisers and approved religious ministers.

(Paras 3, 4)

R. 552A provides for a search of the person who wants to interview a prisoner. If it is thought necessary that such a search should be taken, a person who desires to interview a prisoner may have to subject himself or herself to the search in accordance with the rules and regulations governing the interviews.

(Para 5)

ORDER:— This is a petition under Art. 32 of the Constitution by the Chief Reporter of the Hindustan Times, Smt. Prabha Dutt, asking for a writ of mandamus or any other appropriate writ or direction directing the respondents, particularly the Delhi Administration and the Superintendent of Jail, Tihar to allow her to interview two convicts Billa and Ranga who are under a sentence of death. We may mention that the aforesaid two prisoners have been sentenced to death for an offence under Section 302 I. P. C. and the petitions filed by them to the President of India for commutation of the sentence are reported to have been rejected by the President recently.

2. Before considering the merits of the application, we would like to observe that the constitutional right to freedom of speech and expression conferred by Article 19 (1) (a) of the Constitution, which includes the freedom of the Press, is not an absolute right, nor indeed does it confer any right on the Press to have an unrestricted access to means of information. The Press is entitled to ex-

ercise its freedom of speech and expression by publishing a matter which does not invade the rights of other citizens and which does not violate the sovereignty and integrity of India, the security of the State, public order, decency and morality. But in the instant case, the right claimed by the petitioner is not the right to express any particular view or opinion but the right to means of information through the medium of an interview of the two prisoners who are sentenced to death. No such right can be claimed by the Press unless in the first instance, the person sought to be interviewed is willing to be interviewed. The existence of a free Press does not imply or spell out any legal obligation on the citizens to supply information to the Press, such for example, as there is under Section 161 (2) of the Criminal P. C. No data has been made available to us on the basis of which it would be possible for us to say that the two prisoners are ready and willing to be interviewed. We have, however, no data either that they are not willing to be interviewed and, indeed, if it were to appear that the prisoners themselves do not desire to be interviewed, it would have been impossible for us to pass an order directing that the petitioner should be allowed to interview them. While we are on this aspect of the matter, we cannot overlook that the petitioner has been asking for permission to interview the prisoners right since the President of India rejected the petitions filed by the prisoners for commutation of their sentence to imprisonment for life. We are proceeding on the basis that the prisoners are willing to be interviewed.

3. Rule 549 (4) of the Manual for the Superintendence and Management of Jails, which is applicable to Delhi, provides that every prisoner under a sentence of death shall be allowed such interviews and other communications with his relatives, friends and legal advisers as the Superintendent thinks reasonable. Journalists or newspapermen are not expressly referred to in clause (4) but that does not mean that they can always and without good reasons be denied the opportunity to interview a condemned prisoner. If in any given case, there are weighty reasons, for doing so, which we expect will always be recorded in writing, the interview may appropriately be refused. But no such consideration has been pressed upon us and therefore we

do not see any reason why newspapermen who can broadly, and we suppose without great fear of contradiction, be termed as friends of the society be denied the right of an interview under clause (4) of R. 549.

4. Rule 559A also provides that all reasonable indulgence should be allowed to a condemned prisoner in the matter of interviews with relatives, friends, legal advisers and approved religious ministers. Surprisingly, but we do not propose to dwell on that issue, this rule provides that no newspapers should be allowed. But it does not provide that no newspapermen will be allowed.

5. Mr. Talukdar who appears on behalf of the Delhi Administration contends that if we are disposed to allow the petitioner to interview the prisoners, the interviews can be permitted only subject to the rules and regulations contained in the Jail Manual. There can be no doubt about this position because, for example, Rule 552A provides for a search of the person who wants to interview a prisoner. If it is thought necessary that such a search should be taken, a person who desires to interview a prisoner may have to subject himself or herself to the search in accordance with the rules and regulations governing the interviews. There is a provision in the rules that if a person who desires to interview a prisoner is a female, she can be searched only by a matron or a female warden.

6. Taking an overall view of the matter, we do not see any reason why the petitioner should not be allowed to interview the two convicts Billa and Ranga.

7. During the course of the hearing of this petition, representatives of the Times of India, India Today, PTI and UNI also presented their applications asking for a similar permission. What we have said must hold good in their cases also and they, in our opinion, should be given the same facility of interviewing the prisoners as we are disposed to give to the petitioner in the main writ petition.

8. We therefore direct that the Superintendent of the Tihar Jail shall allow the aforesaid persons, namely the representatives of the Hindustan Times, the Times of India, India Today, the Press Trust of India and the United News of India to interview the aforesaid

two prisoners, namely, Billa and Ranga, today. The interviews may be allowed at 4 O'Clock in the evening. The representatives agree before us that all of them will interview the prisoners jointly and for not more than one hour on the whole.

9. There will be no order as to costs.

10. Mr. Lekhi who appears on behalf of the magazine India Today as also Mr. Jain who appears on behalf of the Hindustan Times has requested us to direct the Superintendent of Jail to allow the aforesaid representatives to be present at the time of the execution of the death sentence. That is not a matter for us to decide. If such an application is made to the Superintendent of Jail, he will be free to consider the same on merits and in accordance with the jail regulations.

Order accordingly.

AIR 1982 SUPREME COURT 8

A. P. SEN AND
BAHARUL ISLAM, JJ.

Writ Petn. (Criminal) No. 3662 of 1981, D/- 30-10-1981.

Smt. Hemlata Kantilal Shah, Petitioner v. State of Maharashtra and another, Respondents.

(A) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), Ss. 8 (e) and 3 — Detention — Legal representation before Advisory Board — Request of detenu rejected — Legality. (Constitution of India, Art. 22 (5).)

Section 8 (e) does not bar representation of a detenu by a lawyer. It only lays down that the detenu cannot claim representation as of right. It has given a discretion to the Board to permit or not to permit according to necessity of case. In complicated cases assistance of lawyers may be necessary. In the instant case the submission that the request of the detenu for legal representation before the Advisory Board was arbitrarily rejected thereby causing serious prejudice to the detenu could not be accepted on two grounds: (i) the Advisory Board, whose action was complained of was not a party before the Supreme Court; and (ii) the decision of the Supreme Court on the point would

be merely academic. It would be academic because after rejection of the request, the Board reviewed the case of the detenu and gave its opinion whereupon the Government confirmed the detention. (Para 6)

(B) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), Sec. 3 — Detention — Grounds — Supply of particulars — Detention for smuggling palladium — Govt. need not inform that import of such metal is prohibited. (Constitution of India, Art. 22 (5).)

When an order of detention together with the grounds of detention is served on a detenu, the detenu may ask for particulars on which a ground is based if they are not already there. When a document contains what are called "grounds" which often consist of the background of a case, narration of facts and instances of the detenu's activities, the detenu is not entitled to know which part or parts of the "grounds" was or were taken into consideration and which not. The Court may not take into consideration any reply given by the detaining authority to such an enquiry; for, the reply may be an afterthought. It will be for the Court to judge whether the facts narrated constitute a ground of detention or which facts might possibly enter and influence the detaining authority in coming to its subjective satisfaction. (Para 6)

Whether or not the import of Palladium is prohibited or not is an information on a question of law and can be obtained from Statutes, Rules or Notifications. The Government is not under any liability to furnish the detenu with legal information available from legal literature. The liability of the detaining authority is only to comply with the requirements of Article 22 (5) of the Constitution. In the instant case, the detenu stated in his statement that he had purchased the palladium from the shop of a dealer in precious metal at Muscat and that he had smuggled that metal to make profits. Though palladium may not be a prohibited article it is admittedly a dutiable article and it was admittedly smuggled by the detenu. (Para 6)

(C) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 — Detention — Delay in detaining person after incident

— **Legality. (Constitution of India, Article 22 (5).)**

Delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person, for, in certain cases delay may be unavoidable and reasonable. What is required by law is that the delay must be satisfactorily explained by the detaining authority. AIR 1974 SC 1264; AIR 1974 SC 2066 and AIR 1975 SC 1408, Rel. on. (Para 6)

Further, the detaining authority is in no legal liability to tell or satisfy the detenu as to the causes of delay; it is under an obligation to satisfy the court as to the causes of delay to show that there was no infraction of the constitutional provisions laid down under Article 22 (5) of the Constitution. On facts it can be held that the delay has been satisfactorily explained by the authority in its affidavit and it has not vitiated the detention. (Para 7)

(D) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 — Detention for violating provisions of Customs Act — Possibility of prosecution is no bar to detention. (Constitution of India, Article 14).

Possibility of a prosecution or the absence of it is not an absolute bar to an order of preventive detention; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. What is required is that the detaining authority is to satisfy the Court that it had in mind the question whether prosecution of the offender was possible and sufficient in the circumstances of the case. In some cases of prosecution it may not be possible to bring home the culprit to book as in case of a professional bully, a murderer or a dacoit, as witnesses do not come forward to depose against him out of fear, or in case of international smuggling it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt. AIR 1979 SC 1945, Foll. (Para 9)

The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed largely from prior events showing tendencies or inclinations of a person that an inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of foreign exchange regulations and his smuggling activities are likely to have deleterious effect on the national economy. (Para 12)

Further, the guidelines given by the Government were necessarily of a confidential nature and were intended to guide the Customs or Intelligence Officers as to how to act and what to do in the detention and apprehension of smugglers. They do not have any force of law; and there cannot be any valid complaint of discrimination, if any, in arresting and bringing to book a particular offender under the Customs Act or under any Preventive Detention Law. (Para 13)

(E) Constitution of India, Articles 32, 226, 136 and 22 (5) — Detention under Preventive detention law — Duty of Court under Arts. 32, 226 and 136.

The High Court under Art. 226 and the Supreme Court either under Art. 32 or under Article 136 do not sit on appeal on the orders of preventive detention. The normal law is that when an isolated offence or isolated offences is or are committed, the offender is to be prosecuted. But, if there be a law of preventive detention empowering the authority to detain a particular offender in order to disable him to repeat his offences, it can do so, but it will be obligatory on the part of the detaining authority to formally comply with the provisions of sub-article (5) of Article 22. The High Court under Art. 226 and the Supreme Court under Article 32 has to see whether the formalities enjoined by Art. 22 (5) have been complied with by the detaining authority. If the formalities have been complied with, the Court cannot examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detained the detenu under the Preventive Detention Act, for, that is the function of an appellate Court. (Para 15)

Cases Referred : Chronological Paras

AIR 1979 SC 1945 : (1980) 1 SCR 54 :
1979 Cri LJ 1306 8, 10

AIR 1975 SC 1408 : 1975 Cri LJ 1235 6

AIR 1974 SC 1264 : 1974 Cri LJ 936 6

AIR 1974 SC 2066 : 1974 Cri LJ 1233 6

Mr. Ram Jethmalani, Sr. Advocate and Miss Rani Jethmalani, Advocate with him, for Petitioner; Mr. O. P. Rana, Sr. Advocate and Mr. R. N. Poddar, Advocate with him, for Respondents.

BAHARUL ISLAM, J.— By this petition under Article 32 of the Constitution of India, Smt. Hemlata Kantilal Shah (hereinafter the 'wife') has challenged the detention of her husband Shri Kantilal Nagar Das Shah (hereinafter the 'detenu') who was detained by the State of Maharashtra (Respondent No. 1) by order dated June 3, 1981 under subsection (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter the 'Act'). The material facts on which the grounds of detention have been based may be briefly stated as follows:—

2. On January 8, 1981, the detenu with his wife and their minor daughter, Miss Chaya Kantilal Shah, arrived in Bombay from Muscat by Flight No. AI 838. The petitioner at the customs clearance counter of the airport appeared nervous and was hasty in clearing her baggage. The Intelligence Officer of the Air Customs Unit who had been present at the counter on receipt of secret information kept a close watch on her. When the family reported at the customs counter, the Intelligence Officer approached them and asked for their passports. It was found that the detenu, the petitioner and their daughter were all holding Indian passports and were frequent travellers. When asked about the contents of the baggages and for declaration in respect of gold, watches, and other valuable items, the detenu replied in the negative. The wife was asked to present her purse which was kept in a corner of the Customs counter covered with other pieces of baggage. In the said purse, one small tobacco tin marked "Three Nuns" was found. The tin appeared to be unusually heavy and as such the detenu was asked again to declare the contents. The declaration was that the contents were

some coins and that the tin was to be delivered to one Torahim in Bombay. Not being satisfied with the reply, two independent panchas were called and in their presence and in presence of the detenu and his wife, the tin was opened and 48 slabs of 'Palladium' metal each weighing one ounce were found. The baggage was then thoroughly examined in the presence of the detenu and his wife and the panchas. The examination resulted in recovery of 93 more slabs of 'Palladium' concealed in cheese packets, and in thermocol. Thus altogether 141 slabs of 'Palladium' valued at Rupees 3,54,192.00 were recovered. They were seized by the Customs Officer.

3. The detenu and his wife were then led to their residential premises of Flat No. 194, 19th Floor, Persepolis Apartment, Cuff Parade, Bombay 5, standing in the name of the wife. The premises were searched under a search warrant. The search resulted in the recovery of (1) Philips Colour T. V. valued at Rs. 18,000.00; (2) Akai Video Cassette Recorder valued at Rs. 24,000; (3) Sharp 3-in-one Model valued at Rs. 6,000.00 and (4) General Air Conditioner valued at Rs. 15,000.00. All these articles were also seized by the Customs Officer.

4. On the following day, the detenu made a statement which was recorded under Section 108 of the Customs Act. The detenu stated that he had been in Muscat for the last 40 years and had business of ready-made garments there; and that he was a wealthy man with two wives named Hasumati and Hemlata (the petitioner). The two wives were staying in Bombay at Cuff Parade in separate apartments. The detenu further stated that two months ago he had come to Bombay where he had come to know from Zaveri Bazar that smuggling of 'Palladium' was a profitable business. He therefore had purchased the 141 slabs of 'Palladium' of one ounce each for 9000 Omani Riyals from one Pursottam Kanji in Muscat who was a dealer in precious metals. Before leaving Muscat for Bombay, he had packed the 141 bars of Palladium in the three containers aforesaid. The detenu also stated that the sharp 3-in-one had been presented to him by His Highness Sultanbin Hamed-Al-Said of Muscat in October, 1980, and that the other three articles had been purchased by him from the Omani Consul General, Mr.

Salim Hakim. The detenu further stated that he took full responsibility for the 141 bars of Palladium seized and his wife had nothing to do with them.

5. Mr. Ram Jethmalani, learned counsel appearing for the petitioner makes the following submissions before us :

(I) The detenu asked for legal representation before the Advisory Board by letter dated July 31, 1981 but it was arbitrarily rejected on August 3, 1981, thereby causing serious prejudice to the detenu.

(II) After his detention, the detenu asked for six particulars to enable him to make the representation; only one particular was furnished and five were refused by the authority by its letter dated July 21, 1981 (Ex. A), thereby depriving the detenu from making a proper representation.

(III) The Government had framed guidelines in regard to detention. The authority however did not follow these guidelines in the case of the petitioner; so the order of detention was mala fide and discriminatory.

(IV) That the case of the petitioner is peculiarly a case in which the prosecution was the normal remedy; and

(V) That the cause of detention arose on January 8, 1981 in the airport and there was no reason for the unusual delay in passing the order of detention on June 6, 1981.

6. We now proceed to examine the contentions one by one.

(I) Legal representation before the Advisory Board.

Learned counsel for the petitioner has placed before us a copy of the letter dated July 31, 1981, addressed to the Secretary, Advisory Board by the detenu's counsel, Mr. G. L. Ajwani.

Mr. Ajwani referred to an earlier letter dated July 10, 1981, wherein he had requested, inter alia, for permission to the detenu to be represented by an Advocate before the Advisory Board. The Secretary of the Advisory Board sent a reply to Mr. Ajwani, who was informed that in view of Section 8 (e) of the Act, the detenu "is not entitled to appear before the Advisory Board by any legal practitioner. The Advisory Board has not permitted a legal practitioner to appear in any reference made to it under the aforesaid Act and hence your request cannot be acceded to."

Section 8 (e) reads as follows:—

"For the purposes of sub-clause (a) of Cl. (4) and sub-cl. (c) of Cl. (7), of Article 22 of the Constitution,—

.....
(e) a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board."

Section 8 (e) has not barred representation of a detenu by a lawyer. It only lays down that the detenu cannot claim representation by a lawyer as of right. It has given the Board a discretion to permit or not to permit representation of the detenu by counsel according to the necessity in a particular case. Certain cases may be complicated and assistance of lawyers may be necessary on behalf of the parties to explain the facts and law involved in the case. In the instant case, the submission is that the rejection of the request of the detenu's counsel by the Advisory Board on the ground that in the past no legal representation had been allowed on behalf of any detenu has been based on a misconception of the law. We are unable to accept the submission of learned counsel on two grounds; (i) the Advisory Board whose action is complained of is not a party before us; and (ii) our decision on the point would be merely academic. It would be academic because after rejection of the request, the Board reviewed the case of the detenu and gave its opinion whereupon the Government confirmed the detention.

(II) The second submission of learned counsel was with regard to non-supply with particulars. Mr. Ajwani aforesaid sent a letter (Ex. A) dated July 10, 1981 to the Assistant Secretary to the Government, Home Department (Special), Government of Maharashtra. In that letter he requested the Government to furnish six 'informations' mentioned in the letter. They were as follows:—

"(1) The name and designation of the officer on whose satisfaction the order of detention was made and relevant authority under the rules of business, enabling the said officer to pass detention orders on behalf of the Government.

(2) The date on which the proposal to detain was received by the detaining authority.

(3) Whether facts mentioned in para 3 of the grounds of detention have been used against the detenu for making the order of detention.

(4) The provision of law under which the import of Palladium is prohibited.

(5) Whether the detaining authority has accepted or rejected my client's story about the acquisition of colour T. V., Akai cassette video recorder, Air-conditioner etc. If it has been rejected, then the material on the basis of which this decision was taken, and

(6) Whether any inquiries, if any, were made from Oman consulate or from Consul General Mr. Salim Hakim."

Learned counsel submits that the 'information' sought under item (1) of the letter has been furnished and he has no grievance about it. But none of the remaining five 'informations' were furnished. The submission of learned counsel is that the Government is bound to disclose under which provision of law import of Palladium is prohibited; their failure to disclose this 'information' deprives the detenu from making a proper representation.

Items 3, 5 and 6 are akin. With regard to item (3), whether the facts mentioned in para (3) of the grounds of detention were used against the detenu for making the order of detention, Shri D. N. Capoor, Secretary to the Government of Maharashtra, Home Department, in his counter-affidavit, has stated in paragraph 20 of the affidavit:

".....I have not passed the order of detention on the ground that the four items seized from the detenu's house were smuggled. I say that I have mentioned the seizure of the said goods in the grounds of detention as narration of facts. I say that paras 3 and 4 of the grounds of detention are the narrations of the fact and the same is not a ground for detention....."

In our opinion the request of the detenu for the 'information' whether the detention was inter alia based on the seizures of the four articles mentioned in para 3 of the list of grounds and the reply of the authority to the request were irrelevant. When an order of detention together with the grounds of detention is served on a detenu, the detenu may ask for particulars on which a ground is based if they are not already there. When a document contains what are called "grounds" which often con-

sist of the background of a case, narration of facts and instances of the detenu's activities, the detenu is not entitled to know which part or parts of the 'grounds' was or were taken into consideration and which not. The Court may not take into consideration any reply given by the detaining authority to such an enquiry; for, the reply may be an afterthought. It will be for the Court to judge whether the facts narrated constitute a ground of detention or which facts might possibly enter and influence the detaining authority in coming to its subjective satisfaction.

The information sought as per Cl. (4) of the letter, namely, the provision under which the import of Palladium is prohibited is equally untenable. Whether or not the import of Palladium is prohibited or not is an information on a question of law and can be obtained from Statutes, Rules or Notifications. In our opinion, the Government is not under any liability to furnish the detenu with legal information available from legal literature. The liability of the detaining authority is only to comply with the requirement of sub-article (5) of Article 22 of the Constitution.

In this case, it appears from Schedule I, Appendix 2 to the Imports (Control) Order, 1955 (as amended up to March 31, 1980) that the articles mentioned against item 71.09 are "Platinum and other metals of the platinum group, unwrought or semi-manufactured" appearing under Chapter 71 under which are mentioned 'Pearls, precious and semi-precious stones, precious metals, rolled precious metals and articles thereof; Imitation jewellery, coin'. In the counter-affidavit the detaining authority has stated that Palladium is a precious metal belonging to the platinum group. The submission of learned counsel is that the detenu even did not know whether Palladium was a precious metal belonging to the platinum group and the Government's failure to furnish him with that 'information' prevented him from filing a proper representation. We are unable to accept this submission, inasmuch as the plea is not permissible on the ground of public policy, for, any detenu may plead that he does not know whether gold or silver is a precious metal. Be that as it may, the detenu stated in his statement that he had purchased the palladium from

the shop of a dealer in precious metal at Muscat and that he had smuggled that metal to make profits. Though palladium may not be a prohibited article it is admittedly a dutiable article and it was admittedly smuggled by the detenu.

(V) Delay

The submission of learned counsel is that the detenu was arrested on January 9, 1981 but was detained on July 6, 1981. The submission is that this delay was fatal. In support of his contention, learned counsel for the petitioner cited before us three decisions of this Court reported in AIR 1974 SC 1264, AIR 1974 SC 2066 and AIR 1975 SC 1408. In AIR 1974 SC 1264, this Court held that in passing a detention order, the authorities concerned must have due regard to the object with which the order was passed. If the object was to prevent disruption of supplies of foodgrains prompt action should be taken. In the absence of any explanation regarding the delay, the order of detention, passed with a view to prevent disruption of supplies of foodgrains on the grounds based on incidents of removal of rice which took place about seven months earlier, was invalid. In AIR 1974 SC 2066 (supra), there was inordinate delay and no proximity in point of time between the alleged prejudicial activity of the petitioner and the order of detention. The Court found that a period of 9 months had elapsed between the incident and the order of detention; and as the delay of nine months in the making of the order for detention after the alleged incident had not been explained, order of detention was held to be invalid. Delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person, for, in certain cases delay may be unavoidable and reasonable. What is required by law is that the delay must be satisfactorily explained by the detaining authority.

In the case in hand in the counter-affidavit filed on behalf of the detaining authority, it has been stated in paragraph 16 as follows:—

".....the detenu was arrested on 9th January, 1981 and was detained on 6th July, 1981. Thereafter the Customs Authorities carried on further investigation and as can be seen from the list of the statements and documents annexed to the grounds of detention, 11

statements of the detenu including the statement dated 7th April, 1981 were recorded by the Customs Authorities.... I therefore say that there is no delay in passing the order of detention as alleged by the petitioner.....the present order of detention has been issued after completing the investigation."

From the foot of the document containing the grounds of detention, it appears that the eleven statements of the detenu and his wife were recorded on various dates between January 8, 1981 and April 7, 1981.

7. The submission of learned counsel is that his grievance is not so much on the time-lag or delay between the date of arrest and the date of detention; his real grievance is in not furnishing with the information as to the cause of the delay so as to enable the detenu to file a proper representation before the Advisory Board for its consideration. In our opinion, the submission is untenable. The detaining authority is in no legal liability to tell or satisfy the detenu as to the causes of delay; it is under an obligation to satisfy the court as to the causes of delay to show that there was no infraction of the constitutional provisions laid down under sub-article (5) of Article 22 of the Constitution. In our opinion, the delay has been satisfactorily explained by the authority in its affidavit and it has not vitiated the detention.

8. (IV) Prosecution

The next point urged by Mr. Ram Jethmalani is that in the instant case, the proper course for the Government was to prosecute and convict the detenu for the offence, if any, for violation of the provisions of the Customs Act. In support of his contention he cites a decision of this Court reported in (1980) 1 SCR 54 : (AIR 1979 SC 1945). In that decision, the Court after reviewing a number of cases summarised the law as follows (at pp. 1947 and 1948 of AIR):

"The ordinary criminal process is not to be circumvented or shortcircuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However,

the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that the question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu."

9. The rule laid down is that a prosecution or the absence of it is not an absolute bar to an order of preventive detention; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. What is required is that the detaining authority is to satisfy the Court that it had in mind the question whether prosecution of the offender was possible and sufficient in the circumstances of the case. In some cases of prosecution it may not be possible to bring home the culprit to book as in case of a professional bully, a murderer or a dacoit; as witnesses do not come forward to depose against him out of fear, or in case of international smuggling, it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt.

10. In the instant case it has been submitted by Mr. Jethmalani that on the facts of this case, the prosecution under the ordinary law would have been sufficient; resort to preventive de-

tention on the face of it was manifestly unreasonable. In the counter-affidavit it has been stated by the detaining authority that it was aware that the detenu was being prosecuted under the ordinary law; but it was satisfied that the prosecution under the ordinary law was not sufficient for preventing the detenu from indulging in similar activities in future. This statement of the authority satisfies the requirement of the rule laid down by this Court in (1980) 1 SCR 54: (AIR 1979 SC 1945) (supra).

11. (II) The last submission of learned counsel was that the detention was mala fide and discriminatory. The submission was that it was opposed to the guidelines laid down and publicised by the Government; under the said guidelines, it was submitted, detention was not ordered except when the activities of the person concerned were a part of an organised crime involving conspiracy and continued activities; the guidelines did not permit or envisage detention for an isolated act of contravention of the Customs Law. In reply it has been stated in the counter-affidavit that the detaining authority was aware that the detenu came to the adverse notice of the Customs Authorities for the first time in the smuggling incident dated 8th/9th January, 1981; that the activities of the detenu on the basis of which prognosis was made was reasonably suggestive of a repetitive tendency or inclination on the part of the detenu to act likewise in future; that the order of detention was essentially a precautionary measure and was based on the reasonable Prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. It has further been stated: "Such past conduct may consist of one single act or of a series of acts. I say that large quantum of Palladium metal brought, the nature in which it was concealed coupled with the detenu's conduct in not disclosing the fact when questioned by the customs authorities clearly demonstrate potentiality for continued criminality and indicate previous practice, experiment and expertise. In the given case even the first act of this kind can be termed to be the beginning of continuing criminal activity. I say in the present case the nature of the act and its magnitude clearly justify

an inference that if the detenu was not detained he is likely to indulge in commission of such acts in future. I say that the detenu admitted in his statement dated January 9, 1981, that he wanted to smuggle the goods under seizure as he wanted to sell the same in Bombay market and earn profit."

12. The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed largely from prior events showing tendencies or inclinations of a person that an inference can be drawn whether he is likely in future to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of foreign exchange regulations and his smuggling activities are likely to have deleterious effect on the national economy.

13. With regard to the confidential guidelines, the averment of the detaining authority in the counter-affidavit is that the guidelines given by the Government were secret and confidential instructions which had no binding force; but yet they were taken into consideration while passing the order of detention.

The guidelines were necessarily of a confidential nature and were intended to guide the Customs or Intelligence Officers as to how to act and what to do in the detection and apprehension of smugglers. They do not have any force of law; and there cannot be any valid complaint of discrimination, if any, in arresting and bringing to book a particular offender under the Customs Act or under any preventive detention law.

14. With regard to the inquiry of the detenu as to whether the facts narrated in paragraph 3 in the document containing the grounds of detention were taken into consideration, it may be said with justification that although paragraph 3 may not constitute an independent ground of detention, there cannot be any objection if this fact possibly entered into the subjective satisfaction of the detaining authority before passing the order of detention. The detaining authority had of necessity to take into account all the relevant materials placed before it and after due

consideration thereof might justifiably come to the conclusion that the activities of a particular person were such that he had a tendency to repeat his illegal activities. In the case in hand, the detenu himself admitted in his confession that he has his home in Bombay and business in Muscat. His passport disclosed that he was frequently shuttling between Muscat and India. Admittedly he smuggled the palladium in question in order to make profit by selling it to customers in India. The detaining authority would be within its jurisdiction to take into consideration all these facts and subjectively come to a satisfaction whether or not the offender may be repeating his activities.

15. It is needless to say that The High Court under Article 226 of the Constitution and the Supreme Court either under Article 32 or under Article 136 of the Constitution do not sit on appeal on the orders of preventive detention. The normal law is that when an isolated offence or isolated offences is or are committed, the offender is to be prosecuted. But, if there be a law of preventive detention empowering the authority to detain a particular offender in order to disable him to repeat his offences, it can do so, but it will be obligatory on the part of the detaining authority to formally comply with the provisions of sub-article (5) of Article 22 of the Constitution of India. The High Court under Article 226 and the Supreme Court under Article 32 has to see whether the formalities enjoined by Article 22 (5) have been complied with by the detaining authority. If the formalities have been complied with, the Court cannot examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detained the detenu under the Preventive Detention Act, for, that is the function of an appellate Court.

16. In the instant case, we are not satisfied that the detaining authority has violated either the relevant provisions of the Constitution or any of the provisions of the Act. This petition has no merit and is rejected.

Petition dismissed.

AIR 1982 SUPREME COURT 16

(From: Delhi)

**P. N. BHAGWATI AND
BAHARUL ISLAM, JJ.**

Civil Appeals Nos. 1179-83 of 1981 arising out of S.L.P. (Civil) Nos. 4860, 6082-85 of 1978, D/- 19-8-1981.

Amolak Ram Khosla, Appellant v. C. I. T., Delhi-II, Respondent.

(A) Income-tax Act (43 of 1961), Sec. 256 (2) — Question of law — Application for requiring reference — Tribunal holding that annual value of house should be determined according to actual rent and not standard rent determinable under Rent Act when limitation for fixation of standard rent has expired — High Court holding no question of law arose in view of its Full Bench decision and refusing to require reference — Held, in view of decision of Supreme Court in AIR 1980 SC 541, overturning said Full Bench decision, High Court was wrong in declining to do so. Decision of Delhi High Court, Reversed. (Para 2)

(B) Income-tax Act (43 of 1961), S. 22 — Annual value of building — Determination — Proper mode. Decision of Delhi High Court, Reversed.

Even where the standard rent of a building has not been fixed by the Controller under S. 9 of the Delhi Rent Act and the period of limitation prescribed by S. 12 of that Act for making an application for fixation of standard rent having expired, the landlord is entitled to recover the agreed rent from the tenant, the annual value of the building must be taken to be the standard rent of the building determinable under the provisions of the Rent Act and not the actual rent received by the assessee from the tenant. Decision of Delhi High Court, Reversed. (Paras 2, 3)

Cases Referred: Chronological Paras

AIR 1981 SC 1729: 1981 Tax LR 1463 2
AIR 1980 SC 541: (1980) 2 SCR 607 2
ILR (1973) 1 Delhi 363 (FB) 1, 2

JUDGMENT:— These appeals arise out of assessment of the assessee to income-tax for the assessment years 1967-68 to 1971-72. There is a common question of law arising in these appeals and hence they have been consolidated together and are being disposed of by a single judgment. The question arising in these appeals relates to the annual value of a

house belonging to the assessee and situate in New Delhi for the purpose of assessment to income-tax under S. 22. The Income-tax Authorities as also the Tribunal in appeal determined the annual value of the building on the basis of the actual rent received by the assessee in respect of the portion of the house let out to the tenant and on an artificial basis of 10% of the other total income of the assessee in respect of the portion of the house which was self-occupied. The Income-tax Authorities and the Tribunal rejected the contention of the assessee that the annual value of the house was liable to be determined with reference to the standard rent determinable under the provisions of the Delhi Rent Control Act, 1958 (hereinafter referred to as the Rent Act). The assessee thereupon made applications to the Tribunal for reference of the question of law arising out of the order of the Tribunal but the applications for reference were rejected by the Tribunal. The assessee thereupon made applications to the High Court calling for reference from the Tribunal but the High Court also rejected these applications on the ground that the question of law arising out of the order of the Tribunal was concluded by the decision of the Full Bench of the Delhi High Court in *Dewan Daulat Ram Kapur v. New Delhi Municipal Committee*, ILR (1973) 1 Delhi 363. Hence the present appeals by special leave obtained from this Court.

2. Now there can be no doubt that a question of law did arise out of the order of the Tribunal, namely, whether the annual value of the house belonging to the assessee was liable to be determined on the basis of the actual rent received by the assessee or it was liable to be determined with reference to the standard rent of the house determinable under the provisions of the Rent Act. But the High Court refused to call for a reference of this question from the Tribunal because, according to the High Court, this question was concluded by the decision of the Full Bench of the High Court in *Dewan Daulat Ram Kapur v. New Delhi Municipal Committee* (supra), where the view was taken that in a case where the standard rent of a building has not been fixed by the Controller under S. 9 of the Rent Act and the period of limitation prescribed by S. 12 of the Rent Act for making an application for fixation of standard rent having expired, the landlord is entitled to recover the agreed rent from the tenant, it is the

agreed rent which must be taken to be the annual value of the building. But this Full Bench decision of the High Court has been overturned by a recent decision given by this Court in *Dewan Daulat Ram Kapur v. New Delhi Municipal Committee*, (1980) 2 SCR 607: (AIR 1980 SC 541) and it has been held by this Court that even where the standard rent of a building has not been fixed by the Controller under S. 9 and the period of limitation prescribed by S. 12 of the Rent Act for making an application for fixation of standard rent having expired, the landlord is entitled to recover the agreed rent from the tenant, the annual value of the building must be taken to be the standard rent of the building determinable under the provisions of the Rent Act and not the actual rent received by the assessee from the tenant. In this view of the matter, it is clear that the High Court was in error in not requiring the Tribunal to refer the question of law relating to the determination of the annual value of the house to the High Court. We would have ordinarily in these circumstances made an order requiring the Tribunal to refer this question of law arising out of the order of the Tribunal to the High Court and left it to the High Court to answer this question of law when referred by the Tribunal. But this would be a futile exercise because having regard to the decision just rendered by us in *Shiela Kaushis v. The Income-tax Officer in Civil Appeals Nos. 2110-2111 of 1978* (reported in AIR 1981 SC 1729), this question of law must be answered in favour of the assessee and against the Revenue. We, therefore, propose to decide this question of law ourselves instead of calling for a reference from the Tribunal and leaving the High Court to answer the question so referred. This course has the consent of both parties.

3. We accordingly allow the appeals, set aside the common order of the High Court rejecting the applications for a reference and decide the question of law arising out of the order of the Tribunal by holding that the annual value of the house belonging to the assessee must be taken to be the standard rent of the house determinable under the provisions of the Rent Act. The Revenue will pay the costs of the appeals to the assessee.

Appeals allowed.

AIR 1982 SUPREME COURT 17

S. MURTAZA FAZAL ALI AND
O. CHINNAPPA REDDY, JJ.

Civil Appeal No. 806 of 1981, D/- 23-2-1981.

Maitreyee Banerjee, Appellant v. Prabir Kumar Mukherjee, Respondent.

Civil P. C. (5 of 1908), S. 115 and O. 6, R. 17 — Revision — Interference — Amendment of plaint allowed — Amendment not barred by limitation — No irreparable injury or injustice caused to opposite party — No jurisdictional error involved — Held, High Court in exercise of its power of revision should not have interfered with order allowing amendment. Decision of High Court, Reversed. (Para 1)

FAZAL ALI, J.:— We have heard counsel for the parties and have gone through the order of the High Court by which the order of the District Judge allowing the amendment of the plaint has been set aside. After going through the amendment prayed for, we are unable to agree with the High Court that the appellant by virtue of the amendment sought, has altered the entire nature of the case or substituted a new cause of action. The High Court has given a number of reasons which relate to the merits of the case and would have to be considered by the trial Court after the evidence is concluded. Hence, we refrain from making any observations on the aspects of the matter which have been highlighted by the High Court. We are satisfied that this is not a case where the amendment would work serious injustice to the respondent. The High Court in its power of revision ought not to have interfered in a case like this as no jurisdictional error was involved. This was not a case where the amendment sought was clearly barred by limitation so as to cause an irreparable injury to the respondent. We, therefore, allow this appeal, set aside the order of the High Court and restore the order of the District Judge allowing the amendment. This order, however, will be subject to payment of costs of Rs. 2,000 to be paid to the respondent by the appellant within a month from today failing which the order of striking down the amendment by the High Court will stand restored.

Appeal allowed.

KY/KY/F359/81/SMA

AIR 1982 SUPREME COURT 18

(From: Allahabad)

D. A. DESAI AND**BAHARUL ISLAM, JJ.**

Civil Appeal No. 1410 of 1981 (Arising out of S.L.P. (Civil) No. 3066/79), D/-14-4-1981.

Wadhya Mal, Appellant v. Prem Chand Jain and another, Respondents.

Limitation Act (36 of 1963), S. 5 — Condonation of delay — Award by Motor Accidents Claims Tribunal — Appeals against filed by claimant and insurer pending — Appeal filed by owner of vehicle after expiry of limitation — Circumstances showing that there was some ex parte proceedings and that owner was misled as to when he should have preferred appeal — Held that there was some justification for delay and that when other two appeals on same subject matter are already pending, the appeal by owner should also be adjudicated on merits — Delay, therefore, condoned. Decision of Allahabad High Court, Reversed. (Motor Vehicles Act (1939), S. 110-D)

(Para 5)

DESAI, J.:— Special leave to appeal granted.

2. We heard learned counsel Mr. O. P. Verma for the appellant, learned counsel Mr. J. P. Goyal for respondent No. 1 and learned counsel Mr. J. L. Nain for respondent No. 2. The only point involved in this appeal at this stage is that the present appellant who had preferred an appeal against an award made by Motor Accidents Claims Tribunal was dismissed by the High Court on the short ground that it was barred by limitation, after rejecting the application for condoning the delay in preferring the appeal.

3. The Award was made by II Additional Motor Accidents Claims Tribunal, Meerut on 31-3-1977. Appellant was the owner of the truck involved in the accident in which respondent No. 1 was injured. Respondent No. 1 preferred 1st Appeal No. 266 of 1977 against the aforementioned award. Respondent No. 2, insurer, preferred 1st Appeal No. 248 of 1977 against the same award. We are informed that both these appeals are pending in the High Court.

4. The present appellant preferred an appeal against the same award. The ap-

peal of the present appellant has been dismissed on the ground that it is barred by limitation. This conclusion was recorded after the application of the appellant for condoning delay was rejected.

5. In view of the fact that the award dated 31-3-1977 is under challenge in two appeals, it is just and proper that the appeal of the present appellant may also be entertained and may be disposed of on merits along with aforementioned two appeals. May be, there was some delay in preferring the appeal by the present appellant, but if one goes through the zig-zag course of the proceedings, it would appear that there was at least some justification for the appellant being misled as to when he should have preferred his appeal. To briefly trace the course of this proceeding, it may be pointed out that the claimants filed an appeal of which notice was served on the appellant on 12-11-1977. There was some ex parte proceedings and the application was made to set aside the same. By an application dated 4-3-1978, a prayer was made for setting aside the ex parte award. The application appears to have been rejected, and an appeal against the order was held not to be maintainable. Thereafter the appellant filed an appeal against the award which was obviously time-barred and his application for condoning delay was rejected on the ground that his moving from pillar to post would not be a sufficient ground for condoning the delay. We need not take a very strict view of the matter and we consider it appropriate to give an opportunity to the appellant to get his appeal adjudicated on merits on the only ground that the award which he seeks to challenge is under appeal by Respondent No. 1 and Respondent No. 2. Guided by these special facts of the case, we allow this appeal, set aside the order of the High Court rejecting the appeal of the appellant on the ground that it was barred by limitation. We condone the delay in preferring the appeal and direct that the appeal be admitted to file and heard and disposed of along with appeals preferred by Respondent No. 1 and Respondent No. 2 pending in the High Court. Appeal allowed to that extent with no order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 19

P. N. BHAGWATI AND

A. VARADARAJAN, JJ.

W. P. No. 1690 of 1981, D/- 20-4-1981.

Rajbir Singh and others, Petitioners v. The Administrator, Union Territory of Delhi and others, Respondents.

(A) Constitution of India, Arts. 309, 311 and 14 — Delhi Police (Promotion and Confirmation) Rules (1980), R. 15 — Rules for promotion to rank of Asstt. Sub-Inspectors — Rules apply to all Head Constables equally without discrimination with effect from 29-12-1980 — Delhi Administration is competent to modify existing rules — Held, that rules are constitutionally valid. (Para 1)

(B) Constitution of India, Arts. 309 and 311 — Delhi Police (Promotion and Confirmation) Rules (1980), R. 15 — Selection by Departmental Promotion Committee — Admission of names to list for promotion to rank of Asstt. Sub-Inspectors — Standing Order No. 40-81 providing for awarding of five marks for representation at different levels in sports for purposes of selection — Standing Order whether inconsistent with R. 15. (Question left open). (Para 2)

ORDER:— The petitioners who are Head Constables in Delhi challenge in this writ petition the new procedure for promotion to the rank of Assistant Sub-Inspector introduced by the Delhi Police (Promotion and Confirmation) Rules, 1980, which were brought into force with effect from 29th December, 1980. It is difficult to appreciate how any challenge can be successfully levelled against these Rules, because indisputably it is competent to the Delhi Administration to modify the existing Rules for promotion to the rank of Assistant Sub-Inspectors and to make new rules in that behalf so long as they do not violate any constitutional guarantee and none seems to have been violated in the present case. The new Rules of promotion clearly apply to all Head Constables equally and without discrimination with effect from 29th Dec., 1980. The challenge to the constitutional validity of these Rules must therefore be rejected.

2. The only ground which could be urged with certain amount of plausibility on behalf of the petitioners was that the Standing Order No. 40-81 for Admission

of Names to the List for promotion to the rank of Assistant Sub-Inspectors was inconsistent with Rule 15 of the Delhi Police (Promotion and Confirmation) Rules, 1980 inasmuch as it provided for awarding of five marks for representation at different levels in sports for the purpose of selection by the Departmental Promotion Committee. The argument of Mr. R. K. Garg, appearing on behalf of the petitioners was that the only factors which the Departmental Promotion Committee was entitled to take into account for the purpose of evaluating the relative merits of the candidates for selection were: (1) service record (2) seniority (3) annual confidential reports (4) professional test comprising (a) physical training and parade (b) Delhi Police Rules and Regulations (c) Police practical work (d) law (e) general knowledge; (5) professional courses and (6) viva voce. Representation at one or the other level of competition in sports, according to Mr. R. K. Garg, was not covered by any of these factors and hence the awarding of five marks for that purpose was ultra vires Rule 15. This contention of Mr. R. K. Garg would have required serious consideration, but we find from the statistics which have been furnished to us by Dr. L. M. Singhvi, appearing on behalf of the respondents, that only two Head Constables out of those who appeared for selection by the Departmental Selection Committee obtained marks — not more than three — on account of sports and none of the other 192 Head Constables who were ultimately selected was awarded any marks on account of sports. The aggregate marks obtained by these two Head Constables were 143½ and 145½ respectively, while the Head Constable, who was ranked last in the selection list had 133 marks. Therefore, even if three marks awarded on account of sports were excluded from the total number of marks obtained by these two Head Constables, they would still have been in the select list at places higher than the Head Constable who was last in the select list, and it would have made no difference to the result even if three marks awarded on account of sports were not taken into account. The petitioners who got less number of marks than the Head Constable who ranked last in the select list could not possibly have come in the select list, even if the provision in the Standing Order in regard to awarding of five marks on account of sports were ultra vires and no marks had been

awarded on account of sports to any Head Constable. This being the factual position, it is unnecessary to consider whether the provision in regard to awarding of five marks on account of sports is ultra vires Rule 15. Moreover, Dr. L. M. Singhvi on behalf of the respondents, has stated before us that though, in his submission, representation at one or the other level of competition in sports would be covered by the expression "Professional Courses", the respondents would for future selections take steps to clarify the position by amending Rule 15 so as to specifically include representation in sports as a relevant factor in evaluation.

3. In this view of the matter, we reject the writ petition. We may, however, observe that in order to increase the efficiency of our Police force at the lower levels, it would be desirable if adequate and intensive in-service training could be given to the Head Constables and constables, so that they may be able to discharge their functions effectively and efficiently.

Petition dismissed.

AIR 1982 SUPREME COURT 20

(From: Bombay)*

D. A. DESAI AND R. S. PATHAK, JJ.

Civil Appeal No. 1537 of 1970, D/- 6-11-1981.

Smt. Gangabai, Appellant v. Smt. Chhabubai, Respondent.

(A) Civil P. C. (5 of 1908), S. 11 — *Res judicata* — Finding as to title by Small Cause Court — Does not operate as *res judicata* in subsequent suit for determination of interest in immovable property.

When a finding as to title to immovable property is rendered by a Court of Small Causes *res judicata* cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as *res judicata* the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the

*Appeal No. 90 of 1962, D/- 30-6-1969 (Bom).

KY/KY/F180/81/SNV

matter which is directly in issue in the case cannot be made the basis of a plea of *res judicata*. A question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as *res judicata* in a subsequent suit in which the question of title is directly raised. (Case law discussed). (Para 9)

(B) Evidence Act (1 of 1872), S. 92 (1) — Bar of, as to adducing of oral evidence — Applicability.

The bar imposed by sub-sec. (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties. AIR 1936 PC 70, Foll. (Para 11)

Cases Referred: Chronological Paras

(1970) 3 SCC 591	8
AIR 1970 All 604: 1970 All LJ 670: 1970 All WR (HC) 419 (FB)	8
AIR 1970 Mad 396: (1970) 2 Mad LJ 562	9
AIR 1967 All 125: 1966 All WR (HC) 782	8
AIR 1965 SC 1153: (1965) 2 SCR 547: (1965) 2 SCA 566	7
AIR 1959 Punj 420: 61 Pun LR 875	8
AIR 1956 Bom 236	8
AIR 1948 All 296: 1948 All LJ 62: 1948 All WR (HC) 63	9
AIR 1937 All 676: 1937 All LJ 727: 1937 All LR 880	8
AIR 1936 PC 70: 1936 All LJ 136: 70 Mad LJ 232	11
AIR 1934 Lah 355 (1)	8
AIR 1929 All 816	8
AIR 1916 Pat 75: 20 Cal WN 1080	8

AIR 1914 All 527: 12 All LJ 334 8
 (1913) 15 Bom LR 773 8
 (1907) 4 All LJ 517: 1907 All WN 218 9
 1886 All WN 44 9
 (1874) 22 Suth WR 349 9
 (1871) 8 Bom HC AC 23 9

Mr. U. R. Lalit, Sr. Advocate with Mr. A. G. Ratnaparkhi, Advocate, for Appellant; Mr. S. S. Khanduja, Advocate, for Respondent.

PATHAK, J.— This appeal by special leave arises out of a declaratory suit in respect of title to a house property.

2. The respondent filed a suit in the Court of the Second Joint Civil Judge, Amravati alleging that the house situated near Sarafa Bazar in Amravati had been purchased by her in 1950 for Rupees 4,000 and thereafter improvements had been effected by her to the property. Being in need of money, she entered into an agreement with the appellant for a loan of Rs. 2,000 and it was decided that simultaneously she should execute a nominal document of sale and a rent note. These documents were executed on January 7, 1953. She alleged that the documents were never intended to be acted upon, and that the rent paid by her represented in fact interest at 18% on the loan. She continued in possession of the house property throughout and, it is said, carried on repairs from time to time. It was stated that the appellant was attempting to enforce the document as a sale deed by filing suits in the Court of Small Causes for recovery of rent. As two suits had resulted in decrees, she considered it necessary to file the present suit for a declaration that she was, and continued to be, owner of the house property. In defence, the appellant maintained that the sale deed represented a genuine transaction, and ownership of the house property had passed to the appellant. It was pleaded that the decrees passed by the Court of Small Causes operated as *res judicata* barring the respondent from pleading that the sale deed was merely a nominal transaction. Reliance was also placed on S. 92 of the Indian Evidence Act.

3. The trial Court held that the sale deed was never intended to be acted upon and decreed the suit. The appellant appealed to the District Court, Amravati, but the learned District Judge did not accept the case that a sale had taken place. He held, however, that the transaction between the parties constituted a mortgage. He modified the trial Court

decree to conform to that finding. The High Court of Bombay, in second appeal, did not agree with the finding of the lower appellate Court that the transaction was a mortgage and affirmed the findings of the trial Court that the sale deed and rent note were sham documents; that the decrees of the Court of Small Causes did not operate as *res judicata* and that S. 92 of the Indian Evidence Act did not prevent the respondent from establishing the true nature of the transaction. Accordingly, the High Court set aside the decree of the lower appellate Court and restored that of the trial Court.

4. When this appeal was heard by us, it appeared that the parties may settle the dispute by negotiated compromise. It seems, however, that no compromise has been possible. Accordingly, we proceed to dispose of the appeal on its merits.

5. Two points have been raised before us. The appellant urges that the Small Cause Court decrees, in view of the general principles of *res judicata*, precluded the trial of the question whether the sale transaction was a genuine transaction. The other point concerns the operation of S. 92 of the Evidence Act.

6. Two successive suits were filed by the appellant against the respondent in the Court of Small Causes for recovery of arrears of rent. In each suit the appellant contended that she was owner of the property and the respondent was her tenant. The tenancy was alleged on the basis of the document dated January 7, 1953 which on its terms purported to be a sale deed by the respondent in favour of the appellant. The respondent resisted the suits. The court decreed the suits on the finding that the document was a sale deed, and therefore the respondent was not the owner of the property but merely a tenant of the appellant. The question is whether this finding operates as *res judicata* in the instant suit. The High Court repelled the plea of *res judicata* on the ground that S. 11 of the Code of Civil Procedure governed the case, and that as a Court of Small Causes is not competent to try a suit for a declaration of title to immovable property, the Court which passed the decrees relied on by the appellant was not competent to try the present suit and therefore an imperative condition of S. 11 was not satisfied.

7. It is contended before us on behalf of the appellant that the High Court erred in applying the statutory provisions

of S. 11 of the Code, and should have invoked instead the general principles of *res judicata*. On that, it is submitted, all that was necessary to find was whether the Court of Small Causes was competent to try the two earlier suits and decide the issues arising therein. We have been referred to *GuLabchand Chhotalal Parikh v. State of Bombay*, (1965) 2 SCR 547 (574): (AIR 1965 SC 1153) where this Court has taken the view that the provisions of S. 11 of the Code are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit; and that on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary, it was said, "that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject matter". The observations were made in considering the question whether decisions on matters in controversy in writ petitions under Art. 32 or Art. 226 of the Constitution could operate as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties.

8. A number of other cases have been cited on behalf of the appellant in support of the plea of *res judicata*. We have considered them and we do not think that they help the appellant. In *Mohomed Abdul Ghafur Khan v. Gokul Prasad*, AIR 1914 All 527 the Allahabad High Court limited itself to observing that a Court of Small Causes possessed a discretion on whether to return the plaint under S. 23, Provincial Small Cause Courts Act on a finding that the relief claimed depended on proof of title. The same High Court in *Madan Kishor v. Mahabir Prasad*, AIR 1929 All 816 merely observed that it was for the Court of Small Causes to decide under S. 23 of the Provincial Small Cause Courts Act whether a question of title was involved in the suit and on finding so it was open to it to return the plaint. That was also the view expressed by it in *Ram Dayal Sonar v. Sukh Mangal Kalwar*, AIR 1937 All 676. So also in *Ganga Prasad v. Nandu Ram*, AIR 1916 Pat 75 the Patna High Court said that the Court of Small

Causes had power under S. 23 to return the plaint where it was of opinion that the question of title raised was so intricate that it should not be decided summarily. To the same effect was the view expressed by the Lahore High Court in *Ganesh Das v. Feroze Din*, AIR 1934 Lah 355 (1). In *Puttangowda Mallangowda Patil v. Nilkanth Kalo Deshpande*, (1913) 15 Bom LR 773, the Bombay High Court declared that a Court of Small Causes could render a finding on an issue as to title to immovable property but only in a suit which did not ask for that relief and merely for payment of a sum of money. Our attention was drawn to *Asgarali Roshanalli v. Kayumalli Ibrahimji*, AIR 1956 Bom 236, but we find nothing there of assistance to the appellant. Reliance was placed on the decision of the Allahabad High Court in *Lala Jageshwar Prasad v. Shyam Behari Lal*, AIR 1967 All 125. There a learned single Judge took the view that as a Court of Small Causes is a Court of exclusive jurisdiction the restrictive conditions imposed by Sec. 11 of the Code of Civil Procedure requiring "two-fold competency" of the Court whose decision is to operate as *res judicata* cannot be invoked. It was sufficient, he observed, that the decision had been rendered by a court of competent jurisdiction and it was not necessary that that court should also be competent to decide the subsequent suit. The judgment was brought in appeal to this Court but while disposing of the appeal, *Shyam Behari Lal v. Lala Jageshwar Prasad*, (1970) 3 SCC 591, this Court declined to decide whether a Court of Small Causes could be regarded as a Court of exclusive jurisdiction. We find, however, that the view taken by the High Court in *Lala Jageshwar Prasad* (supra) was expressly overruled by a Full Bench of that High Court in *Manzurul Haq v. Hakim Mohsin Ali*, AIR 1970 All 604 and it was laid down that a Court of Small Causes could be described as a court of "preferential jurisdiction" but not as a court of "exclusive jurisdiction". It was also held by the Full Bench that a decision rendered by a Court of Small Causes in a suit for arrears of rent would not operate as *res judicata* in a subsequent suit filed in the Court of the Munsif for recovery of arrears of rent for a different period and for ejectment. That the principle of *res judicata* could not be availed of where a decision given by a Court of Small Causes was relied on in a subsequent regular civil suit was the view also taken by the

Punjab High Court in *Pateshwari Parshad Singh v. A. S. Gilani*, AIR 1959 Punj 420.

9. It seems to us that when a finding as to title to immovable property is rendered by a Court of Small Causes *res judicata* cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as *res judicata* the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of *res judicata*. It has long been held that a question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as *res judicata* in a subsequent suit in which the question of title is directly raised. *Poholi Mullick v. Fukeer Chunder Patnaik*, (1874) 22 Suth WR 349, *Chet Ram v. Ganga*, 1886 All WN 44, *Anwar Ali v. Nur-Ul-Haq*, (1907) 4 All LJ 517, *Khandu valad Keru v. Tatia valad Vithoba*, (1871) 8 Bom HC AC 23 (24). See also *Mohd. Yusuf v. Abdul Wahid* AIR 1948 All 296 and *S. A. A. Annamalai Chettiar v. Molaiyan*, AIR 1970 Mad 396. Our attention has been drawn to Explanation VIII to S. 11 in the Code of Civil Procedure recently inserted by the Code of Civil Procedure (Amendment) Act, 1976. Section 97 (3) of the Amendment Act declares that the new provision applies to pending suits, proceedings, appeals and applications. In our opinion the Explanation can be of no assistance, because it operates only where an issue has been heard and finally decided in the earlier suit.

10. Accordingly, we hold that the finding rendered by the Court of Small Causes in the two suits filed by the appellant that the document executed by the respondent is a sale deed cannot operate as *res judicata* in the present suit.

11. The next contention on behalf of the appellant is that sub-sec. (1) of S. 92 of the Evidence Act bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parol evidence in support of the contention. S. 91 of the Evidence Act provides that

when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Sub-sec. (1) of S. 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. And the first proviso to S. 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by sub-sec. (1) of S. 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties. *Tyagaraja Mudaliyar v. Vedathani*, AIR 1936 PC 70. The trial Court was right in permitting the respondent to lead parol evidence in support of her plea that the sale deed dated January 7, 1953 was a

sham document and never intended to be acted upon. It is not disputed that if the parol evidence is admissible, the finding of the court below in favour of the respondent must be accepted. The second contention on behalf of the appellant must also fail.

12. In the result, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 24

(From: 1980 (UP) RCC 599)

D. A. DESAI AND
BAHARUL ISLAM, JJ.

Civil Appeal No. 1494 of 1981, (arising out of SLP. (Civil) No. 501 of 1981), D/-14-4-1981.

Mulk Raj Batra and others, Appellants; v. The Distt. Judge, Dehradun and others, Respondents.

Civil P. C. (5 of 1908), O. 6 R. 17. — Application for amendment of written statement, allowed partly — Rejected part having bearing on question to be decided — Rejection of such part — Held, erroneous. 1980 (UP) RCC 599 Reversed.

The High court in a rent case while confirming the finding on the issue of personal requirement of the landlord, set aside the eviction decree and remitted the matter to first appellate court to re-examine the issue of comparative hardship. The appellant tenant thereon moved an application under O. 6 R. 17 before first appellate court for amendment of the written statement. His application was allowed in part; even though the rejected part of the amendment had bearing on the subject of comparative hardship.

Held, that the incorporation of the amendment in part was erroneous. Rejected part of the amendment sought by the tenant directed to be incorporated in the written statement. 1980 (UP) RCC 599 Reversed. (Para 2)

DESAI, J.:— Special leave to appeal granted.

2. The only dispute in this appeal is whether the application for amendment of the written statement under O. 6, R. 17 should be allowed as a whole or in part as has been done by the learned District Judge and confirmed by the High Court in revision. The real dispute is with regard to para. 16-A in the proposed amendment extracted at page 5. The con-

tention which found favour with the High Court is that by this paragraph, the appellant seeks to reopen the concluded findings of facts about the personal requirement of the respondent-landlord. Respondent No. 2, Shri Lal Krishan referred to as landlord commenced an action for eviction of appellants inter alia on the ground of his personal requirement. Courts including the High Court accepted the case that landlord requires premises involved in the suit for his personal requirement. It is obligatory for the courts while granting decree for eviction on the ground of bona fide personal requirement to comparatively assess the hardships of the landlord as well as the tenant relevant to passing the decree for eviction or refusing to pass the same and mould the decree in accordance with the assessment of hardship. When the matter was before the High Court, it was urged on behalf of appellants that they would suffer greater hardship compared to landlord if a decree in ejectment is passed. The High Court was of the opinion that the issue of hardship was not properly examined by the first appellate Court and accordingly while confirming the finding on the issue of personal requirement of the landlord, set aside the decree and remitted the matter to first appellate Court to re-examine the issue of comparative hardship and to mould the decree in accordance with the finding. Pursuant to the direction of the High Court when the matter went back to the first appellate Court, the appellant defendant moved an application under O. 6, R. 17 for amendment of the written statement, which was allowed in part rejecting a part of the amendment sought as set out in para. 16-A on the ground that thereby the appellants-defendants are surreptitiously attempting to reopen the concluded findings between the parties and thereby circumvent the finding concluded by the High Court which was impermissible. In our opinion this approach wholly overlooks what are the relevant considerations in comparative evaluation of hardship. The allegations or facts alleged in para 16-A have a direct bearing also on the issue of comparative hardship and that is unavoidable. Mr. P. H. Parekh, learned advocate for respondent No. 2 could not controvert this aspect. Therefore, the first appellate Court indulged in self-contradiction when it allowed the amendment in part and rejecting the other part which also bears on the sub-

ject of comparative hardship. This is a glaring error apparent on record and in the interest of justice we want to interfere. Therefore, having heard Mr. S. N. Kacker and Mr. P. H. Parekh, we are of the opinion that the amendment as a whole ought to have been allowed. Accordingly, we allow this appeal and direct that para. 16-A should be incorporated in the written statement by way of amendment. It would be open to the respondent No. 2 landlord to file his replication to the amended written statement.

3. As the matter is pending for a long time, the learned District Judge before whom the appeal is pending should expedite its hearing and dispose it of as expeditiously as possible. Appeal allowed to the extent indicated herein with no order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 25

(From: (1980) 2 Cal HN 496)

R. S. PATHAK, E. S. VENKATARAMIAH AND V. BALAKRISHNA
ERADI, JJ.

Civil Appeals Nos. 3029-31 of 1980, D/- 22-9-1981.

Anupama Sen Gupta and others, Appellants v. Deb Kumar Sen Sarma and others, Respondents.

(A) W. B. Premises Tenancy Act (12 of 1956), Ss. 29-B and 13 (1) Cl. (ff) and (6) — Petition under S. 29-B by Government employee — House alleged to belong to him standing in the name of his wife — Notice issued in the name of wife to tenants for vacating house — Death of wife — Employee is entitled to maintain petition.

An order asking a Govt. employee to vacate the Govt. premises was issued on the ground that he had a house owned by him. The house was alleged to belong to his wife as it was in her name. The wife issued notices to tenants to vacate the premises as they required the same for their occupation. In the meantime the wife died and the employee filed a petition under S. 29-B for eviction of tenants, before the Controller.

Held, that the employee was entitled to maintain the petition, as, on the death of the wife the employee became a co-owner of the house along with his children. AIR 1977 SC 1599 and AIR 1976 SC 2335, Foll., (1980) 2 Cal HN 496, Affirmed (Para 7)

In the instant case on the date of the petition before the Controller, the wife of employee had died. Even granting that she was the owner of the building in question, the employee had become its co-owner along with his children. The order asking him to vacate the Government accommodation issued earlier had not been withdrawn and was still in force even on the date of the petition. He was, therefore, entitled to maintain the petitions as he otherwise satisfied the requirements of the law. Such a petition had to be filed before the Controller as the Civil Court had no jurisdiction to try it. (Para 7)

(B) W. B. Premises Tenancy Act (12 of 1956), S. 29-B — Petition under S. 29-B by Government employee — During pendency of petition employee retiring from service — Right of prosecuting petition is not lost thereby. AIR 1978 SC 259, Applied. (Para 8)

Cases Referred: Chronological Paras
AIR 1978 SC 259: (1978) 2 SCR 183: 1977
UJ (SC) 781 8
AIR 1977 SC 1599: (1977) 3 SCR 412: 7
(1977) 2 SCJ 277 7
AIR 1976 SC 2335: (1977) 1 SCR 395: 7
1976 UJ (SC) 899 7

VENKATARAMIAH, J.:— These three appeals by special leave are directed against a common judgment and order dated Aug. 27, 1980 of the Calcutta High Court in three Civil Rules Nos. 260-262 arising under the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as 'the Act').

2. The first respondent in each of these appeals is Deb Kumar Sen Sarma. He was working as a Sub-Inspector of Police, Calcutta in the year, 1977 and was residing in a Government building being flat No. 8 on the third floor of premises No. 20A, Lower Range. The Deputy Commissioner of Police, Headquarters, Calcutta issued a notice to him to vacate the above mentioned flat forthwith as he owned a residential building in the name of his wife bearing No. 22/E, Lower Range, Calcutta-17 which was in the occupation of tenants, the appellants herein and another person by name Ahmed Hussain Molla. The appellants in each of these cases and the said Ahmed Hussain Molla were occupying under separate leases different portions of the building bearing No. 22/E, Lower Range, Calcutta-17 which was standing in the name of Sudha Rani Sen Sarma, wife of the first respondent. On receipt of the notice asking him to vacate the Government quar-

ters, the first respondent got notices issued on Sept. 7, 1977 in the name of his wife, Sudha Rani to the tenants referred to above asking them to vacate the premises in accordance with S. 13 (6) read with S. 29B of the Act. Sudha Rani died on Sept. 27, 1977 and on the tenants not vacating the premises in question, the first respondent along with his son and five daughters (who were the heirs of Sudha Rani along with the first respondent) filed on Nov. 24, 1977 four petitions before the Rent Controller at Calcutta in R. C. Cases Nos. 10, 11, 12 and 13 of 1977 under S. 29B of the Act, which prescribed a special procedure which enabled a Government official who was asked to vacate a residential accommodation provided by the Government on the ground that he owned a residential accommodation either in his name or in the name of his wife or dependent child at or near the place where he was posted for the time being to recover possession of any premises on the ground specified in Cl. (ff) of sub-sec. (1) of S. 13 of the Act. The relevant part of S. 29-B of the Act reads thus:

"29-B. (1) No Civil Court shall entertain any application by a landlord being a Government employee, and who being in occupation of any residential premises allotted to him by his employer, is required by, or in pursuance of, an order made by such employer to vacate such residential accommodation, or in default, to incur certain obligations on the ground that he owns a residential accommodation either in his own name or in the name of his wife or dependent child at or near the place where he is posted for the time being, for the recovery of possession of any premises on the ground specified in clause (ff) of sub-section (1) of Section 13 but such application shall be dealt with by the Controller in accordance with the procedure specified in this section.

(2) Whenever any application is filed before the Controller by a landlord referred to in sub-section (1) for the recovery of possession of any premises on the ground specified in clause (ff) of sub-section (1) of Section 13, the Controller shall issue summons, in the form specified in the Second Schedule.

.....

(7) The provisions of sub-sections (2) (3), (4) and (6) of Section 13 shall, so far as may be, apply to a proceeding under this Chapter but nothing contained in

sub-section (3A) of Section 13 shall apply to such a proceeding.

(8) The Controller shall, while holding an inquiry in a proceeding to which this Chapter applies, follow the practice and procedure of a Court of Small Causes, including the recording of evidence.

(9) No appeal or second appeal shall lie against an order for the recovery of possession of any premises made by the Controller in accordance with the procedure specified in this section:

Provided that the High Court may, for the purpose of satisfying itself that an order made by the Controller under this section is according to law, call for the case and pass such order in respect thereof as it thinks fit.

.....

3. Clause (ff) of sub-sec. (1) and sub-section (6) of S. 13 of the Act which are relevant for purposes of these appeals read as follows:—

"13. Protection of tenant against eviction.— (1) Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against tenant except on one or more of the following grounds, namely:—

.....

(ff) subject to the provisions of sub-section (3A), where the premises are reasonably required by the landlord for his own occupation if he is the owner or for the occupation of any person for whose benefit the premises are held and the landlord or such person is not in possession of any reasonably suitable accommodation;

.....

(6) Notwithstanding anything in any other law for the time being in force, no suit or proceeding for the recovery of possession of any premises on any of the grounds mentioned in sub-section (1) except the grounds mentioned in cls. (i) and (k) of that sub-section shall be filed by the landlord unless he has given to the tenant one month's notice expiring with a month of the tenancy.

4. The appellants resisted the petitions inter alia on the following grounds: (a) that the building in question did not belong to the first respondent and hence the proceedings were not maintainable; (b) that the notice under S. 13 (6) of the Act having been issued in the name of Sudha Rani, there was no valid termination of the tenancy; (c) that the respondent other than the first respondent who

were co-sharers and who were not Government servants could not avail themselves of the special procedure prescribed under S. 29-B of the Act; (d) that the petitions filed before the Rent Controller did not contain necessary allegations; and (e) that in any event as the first respondent herein had retired from Government service during the pendency of the petitions, no relief could be granted to him under S. 29-B. The appellants in two of the above appeals also contended that the portions of the building in their possession were being used for non-residential purposes and therefore S. 29-B was not applicable to them.

5. The tenant involved in R. C. Case No. 13, Ahmed Hussain Molla also raised a plea that the accommodation in his possession was non-residential in character. The Rent Controller accepting this part of his case dismissed the petition R. C. No. 13/77. We are not concerned in these appeals with his case. He, however, rejected the contentions of the appellants, who were tenants involved in R. C. Cases Nos. 10, 11 and 12 of 1977 and ordered their eviction. Aggrieved by the order of the Rent Controller the appellants filed three revision petitions before the Calcutta High Court which as stated above were dismissed by a common judgment dated Aug. 27, 1980. These appeals are preferred against the said judgment.

6. Chapter VIA of the Act was inserted by W. B. Act 52 of 1976 to provide a special machinery for enabling an employee of the Central or State Government or any local authority, who being in occupation of any residential premises allotted to him by his employer, was required by such employer to vacate such residential accommodation or in default, to incur certain obligations on the ground that he owned a residential accommodation either in his own name or in the name of his wife or dependent child at or near the place where he was posted for the time being to recover possession of any premises on the ground specified in cl. (ff) of sub-sec. (1) of S. 13 of the Act. This new Chapter appears to furnish almost a complete code for that purpose. It contains only two sections, viz., S. 29-A and S. 29-B. S. 29-A of the Act which contains a non-obstante clause states that the provisions of Chapter VIA or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained elsewhere in the Act or in any other law for the time being in force. Sub-sec. (1) of Sec-

tion 29-B which is the other provision contained in Chapter VIA of the Act excludes the jurisdiction of ordinary civil courts to deal with cases referred to therein and vests it in the Controller appointed under Chapter V of the Act. Sub-secs. (2) to (8) of S. 29-B of the Act lay down the special procedure which is almost summary in character for the disposal of applications made by Government employees in the circumstances set out in sub-sec. (1) for the recovery of possession of any premises on the grounds set out in cl. (ff) of sub-sec. (1) of S. 13 of the Act. The tenant or the sub-tenants to whom notices are issued by the Controller cannot contest the application for eviction without obtaining the leave of the Controller which can be granted in accordance with sub-sec. (5) of S. 29-B. By sub-sec. (7) of S. 29-B of the Act, the provisions of sub-secs. (2), (3), (4) and (6) of S. 13 so far as may be, are made applicable to proceedings before the Controller but sub-sec. (3A) of S. 13 of the Act is, however, excluded from operation in such cases. Sub-sec. (9) of S. 29-B of the Act makes the order of the Controller final subject only to the power of the High Court under the proviso to that subsection, by which the High Court may, for the purpose of satisfying itself that an order made by the Controller under S. 29-B is according to law, call for the case and pass such order in respect thereto as it thinks fit. Sub-sec. (10) of S. 29-B confers a power of review on the Controller where no application is filed before the High Court under the proviso to sub-sec. (9) of S. 29-B. Sub-sec. (11) of Section 29-B provides for the framing of rules governing the execution of an order made by the Controller under S. 29-B. The Explanation appearing at the end of that section states that for purposes of Chapter VIA of the Act, the expression 'landlord being a Government employee' includes an employee of the Central or State Government or any local authority.

7. The first question which arises for consideration in these appeals is whether the first respondent was entitled to get possession of the premises in question under S. 29-B of the Act at all. This contention is raised by the appellants on the ground that the premises in question which stood in the name of his wife actually belonged to her and that S. 29-B was applicable only to cases where the residential accommodation in question truly belongs to the Government employee and is standing in his own name or nominally

in the name of his wife or dependent child. It is urged on behalf of the appellants that since the finding of the High Court is that the premises in question belonged to the wife of the first respondent, the eviction petitions filed were liable to be dismissed. On the other hand it is urged on behalf of the respondents that the question of title to the property in question is foreign to the scope of a proceeding before a Controller who has to dispose of the matter in a summary way and that the Government employee acquires a right to resort to Chapter VI of the Act by mere service of a notice on him by his employer requiring him to vacate any residential accommodation provided for by the employer or in default to incur certain obligations on the ground that he owns a residential accommodation in his name, or in the name of his wife or dependent child, near the place where he is posted. It is urged that since in this case a notice containing a statement which satisfies the requirements of sub-sec. (1) of S. 29-B of the Act had been served on the first respondent, no enquiry is called for on the question of title. In the alternative, it is urged on behalf of the respondents that even granting that the issue relating to title can be raised, the respondents have established that the premises in question belonged to the first respondent though it stood in the name of his wife. It is further urged that the finding of the High Court on the question of title is not sustainable and that they are entitled to raise that plea in support of the judgment of the High Court which has gone in their favour. In the circumstances of this case we feel that it is not necessary to go into the questions whether the question of title to the premises is relevant at all and if it is relevant, whether it can be gone into by the Controller. We shall assume for purposes of these appeals (but without deciding) that as contended on behalf of the appellants, a Government employee can succeed, where the building stands in the name of his wife or dependent child, only if he establishes that he is himself its true owner and that the building is only nominally standing in the name of his wife or dependent child, as the case may be. In the instant case it is to be noted that on the date of the petitions before the Controller, the wife of the first respondent had died. Even granting that she was the owner of the building in question, the first respondent had become its co-

owner along with his children. The order asking him to vacate the Government accommodation issued earlier had not been withdrawn and was still in force even on the date of the petition. He was, therefore, entitled to maintain the petitions as he otherwise satisfied the requirements of the law. Such a petition had to be filed before the Controller as the civil court had no jurisdiction to try it. As held by this Court in *Kanta Goel v. B. P. Pathak*, (1977) 3 SCR 412: (AIR 1977 SC 1599) even though the first respondent was a co-owner, he was as such an owner of the entire property as any sole owner of the property and owned every part of the composite property along with others and he could file the petitions. In *Sri Ram Pasricha v. Jagannath*, (1977) 1 SCR 395: (AIR 1976 SC 2335) which was a case arising under the Act this Court had expressed the same view. The first respondent as an heir could avail of the benefit of the notices issued in the name of his wife under S. 13 (6) of the Act which she was entitled to issue the object of which was only to give previous intimation to the tenants that eviction petitions would be filed against them. There was no need to issue fresh notices after her death. Having regard to the peculiar features of the case, we do not consider that there is any infirmity in the petitions filed for the eviction of the appellants. Any other view would defeat the very object of Chapter VIA of the Act.

8. The only other ground urged on behalf of the appellants is that since the first respondent had retired during the pendency of these proceedings, he had lost his right to prosecute the petition under S. 29-B of the Act as he was no longer a Government employee. This contention again is untenable as a petition duly filed under the circumstances stated above cannot be defeated on the ground that the Government employee has retired subsequently. (See *Nihal Chand v. Kalyan Chand*, (1978) 2 SCR 183: (AIR 1978 SC 259) per Tulzapurkar, J. which was a case under S. 14-A of the Delhi Rent Control Act).

9. It is not the contention of the appellants that the respondents had not established that the premises were reasonably required by them for their own occupation and they were not in possession of any other reasonably suitable accommodation. It is unfortunate that even the so-called summary remedy pro-

vided by the statute has taken nearly four years.

10. We do not find any error in the decisions of the Controller and the High Court which calls for our interference under Art. 136 of the Constitution.

11. In the result, the appeals fail and are hereby dismissed. There shall, however, be no order as to costs.

Appeals dismissed.

AIR 1982 SUPREME COURT 29

O. CHINNAPPA REDDY, A. P. SEN
AND BAHARUL ISLAM, JJ.

Writ Petns. Nos. 4839 to 4845 and 3833-3834 of 1981, D/- 4-9-1981.

M/s. Krishan Lal Praveen Kumar and others etc., Petitioners v. State of Rajasthan and others etc., Respondents.

And

M/s. Mohan Lal Lila Dhar and another, Petitioners v. State of Rajasthan and others, Respondents.

(A) Essential Commodities Act (10 of 1955), S. 3 (1) (d) — Rajasthan Wheat (Export Control) Order (1981), Pre. — Wheat control order restricting export of wheat from the State is not violative of Art. 19 (1) (g). (Constitution of India, Arts. 19 (1) (g), (6) and 302).

Wheat Control Order does not impose unreasonable restriction on freedom of trade, commerce or intercourse between one State and another and the same having been issued with prior concurrence of Central Government, is not open to challenge. (Para 5)

The restriction on the export of wheat from Rajasthan is clearly a reasonable restriction within the meaning of Article 19 (6) and is required in the public interest as contemplated by Art. 302 of the Constitution. Under Art. 302. Parliament may by law impose such restriction on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. The Essential Commodities Act which is an Act to provide, in the interests of the general public, for the control of production, supply and distribution of trade and commerce in certain commodities is, without doubt, such a law as contemplated by Art. 302 of the Constitution. If the Wheat (Export Control) Order, 1981 is authorised by the provisions of the Essential Commodities Act,

it has to be held perfectly valid. S. 3 (2) (d) enables the Central Government to make an order providing "for regulating by licence, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity". S. 5 empowers the Central Government to delegate its power under S. 3 to the State Government. By various orders made from time to time, the Central Government has delegated such power to the State Government. By notification GSR No. 800 dated June 9, 1979, the Central Government has delegated to the State Government its powers to make orders to provide for the matters specified in cls. (a), (b), (c), (d), (e), (f), (h), (i) and (ii), (j) of S. 3 (2) in relation to foodstuffs subject to certain conditions. One of the conditions is that in regard to distribution or disposal of foodstuffs to places outside the State or in regard to regulation of transport of any foodstuffs under cl. (d) the State Government should obtain prior concurrence of the Central Government. (Para 5)

(B) Essential Commodities Act (10 of 1955), S. 3 — Rajasthan Trade Articles (Licensing and Control) Order (1980), Cl. 18 — Notification under, prescribing quantity of wheat to be possessed at one time — It is reasonable restriction. (Constitution of India, Art. 19 (6).)

The notification under Cl. 18 providing for the maximum quantity of wheat which may be possessed by any dealer at any one time is clearly designed to prevent hoarding of foodgrains and is certainly a reasonable restriction within the meaning of Art. 19 (6) of the Constitution. (Para 6)

(C) Essential Commodities Act (10 of 1955), S. 3 — Rajasthan Trade Articles (Licensing and Control) Order (1980), Cl. 18 — Notification under, prescribing 200 quintals of wheat to be possessed at a time by a dealer — Implications of.

The notification merely fixes "a maximum limit of 200 quintals of wheat to be possessed by a dealer at any one time." "At any one time" can only mean 'at only given point of time'. It does not mean that if a dealer was in possession of 200 quintals at 10 a.m. and sold 120 quintals between 10 a.m. to 12 noon, he is barred from purchasing 120 quintals after 12 noon so as to make up the 200 quintals. All that is necessary is that he should not have in his possession at any one time more than 200 quintals. (Para 6)

Cases Referred: Chronological Paras
 AIR 1962 SC 1406: (1963) 1 SCR 491:
 (1962) 1 SCA 35 2

CHINNAPPA REDDY, J.:— In these petitions under Art. 32 of the Constitution of India the petitioners seek to question the validity of the Rajasthan Wheat (Export Control) Order 1981 and that of a notification issued under the Rajasthan Trade Articles (Licensing & Control) Order, 1980.

2. The Rajasthan Wheat (Export Control) Order purports to prohibit the export of wheat from any place within the State of Rajasthan to any place outside the State except under and in accordance with a permit issued by the State Government or any officer authorised by the State Government in that behalf. The submission of the learned counsel for the petitioners was that the control order banned the export of wheat from a place within the State of Rajasthan to a place outside the State of Rajasthan and, therefore, it contravened the provisions of the Constitution which guaranteed freedom of trade, commerce and intercourse throughout the territory of India. According to the learned counsel it might be open to Parliament to make a law banning such export from one State to other States but it could not be done by the State Government in the exercise of a delegated power under the Essential Commodities Act. Reliance was placed on a decision of this Court in *The Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, (1963) 1 SCR 491: (AIR 1962 SC 1406). In any case it was argued that the Control Order was not authorised by the terms of the Essential Commodities Act. It was also submitted that there was an infringement of the fundamental right guaranteed by Article 19 (1) (g) of the Constitution.

3. The notification banning a dealer from possessing more than 200 quintals of wheat at any one time, issued under Cl. 18 of the Rajasthan Trade Articles (Licensing & Control) Order, 1980, was questioned on the ground that it infringed the fundamental right guaranteed by Art. 19 (1) (g) of the Constitution. It was also urged that the Officers of the State of Rajasthan were misinterpreting the notification and preventing the dealers from purchasing any wheat in the course of a day if at some point of time in the course of the day the dealer was in possession of 200 quintals though, later in the day the quantity in his pos-

session might have gone far below 200 quintals as a result of the transactions of the day.

4. We do not find any substance in any of the submissions made before us except in regard to the interpretation of the notification fixing the maximum quantity of wheat permitted to be possessed by a dealer at any one time.

5. In the first place it is not correct to say that the Rajasthan Wheat (Export Control) Order, 1981 imposes a total ban on export of wheat from the State of Rajasthan. What it does is to regulate the export of wheat by prohibiting it except under and in accordance with a permit issued by the State Government. We do not mean to say that regulation may not under certain circumstances include total ban having regard to the exigencies of production, demand and distribution. In the present case the aim and object of the Control Order is apparent. It is obviously to conserve the wheat produced in the State of Rajasthan for effective distribution to the people of the State who need them, at reasonable price and to prevent the sky-rocketing of the price of wheat within the State of Rajasthan. The restriction on the export of wheat from Rajasthan is clearly a reasonable restriction within the meaning of Art. 19 (6) of the Constitution and is required in the public interest as contemplated by Art. 302 of the Constitution. Under Art. 302 of the Constitution Parliament may by law impose such restriction on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. The Essential Commodities Act which is an Act to provide, in the interests of the general public, for the control of production, supply and distribution of trade and commerce in certain commodities is, without doubt, such a law as contemplated by Art. 302 of the Constitution. If the Rajasthan Wheat (Export Control) Order, 1981 is authorised by the provisions of the Essential Commodities Act, it has to be held perfectly valid. S. 3 (2) (d) enables the Central Government to make an order providing "for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity". Sec. 5 empowers the Central Government to delegate its power under Sec. 3 to the State Government. By various orders made from time to time, the Central Govern-

ment has delegated such power to the State Government. By notification GSR No. 800 dated June 9, 1979, the Central Government has delegated to the State Government its powers to make orders to provide for the matters specified in clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii), (j) of S. 3 (2) in relation to foodstuffs subject to certain conditions. One of the conditions is that in regard to distribution or disposal of foodstuffs to places outside the State or in regard to regulation of transport of any foodstuffs under cl. (d) the State Government should obtain prior concurrence of the Central Government. In our view the Rajasthan Wheat (Export Control) Order 1981 is an order which regulates the transport, distribution, disposal of an Essential Commodity, clearly falling within and authorised by cl. (d) of S. 3 (2) of the Essential Commodities Act. The preamble to the order recites that the prior concurrence of the Central Government had been obtained. Nothing has been shown to us to indicate that the concurrence of the Central Government had not been so obtained. It was also submitted that the control order did not provide for a machinery for obtaining a permit. That is not correct. The Control Order provides that a permit for export of wheat should be obtained from a State Government or any officer authorised by the State Government in this behalf. In our view the Rajasthan Wheat (Export Control) Order is not open to challenge on any of the grounds raised by the petitioners.

6. The notification providing for the maximum quantity of wheat which may be possessed by any dealer at any one time is clearly designed to prevent hoarding of foodgrains and is certainly a reasonable restriction within the meaning of Art. 19 (6) of the Constitution. It is authorised by cl. 18 of the Rajasthan Trade Articles (Licensing & Control) Order, 1980, made in exercise of the powers conferred by Sec. 3 of the Essential Commodities Act. This notification also had the prior concurrence of the Central Government. The learned counsel for the petitioners urged that the notification was being misinterpreted in the manner mentioned earlier. The notification merely fixes "a maximum limit of 200 quintals of wheat to be possessed by a dealer at any one time". 'At any one time' can only mean at only given point of time. It does not mean that if a dealer was in possession of 200 quintals at 10

a.m. and sold 120 quintals between 10 a.m. and 12 noon, he is barred from purchasing 120 quintals after 12 noon so as to make up the 200 quintals. All that is necessary is that he should not have in his possession at any one time more than 200 quintals. With this clarification the Writ Petitions are dismissed.

Order accordingly.

AIR 1982 SUPREME COURT 31

(From: Bombay)

D. A. DESAI AND BAHARUL ISLAM, JJ.

Criminal Appeal No. 442 of 1981, D/-14-4-1981.

Rajaram Govind Gavade, Appellant v. State of Maharashtra, Respondent.

Penal Code (45 of 1860), S. 300. — Conviction for offence under — Accused raising plea of acting under grave and sudden provocation — Sessions Judge negating the plea after full discussion — Absence of any discussion of this plea in judgment of High Court — The question involved being a mixed question of law and facts and there being only one appeal on facts to High Court, High Court must have given its finding on the plea — Judgment of High Court set aside and case remitted to High Court for disposal according to law in interest of justice. (Para 2)

DESAI, J.:— Special leave to appeal granted.

2. The only defence in this case put forward in the Sessions Court was that the accused acted under grave and sudden provocation having been enraged on finding that his wife Jayashree had deviated from the path of virtue and she had become pregnant on account of her illicit intimacy with Jayaram son of P. W. Rukmini. Undoubtedly the learned Sessions Judge has fully considered this defence and rejected the same. However, upon a conviction in a criminal trial on a charge of murder under S. 302, there is only one appeal on facts. That appeal lies to High Court. Accused preferred an appeal. The High Court dismissed the appeal preferred by the appellant in limine after making a brief laconic

KY/LY/F191/81/PGS/SNV

order. And in this order, this defence suggested, is conspicuously silent by its absence. Grave and sudden provocation is a mixed question of law and facts. It was incumbent upon the High Court to examine that defence and record its own findings on the point. Mr. O. P. Rana is right in saying that this Court can look into this evidence and examine the defence. Mr. Rana also feels that it would be a mere formality to remand the case. Maybe, he may be right. The fact, however, remains that an accused convicted upon a charge of murder punishable under S. 302, I.P.C. has only one appeal on facts to the High Court. It is open to the High Court to reject the defence version after applying its mind to it, and to reject it after setting out its reasons on points which are shown to be arguable. In this case, the only point which is being stressed is that the case is covered by exception one to Sec. 300. There is not even whisper of it in the judgment of the High Court. Therefore in the interest of justice, we set aside the judgment of the High Court and remit the appeal to the High Court for disposal according to law.

3. Appeal allowed to that extent only.

Appeal allowed.

AIR 1982 SUPREME COURT 32

(From: 1973 Tax LR 1228 (Guj))

R. S. PATHAK AND

E. S. VENKATARAMIAH, JJ.

Civil Appeals Nos. 923-925 of 1973, D/- 7-4-1981.

Commissioner of Income-tax, Gujarat III, Ahmedabad, Appellant v. Ahmedabad Rana Caste Association, Ahmedabad, Respondent.

Income-tax Act (43 of 1961), Ss. 11 and 256 — Constitution of India, Art. 133 — Income of association — Exemption — Reference to High Court — High Court after considering entire matter at length in the light of prevailing case law holding that income derived by association was applied entirely to charitable and religious purposes — Held, there were no reasons for interference by the Supreme Court. 1973 Tax LR 1228 (Guj), Affirmed. (Para 3)

PATHAK, J.:— These appeals by certificate granted by the High Court of Gujarat are directed against the judgment of the High Court delivered on 29/30-6-1972* on the application of Section 4 (3) (i) of the Income-tax Act, 1922 and Section 11 of the Income-tax Act, 1961.

2. The assessment years involved are 1960-61, 1961-62 and 1962-63 (the corresponding accounting periods being the financial years ending 31-3-1960, 31-3-1961 and 31-3-1962 respectively). The Income-tax Officer held that the respondent was not entitled to the benefit under Sec. 4 (3) (i) of the Act of 1922 in respect of the first assessment year and under Section 11 for the assessment years 1961-62 and 1962-63. The Income-tax Officer proceeded on the view that the objects for which the respondent association was constituted contained certain clauses which permitted the respondent to apply the income to purposes which were not wholly charitable. The Appellate Assistant Commissioner maintained the order of the Income-tax Officer. But the Income-tax Appellate Tribunal took an entirely contrary view and held that the respondent was entitled to the exemption claimed by it. Upon a reference made at the instance of the Commissioner of Income-tax, Gujarat the Appellate Tribunal referred the following question for the opinion of the High Court:

"Whether on the facts and in the circumstances of the case the income of the assessee trust is exempt under Section 4 (3) (i) of the Income-tax Act, 1922 and Section 11 of the Income-tax Act, 1961?"

3. Before the High Court the controversy centred around sub-cl. (4) and (5) of Cl. 3 of the Memorandum of Association of the respondent association as well as sub-cl. (4) of Cl. 8. The High Court after considering the entire matter at length in the light of the prevailing case law has found that the objects sufficiently control the application of the income derived by the respondent association to purposes which can be described as entirely religious and charitable.

4. After hearing learned counsel for the parties we see no reason for interfering with the judgment of the High Court. The appeals are dismissed. Costs in one set.

Appeals dismissed.

*Reported in 1973 Tax LR 1228.

AIR 1982 SUPREME COURT 33**A. P. SEN AND BAHARUL ISLAM, JJ.**

A. (a) Writ Petns. Nos. 2907-2908; 3234, 3238-39, 3164, 3254; 3630-31, 3686, 3783, 3816, 4816, 4829-31, 4836-38, 4996-5001, 5051-54, 5089-93, 5136-46, 5247, 3160, 3634, 4494, 4616, 4967, 5362-71, 5416-20, 5447-50, 5716-17, 5840, 6015, 6587-89, 6609-14/81, (b) 5062, 5094, 5157-58, 5451, 5615-17/81, (c) 5097, 5042, 5098, 5017, 5214, 6135-36 & 7003/81; (d) 3421, 3407, 3408-13, 3422, 3536, 3561-64, 5238, 3824, 5466, 5544, 6009, 6130-31, 6562-74 & 6582-83/81, (e) 4904-4905, 5080, 5094, 5239-45, 5358-59, 5395, 5483, 5484-88, 5489-92, 5734-39, 6584-86 & 6817-21/81, (f) 4960-62, 4958-59, 5129-33, 5219-20, 5331-33, 5518-19, 5526, 5428-31 & 5527/81, (g) 4526, 4926, 4995, 5046, 5048-50, 5100-5101, 5136-46, 5402-11, 5436-38, 5560, 5520-21, 5562, 5558, 5556, 5559, 5550, 5546-47, 5552, 5555, 5553-54, 5511, 5551, 5482, 5618-19, 5809-20, 6132-33, 6244, 6273-75, 6267-72, 5512-14, 5515, 6570, 5562, 7027-29 & 7032-34/81, (h) 5568-69, 5221, 5380-83, 5129-33, 5421-22, 5440, 5507-10, 5662, 5806-7, 6245, 6246, 6265, 6398 & 6684/81, (i) 3592, 3353, 5396, 6016, 6247-48, 6616, 6668 & 6798/81, (j) 5003, 4453, 4455-56, 5346-48, 4955, 5082-89, 5577-80, 5581 & 5224/81, (k) 3489 & 4263/81, (l) 4818/81, (m) 2916, 2932, 3242, 3297-3302, 3334-43, 3475, 4098-4100, 4136, 4304, 4187, 4777, 5007-17, 2027-34, 5352-55, 5473-79, 5604-5608, 5740-42, 5743-44, 5821, 6012-13 & 5583-92/81, (n) 5391 & 5525/81, (o) 5443/81, (p) 5444, 5663 & 6266/81, (q) 5464/81, (r) 5451 & 5564-66/81, (s) 5808/81, (t) 5571-75, 5622-29 & 6014/81, (u) 5718-19 & 6943/81, (v) 5568-69/81.

B.: (a) 2932, 3776-80, 4140-45, 4326-28, 4876-4902, 4670-78 & 5473-79/81, (b) 5480/81, (c) 4955-56, 5330, 5392, 3823 & 6278/81, (d) 5529-30/81, (e) 5531-32/81, (f) 5841-50/81 and (g) 5656-58 of 1981, D/- 5-11-1981.

Foodgrains Matters.**A. Movement By Road:**

(a) M/s. Bishamber Dayal Chandra Mohan etc. etc., Petitioners v. State of U. P. and others etc. etc., Respondents.

(b) Jagdish Prasad Agarwal etc. etc., Petitioners v. State of U. P. and others, Respondents.

(c) Haryana Dall Industries etc., Petitioners v. State of U. P. and others, Respondents.

(d) M/s. Kalyan Mal Deep Chand etc., Petitioners v. State of U. P. and others, Respondents.

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(e) Aggarwal Trading Co. etc. etc., Petitioners v. State of U. P. and others, Respondents.

(f) M/s. Attar Singh Santosh Kumar, Petitioners v. Secretary, Ministry of Food & Civil Supplies and others, Respondents.

(g) M/s. J. B. Flour Mills etc. etc., Petitioners v. State of U. P. and others, Respondents.

(h) M/s. Anupchand Shyamlal etc. etc., Petitioners v. Union of India and others, Respondents.

(i) M/s. Kaly Ram Govind Narain and others etc. etc., Petitioners v. State of U. P. and others, Respondents.

(j) M/s. Radhye Shyam Mukesh Kumar and others etc. etc. Petitioners v. State of U. P. and others, Respondents.

(k) M/s. Ramji Lal Ram Karan and others, Petitioners v. Union of India and others, Respondents.

(l) Namuna Parshad Shobit Kumar, Petitioner v. State of U. P. and others, Respondents.

(m) M/s. Har Kishan Dass Shiv Lal etc. etc., Petitioners v. State of M. P. and others etc. etc., Respondents.

(n) M/s. Jatta Mal Rati Ram etc., Petitioners v. State of U. P. and others, Respondents.

(o) Durga Prasad Rungta & Bros. and others, Petitioners v. State of U. P. and others, Respondents.

(p) Balaji Trading Co. etc. etc., Petitioners v. State of U. P. and others, Respondents.

(q) Mangey Lal Aggarwal etc., Petitioners v. State of U. P. and others, Respondents.

(r) M/s. Mangal Sen Ram Gopal Sikan-dra Rao etc. etc., Petitioners v. State of U. P. and others, Respondents.

(s) M/s. Adarsh Vyapar Mandal, Petitioner v. State of U. P. and others, Respondents.

(t) Gujarat Trading Co. and others etc., Petitioners v. State of U. P. and others, Respondents.

(u) M/s. Darshan Lal Santosh Kumar and others etc., Petitioners v. State of U. P. and others, Respondents.

(v) M/s. Siya Ram Girish Chandra and another, Petitioners v. State of U. P. and others, Respondents.

B. Restriction On Quantum Of Food-grains Which Can Be held:

(a) M/s. Ashavani Kumar Mahesh Kumar Malani etc. etc., Petitioners v. Union of India and another, Respondents.

(b) Jagan Nath Shri Bhagwan and others, Petitioners v. Union of India and others, Respondents.

(c) M/s. Phudan Lal Pyare Lal and others, etc., etc., Petitioners v. State of U. P. and others, Respondents.

(d) M/s. Jai Kishan Vinod Kumar etc. etc., Petitioners v. State of U. P. and others, Respondents.

(e) M/s. Aggarwal Trading Co. etc. etc., Petitioners v. State of U. P. and others, Respondents.

(f) M/s. Keshri Chand Udai Chand and others, Petitioners v. Union of India and others, Respondents.

(g) M/s. Mansa Ram Puran Mal and others, Petitioners v. State of Haryana and others, Respondents.

(A) Constitution of India, Arts. 162; 19 (1) (g) & (6), 301, Sch. 7, List 3, Entry 33 — Executive power of State — Scope of — Enactment of Essential Commodities Act, 1955 — Exercise of concurrent jurisdiction by Parliament under Entry 33 — State Legislature, not deprived of its jurisdiction — Executive power of State is co-extensive with its legislative power — Teleprinter message to secure compliance with orders under Act — Valid — (i) Essential Commodities Act (1955), S. 3 — (ii) Words and Phrases — Search and Seizure).

The State in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the State. So long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power cannot be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf. AIR 1955 SC 549 and AIR 1974 SC 1232, Foll. (Para 20)

The Essential Commodities Act, 1955 was enacted by Parliament in exercise of concurrent jurisdiction under Entry 33, List III of the Seventh Schedule to the Constitution as amended by the Constitution (Third Amendment) Act, 1954. The exercise of such concurrent jurisdiction would not deprive the State legislature of its jurisdiction thereunder. The executive power of the State being co-extensive with its legislative power under Entry 33, List III, it relates to all matters covered by the subject "foodstuffs" trade and commerce in, and the production, supply

and distribution thereof. This is, of course, subject to the limitation contained in Proviso to Art. 162. (Para 22)

The executive power of "search and seizure" is a necessary concomitant of a welfare State. It tends to promote the well-being of the nation. Many questions arising in the field of search and seizure are factual in nature. Just as inter-State trade and commerce must pay its way and be subject to taxation, persons engaged in such inter-State trade or commerce are equally subject to all regulatory measures. There is no reason why the check-posts or barriers set by the State Government under S. 28 of the U. P. Sales Tax Act, 1948, cannot be utilised as a machinery for due observance of the laws, e.g. for verification and control of movement of wheat by traders on private account from the State of Uttar Pradesh to various other States.

(Paras 23, 24)

When a teleprinter message from U. P. Secretariat in the nature of executive instructions of the State Government to the Regional Food Controllers was issued in order to secure compliance with the Orders under Essential Commodities Act i.e. U. P. Foodgrains Dealers (Licensing and Restriction on Hoarding) Order, 1976 and the U. P. Foodgrains (Procurement and Regulation of Trade) Order, 1978 conveying the policy decision of the Government about movement of wheat by traders on private accounts to outside districts, the teleprinter message being a direct sequel to the Centre's directives was obviously meant to subserve the object of the Legislation and were in public interest. (Para 25)

(B) Constitution of India, Arts. 19 (1) (g) and (6), 301, 302, 162 — Individual's rights of freedom and freedom of inter-State trade as against national interest — Duty of Court — "Reasonable restriction" — Meaning of — Regulatory measure to prevent price rise in wheat and its outflow — Held, to be in interest of general public.

The quintessence of our Constitution is the rule of law. The State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts. There can be no doubt that the Essential Commodities Act, 1955, is a "law" within the meaning of Art. 302 of the Constitution imposing reasonable restrictions on the right to carry on trade and commerce as guaranteed by Art. 19 (1) (g) and Art. 301 of the Constitution.

The object of the Act is to provide, in the interests of the general public, for the control, production, supply and distribution of, and trade and commerce, in certain essential commodities.

(Paras 27, 28)

The fundamental right to carry on trade or business guaranteed under Article 19 (1) (g) or the freedom of inter-State trade, commerce and intercourse under Art. 301 of the Constitution, has its own limitations. The liberty of an individual to do as he pleases is not absolute. It must yield to the common good. The Court must balance the individual's rights of freedom of trade under Art. 19 (1) (g) and the freedom of inter-State trade and commerce under Art. 301 as against the national interests. Such a limitation is inherent in the exercise of those rights.

(Paras 32, 34)

The expression "reasonable restriction" signifies that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable in all cases. The restriction which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19 (1) (g) and the social control permitted by cl. (6) of Art. 19, it must be held to be wanting in that quality.

(Para 33)

Although Art. 301 guarantees that trade, commerce and intercourse throughout the country shall be free, the right to carry on inter-State trade and commerce may be subject to reasonable restrictions in the interests of the general public. Subject to the provisions of Part XIII, no restrictions can be imposed upon the flow of trade, commerce and intercourse, not only between one State and another, but between any two points within the territory of India whether any State border has to be crossed or not.

(Paras 35, 37)

Where by a teleprinter message to Regional Food Controllers the State Government issued instructions requiring verification and endorsement by concerned Marketing Officer, of stock of wheat moving to other States or from one district to another and further requiring physical verification at the check-posts on

the State's borders, these steps being designed to prevent price rise in wheat and to prevent its outflow it could not be said that they did not contain quality of reasonableness or were not in the interest of general public, more so when the whole object was to ensure that the wholesale dealers did not corner stocks of wheat for the purpose of speculation. Even if these requirements are construed to be a "restriction" on the inter-State or intra-State trade, the limitation so imposed on the enjoyment of the right cannot be considered to be arbitrary or of an excessive nature. Nor can it be said that such restrictions do not satisfy the test of reasonableness.

(Paras 34, 37, 50)

(C) Constitution of India, Art. 32 — Nature of and scope of proceeding under — Question of fact — Writ petitions against seizure of foodgrains — Question whether seizure was for any contravention of any Order under S. 3 of Essential Commodities Act — Question determinable by Additional District Magistrate (Civil Supplies) — Facts controverted — Petitioners have no right to relief under Article 32 — Transaction still to be proved — Supreme Court cannot act on documents. (i) Essential Commodities Act (1955), S. 3 — (ii) U. P. Foodgrains Dealers (Licensing and Restriction on Holding) Order (1976), Cl. 14 — (iii) U. P. Foodgrains (Procurement and Regulation of Trade) Order (1978), Cl. 6

(Paras 40, 43)

(D) Constitution of India, Arts. 162, 300A — Executive power of State under Art. 162 — It is subject to Art. 300A — Word "law" — Meaning of. (Words and Phrases— "Law").

The State Government cannot while taking recourse to the executive power of the State under Art. 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Art. 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Art. 300A. The word "law" in the context of Art. 300A must mean an Act of Parliament or of a State Legislature, a rule, or a statutory order, having the force of law, that is positive or State-made law. The effect of the Constitution (Fourth) Amendment Act, 1955, is that there can be no "deprivation" unless there is extinction of the right to property. (Obiter).

(Paras 41, 42)

(E) Constitution of India, Arts 19 (1) (g), 14 — Essential Commodities Act (1955), S. 3 — U. P. Foodgrains (Procurement and Regulation of Trade) Order (1978), Cl. 4 (as amended by Notification dated 21-4-81) — Cl. 4 as amended is valid.

Where a notification of U. P. Government dated 21-4-81 amending Cl. 4 of the U. P. Foodgrains (Procurement and Regulation of Trade) Order, 1978 has fixed maximum limit of wheat permitted to be possessed by a wholesale dealer and a commission agent at 250 quintals at any time, the restriction imposed by the State Government is neither arbitrary nor excessive. It is neither violative of Art. 19 (1) (g) nor Art. 14. The fixation of the stock limit of wheat to be possessed by wholesale dealers, at any time, at 250 quintals is an important step taken by the State Government to obviate hoarding and black-marketing in wheat which is in short supply. It is hardly necessary to emphasise the extent and urgency of the evil sought to be remedied thereby. The underlying idea is that the wholesale dealers should be allowed to continue their trading activities within reasonable limits. The fixation of stock limit at 250 quintals implies that wholesale dealers can have at any time, in stock, a wagon-load of wheat. The expression "at any time" means that a wholesale dealer should not have in stock more than 250 quintals at a time. But there is nothing to prevent a wholesale dealer from entering into a series of transactions during the course of the day. (Para 48)

To obviate hoarding and blackmarketing in foodstuffs, the State Government has promulgated the Order. It introduces a system of checks and balances to achieve the object of the legislation, i.e., to ensure equitable distribution and availability of essential commodities at fair prices. It cannot be said that looking to the prevailing conditions, the imposition of such restrictions does not satisfy the test of reasonableness. Nor can it be said that the fixation of such stock limit is arbitrary or irrational having no nexus to the object sought to be achieved and is, therefore, violative of Art. 14. (Para 49)

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1981 (SC), Krishan Lal Praveen Ku- 48
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M/s. Hari Sarup, M. N. Phacke, Soli J. Sorabjee, J. P. Goyal and Mr. C. M. Lodha, Sr. Advocates (M/s. E. Datta, R. A. Gupta, Miss Kamini Jaiswal, Rajiv Dutta, Manoj Swarup & Miss Lalita Kohli, M/s. R. S. Sharma, R. K. Jain, Pankaj Jain, P. K. Jain, K. K. Jain, K. B. Rohatgi, B. R. Kapur, B. S. Tawakley, S. R. Srivastava, N. N. Sharma, A. K. Goel, M/s. Mitter & Mitters & Co., S. K. Jain, Rajesh Jain, Mukul Mudgal, M. Qamaruddin, Mrs. M. Qamaruddin, M/s. Anis Suhrawardy, A. P. Mohanty, K. K. Gupta, Ravi Prakash Gupta, C. K. Ratnaparkhi, S. C. Birla, M. C. Dhingra and S. K. Gambhir, Advocates with them), for Petitioners; M/s. G. N. Dikshit & O. P. Rana, Sr. Advocates (Mrs. Shoba Dixit, R. N. Poddar, G. Gopalakrishnan, Mr. A. V. Rangam, B. D. Sharma, D. P. Mohanty and Mr. A. Shroff, Advocates with them), for Respondents.

A. P. SEN, J.:— The issue in this and the connected 505 petitions under Art. 32 of the Constitution is of far-reaching significance. It raises questions of the highest importance as to the scope and extent of the executive power of the State under Art. 162 of the Constitution, in relation to regulation and control of trade and commerce in foodstuffs. It necessarily involves a claim by the petitioners who are wholesale dealers of foodgrains that the exercise of such governmental power conflicts with the rule of law and is in flagrant violation of the freedom of trade, commerce and intercourse guaranteed under Art. 301 of the Constitution and the fundamental right to carry on trade and business guaranteed under Art. 19 (1) (g) of the Constitution. These petitions fall into two distinct and separate categories, one by the wholesale dealers of foodgrains from the Union Territory of Delhi and the neighbouring States of Punjab and Haryana, and the other by the wholesale dealers of foodgrains from the State of Uttar Pradesh.

2. The short question that falls for consideration in some of the writ peti-

tions by wholesale dealers of foodgrains from the Union Territory of Delhi and the State of Punjab and Haryana is, whether the action of the State Government of Uttar Pradesh in setting up check-posts on its borders and the stoppage and seizure of wheat in transit through the State of Uttar Pradesh during the course of inter-State trade and commerce to various destinations in the States of Madhya Pradesh and Maharashtra at the check-post at Saiyan on the border between the States of Uttar Pradesh and Madhya Pradesh on the strength of its instructions conveyed by its teleprinter message dated March 31, 1981, was in violation of Art. 301 of the Constitution.

3. In a majority of the writ petitions by wholesale dealers from the State of Uttar Pradesh, two questions arise, (1) whether Notification No. P-XXIX-Food-5-5(42)/80 dated April 21, 1981, issued by the State Government of Uttar Pradesh, in exercise of the powers conferred by S. 3 read with S. 5 of the Essential Commodities Act, 1955 (hereinafter referred to as the Act), by which cl. 4 of the Uttar Pradesh Foodgrains (Procurement and Regulation of Trade) Order, 1978, has been amended, providing that no wholesale dealer, commission agent or a retailer shall have in stock wheat more than 250 quintals, 250 quintals and 20 quintals respectively, at any time, infringes the fundamental right to carry on trade or business guaranteed under Article 19 (1) (g); and (2) whether the governmental instructions conveyed by its teleprinter message dated March 31, 1981, placing restrictions on movement of wheat by traders on private account from the State of Uttar Pradesh to various other States and on inter-district movement of wheat within the State, were in breach of the fundamental right under Art. 19 (1) (g) read with Art. 301 of the Constitution.

4. The following are the facts and circumstances so far as necessary to show as to how the legal questions are presented. It would be convenient first to deal with the writ petitions filed by the wholesale dealers of foodgrains from the Union Territory of Delhi and the States of Punjab and Haryana seeking a declaration that the impugned action of the State Government of Uttar Pradesh in setting up check-posts on the borders of the State and directing seizure of wheat in transit through the State, on the strength of the impugned teleprinter

message, conflicted with the guarantees of inter-State trade and commerce dealt with by Art. 301 of the Constitution.

5. Facts in all these cases are more or less similar. The petitioners who are wholesale dealers of foodgrains from the Union Territory of Delhi and the States of Punjab and Haryana allege that between April 29-30, 1981, they, acting as commission agents, purchased wheat from the open market in Delhi and elsewhere and despatched the same by trucks to various destinations in the State of Maharashtra and to some places in the State of Madhya Pradesh. According to them, the trucks laden with wheat were accompanied by relative bills, goods receipts, inter-State transit passes etc., duly crossed the check-post at Faridabad and were also allowed to cross the check-post at Kotwan on the border between the Union Territory of Delhi and the State of Uttar Pradesh and were on their way to their respective destinations. They allege that the Senior Marketing Inspector, Agra, intercepted the trucks in question at the check-post at Saiyan on the border between the State of Uttar Pradesh and Madhya Pradesh between April 30, 1981, and May 2, 1981. The seized trucks were brought back to the purchase point at Agra and the wheat was unloaded. Thereupon, the petitioners rushed to Agra and made an application on May 4, 1981, under S. 6A read with Ss. 3 and 7 of the Act before the Additional District Magistrate (Civil Supplies), Agra, for the release of the seized wheat. In the said application, the petitioners, inter alia, claimed and unequivocally stated that there was no ban on export of wheat from the Union Territory of Delhi to other States, that the wheat in question was neither purchased at Agra, nor was it being transported from Agra to any other district in Uttar Pradesh, that Agra was a place in transit, and that the instructions of the State Government contained in the impugned teleprinter message dated March 31, 1981, did not constitute a validly notified order under sub-sec. (5) of S. 3 of the Act.

6. The Chief Marketing Inspector, Agra, had in the meanwhile seized 42 trucks laden with wheat either at the check-post at Saiyan or at Agra and lodged first information reports at the Saiyan police station or at the Civil Lines police station in respect of the consignments alleging that the movement of wheat was in contravention of the impugned

ed teleprinter message and it was therefore seized, and in three of them it was alleged that the wheat had been purchased at Agra. On the report of the Chief Marketing Inspector, the Additional District Magistrate (Civil Supplies), Agra drew up proceedings under S. 6A of the Act and directed the police to complete the investigation within 15 days.

7. On May 23, 1981, the Additional District Magistrate (Civil Supplies), Agra, under sub-sec. (2) (i) of S. 6A of the Act passed interim orders for the sale of the seized wheat as it was subject to speedy and natural decay, at the request of the Senior Marketing Inspector, similar to the one reproduced below:

These proceedings under S. 6A of the Essential Commodities Act started on the report of SMI Saiyan dated 30-4-1981 (Paper No. 1) whereby it was brought to the notice of this Court that trucks Nos. were caught carrying 120 quintals, ... of wheat respectively beyond Saiyan border outside the State in contravention of the orders issued by the Government vide telex No. 1061/29-Food-5, dated 31-3-1981. F.I.R. was lodged at P.S. Saiyan in respect of the above contravention. Notice under S. 6B of the EC Act was issued to the O.Ps. who were driving the trucks at the time of search and seizure.

Replies were filed by the owners of the wheat contending that the said rules were not part of any Control Order under Section 3 of the E. C. Act nor they had any legal sanction for want of publication in the Official Gazette. The O.Ps. have pleaded that they were taking their goods in transit through Agra and in fact the movement of wheat so made by them was inter-State movement which was not banned by the Central Government or State Government.

I heard the learned counsels on behalf of the O.Ps. and the learned P.O. as well. In these proceedings final orders cannot be passed at this stage as the matter is still under investigation.

P.O. directed to put up progress of investigation within 15 days from now.

In the meanwhile I order that the wheat seized by S.M.I. Saiyan be got purchased at the Official Price so that the same does not get damaged. The sale proceeds be got deposited in Government Treasury under proper Head of Account.

This interim order is being passed under sub-sec. (2) (i) of S. 6A of the Essential Commodities Act, 1955. File be put up after 15 days along with report

of prosecuting office regarding progress of investigation.

Sd/-

N. N. Varma,
Addl. Collector, Agra,
23-5-1981.

The seized wheat has been purchased by the State Government on Government account at the procurement price and the sale proceeds credited into the Treasury.

8. The State Government has filed a counter-affidavit of the Chief Marketing Officer, Lucknow, in all these cases as also the affidavits of the Senior Marketing Inspectors at Agra controverting the allegations made by the petitioners. It is stated that the source of the power to effect the seizure was not the impugned teleprinter message, but the power of search and seizure conferred on an Enforcement Officer under cl. 6 of the U. P. Foodgrains Dealers (Licensing and Restriction on Hoarding) Order, 1976 and under cl. 6 of the Uttar Pradesh Foodgrains (Procurement and Regulation of Trade) Order, 1978 (hereinafter called the 1976 Order and 1978 Order respectively), both of which were issued by the State Government, in exercise of the powers under S. 3 of the Act, read with Government of India, Ministry of Agriculture (Department of Food) Notification No. GSR 888 dated June 28, 1961, No. GSR 316 (E) dated June 20, 1972, No. GSR 452 (E) dated October 25, 1972, No. GSR 168 (E) dated March 13, 1973 and No. GSR 800 dated June 9, 1978 respectively, since it was of opinion that it was necessary or expedient so to do for securing the equitable distribution and availability of foodgrains at fair prices. The State Government contends that the impugned teleprinter message dated March 31, 1981 was in the nature of an executive instruction issued by the State Government under its undoubted powers under Art. 162 of the Constitution for the due observance of the provisions of the two Control Orders. It is said that no person can carry on business in foodgrains as a dealer or as a commission agent except under and in accordance with the terms and conditions of a valid licence issued in that behalf under cl. 4 of the 1976 Order. It is also said that no wholesale dealer, commission agent or trader can have in stock more than 250 quintals, 250 quintals and 20 quintals respectively, at any time. It is asserted that the State Government has the right to set up check-posts for the purpose of verification so that there is no contravention of the provisions of

the two Control Orders, particularly with a view to ensure that excess quantity of wheat is not transported in violation of the 1978 Order to other districts or other States.

9. The State Government in the counter-affidavit of the Chief Marketing Officer, Lucknow, specifically denies the allegations made by the petitioners that the 42 trucks laden with wheat seized at the check-post at Saiyan on the border between the States of Uttar Pradesh and Madhya Pradesh or at Agra were in transit during the course of inter-State trade and commerce.

10. With regard to the seizure of the wheat, it is averred in para 13 of the counter-affidavit:—

"The correct fact is that the authority on the bona fide apprehension that the wheat so moved actually was purchased from the State of Uttar Pradesh from nearby places and the same was being moved to other States on the garb of outside wheat. It is submitted that such traders who are exporting wheat alleged to have purchased from places other than the State of Uttar Pradesh and were/are carrying the same to other States, have only to satisfy the authorities concerned of the bona fide of such transactions. However, there is no ban on such movement from one State to another."

11. As regards the check-posts, it is submitted that the State Government is committed to provide price support in wheat to farmers at Rs. 130 per quintal. This commitment also involves purchase of wheat directly from the farmers without interference from traders/middlemen, who try to purchase wheat from the farmers at lower prices and sell the same at Government purchase centres with substantial profits. Such transactions are effected in fictitious names. This not only frustrates the procurement policy of the Government but also prejudicially and financially affects the producers' interests. In para 5 it is accordingly averred:—

"In order to curb the above tendencies and preventing the activity of traders/middlemen the State Government have provided a simple system of verifying all transactions by traders. This procedure involves getting all transactions of wheat verified by the Deputy Regional Marketing Officer indicating inter alia the name of the persons to whom the stocks are sold, their licence numbers etc. and quantum of stocks sold, price paid etc. This process will make it simultaneously very difficult for traders to buy at low

price from farmers and resell at high prices at the Government purchase centres."

12. As regards the impugned teleprinter message it was stated that it was issued by the State Government in order to sustain and maintain and maximise the procurement of wheat by introducing a system of verification at the check-posts.

13. The State Government contests the right of the petitioners falling in the first category, that is, wholesale dealers of wheat from the Union Territory of Delhi and the States of Punjab and Haryana, to relief under Art. 32 of the Constitution who question the legality and propriety of the seizures. It is a matter for investigation which is pending before the Additional District Magistrate (Civil Supplies), Agra and, according to it, the question cannot be decided without full investigation into facts.

14. In support of the writ petitions, learned counsel appearing for the petitioners have, in substance, urged three grounds: (1) There was nothing to prevent the State Government from making a law placing reasonable restrictions on the freedom to carry on any occupation, trade or business guaranteed under Article 19 (1) (g) read with Art. 19 (6) of the Constitution, or on the freedom of trade, commerce and intercourse, throughout the territory of India, guaranteed under Art. 301 of the Constitution, but the restriction must be by "law" or by an "order having the force of law" and not by recourse to the executive authority of the State under Art. 162 of the Constitution, i.e., by an executive action. (2) The seizure of the consignments of the wheat, while they were in transit in the course of inter-State trade and commerce from the Union Territory of Delhi and the States of Punjab and Haryana to various destinations in the States of Maharashtra and Madhya Pradesh, was without the "authority of law" and in violation of Art. 300A of the Constitution. The seizure of the wheat being wrongful, the petitioners were entitled to an appropriate writ, direction or order for the return of the seized wheat or the price thereof. (3) The impugned teleprinter message of the State Government dated March 31, 1981 on the basis of which the seizures were effected, in truth and substance, had no legal sanction and cannot be construed to be a notified order within the meaning of sub-sec. (1) read with sub-sec. (5) of S. 3 of the Act; it was nothing but an executive

direction. No executive action which operates to the prejudice of a citizen can be taken without the authority of law. It was asserted that the seizures effected were in compliance of the instructions contained in the impugned teleprinter message and not for breach of the two Control Orders and therefore it was nothing but a "colourable exercise" of power. The real purpose of the seizure was procurement of wheat in furtherance of the directives of the Central Government, without any legal sanction since the farmers were not willing to sell their wheat at the procurement price.

15. Learned counsel for the petitioners also challenge the action of the Additional District Magistrate (Civil Supplies) Agra in passing an interim order in terms of sub-sec. (2) (i) of S. 6A of the Act for the sale of the seized wheat on Government account and for the sale proceeds to be credited into the treasury in an appropriate Head of Account; it is urged that under sub-sec. (2) (ii) of Section 6A of the Act there being no control price for wheat, the wheat should have been sold by public auction.

16. In reply, learned counsel for the State has repelled all these contentions. It is submitted that the source of power to effect the seizure was not the impugned teleprinter message, but the two Control Orders issued under S. 3 of the Act. He asserted that the wheat in question was not being transported during the course of inter-State trade and commerce from the Union Territory of Delhi and the States of Punjab and Haryana to various other States. The wheat had in fact been purchased at Agra and was being lifted from the State of Uttar Pradesh and had, therefore, to be seized at the check-post at Saiyan and at Agra. He points out that under cl. 3 of the 1976 Order, no person can carry on business as a dealer or commission agent, except and in accordance with the terms and conditions of a licence issued in that behalf by the licensing authority. According to him, the seized wheat had been purchased at Agra in the course of trade, and they were not isolated transactions and, therefore, the Delhi traders committed contravention of cl. 3 of the 1976 Order. It is also pointed out that cl. 4 of the 1978 Order, as amended, provides that no person who is a wholesale dealer, commission agent or retailer shall have in stock wheat in quantities exceeding 250 quintals, 250 quintals and 20 quintals at a time. It is further pointed out, cl. 14

of the 1976 Order, and cl. 6 of the 1978 Order confer the power of search and seizure on an enforcement officer or the licensing authority or any other officer authorised by the Government in that behalf, and the expression "enforcement officer" defined in cl. 2 (e) of the former Order and cl. 2 (d) of the latter, includes the Chief Marketing Inspector. According to the learned counsel the Government instructions conveyed in the impugned teleprinter message is merely in the nature of an executive instruction for the enforcement of the two Control Orders. In support of the contentions, he also relies on the executive power of the State under Art. 162 of the Constitution. In the premises, the contention on behalf of the State is that the question whether the seized wheat was liable to be confiscated or not under S. 6A of the Act, was a matter pending adjudication before the Additional District Magistrate (Civil Supplies) Agra. That depends on whether or not there was contravention by the petitioners of any of the Orders issued under S. 3 of the Act and, therefore, cannot be determined without full investigation into the facts.

17. The Inter-Zonal Wheat (Movement Control) Order, 1976, issued by the Central Government, in exercise of the powers conferred by S. 3 of the Act has been rescinded with effect from April 13, 1977. The result of this is that the whole country constitutes a single zone for free movement of wheat except in such States where an order is issued under S. 3 read with S. 5 of the Act, placing a ban on export of wheat such as in the State of Rajasthan. Admittedly, the State Government of Uttar Pradesh has not issued any order under S. 3 read with S. 5 of the Act, placing a ban on export of wheat from the State or any restriction on inter-district movement of wheat within the State. The State Government does not contest this position and indeed, the Chief Marketing Officer in his counter-affidavit states:

"The State of Uttar Pradesh has not banned the movement of wheat outside the State or from one district to another district within the State. It is submitted that such traders who are transporting wheat alleged to be purchased from a place other than the State of Uttar Pradesh and were/are carrying the same to other States other than Uttar Pradesh have only to satisfy the authorities concerned of the bona fides of the transactions. However, there is no ban on such

movement from one State to another."

18. The impugned teleprinter message dated March 31, 1981 runs as follows:

"For:

Regional Food Controller,
Agra/ Bareilly/ Dehradun/ Faizabad/ Gorakhpur/ Jhansi/ Haldwani/ Kanpur/ Meerut/Varanasi/Lucknow (by hand),

From:

Secretary (Food).

Lucknow

No. TP-1061/XXIX-Food-5

Dated: Lucknow, March 31, 1981.

Refourtel TP-172/XXIX-Food-5-5(1)/81 of 9th March 1981 regarding renewal of and issue of new licences to dealers(.) Government committed to provide benefits of support price to producers hence to ensure that maximum quantity of wheat is purchased by agencies (.) Para (.) After careful consideration Government have decided that with effect from first April 1981 till thirtieth June 1981 no repeat no fresh licences are to be issued to any person who wish to deal in wheat, wheat products or both as wholesaler commission agent retailer (.) Para (.) Government have also decided that during April 1981 to June 1981 movement of wheat by traders on private account to outside district shall be regulated only on the endorsement of Deputy Regional Marketing Officer Concerned and hitherto this power being exercised by Senior Marketing Inspector shall not repeat not be used by them (.) Para (.) At the same time easy availability of wheat in open markets is to be ensured (.) Keeping all the relevant factors in view endorsement by Dy. R.M.O. should be made judiciously on genuine and bona fide grounds (.) Para (.) Dy. R.M.O. will send daily report to RFC of the cases in which such permission is granted or endorsement made (.) RFC will compile and send weekly report to Government (.) Permission to be given very sparingly and general impression made should be that they will not gain by doing any trading in wheat (.) Visit Mandis regularly and check quantities lying in traders premises (.) Presence of large stocks with trade means staff is not doing their job properly (.) Inform all concerned immediately for strict compliance (.)

Dated: Lucknow: March 31, 1981.

Sd/-

M. Subrahmanyam,
Secretary,

Food & Civil Supplies Sec. 5
U. P. Secretariat, Lucknow."

19. There can be no doubt that the aforesaid teleprinter message was in the nature of executive instructions of the State Government to the Regional Food Controllers of the various regions to secure compliance with the orders. It may be mentioned that the State Government was committed to provide price support in wheat to producers and hence to maximise procurement of wheat, issued instructions that no fresh licences till June 30, 1981 were to be granted to any person who wished to deal in wheat, wheat products, or both, as well as a wholesale dealer, commission agent or a retailer. It further conveyed the policy decision of the Government that during April 1981 movement of wheat" by traders on private account to outside districts shall be regulated only on the endorsement of the Deputy Marketing Officer concerned and not by the Senior Marketing Inspectors as hitherto before. The Government also directed the Regional Food Controllers to ensure easy availability of wheat in open market. As regards the making of endorsement, they were advised that the powers should be exercised with due circumspection. They were also asked to visit the mandis and keep a constant vigil on the stocks lying with the traders. There appears to be nothing unusual on the State Government issuing such executive instructions.

20. Even assuming that the impugned teleprinter message is not relatable to the two Control Orders, the State Government undoubtedly could, in exercise of the executive power of the State, introduce a system of verification on movement of wheat from the State of Uttar Pradesh to various other States at the check-posts on the border and place restrictions on inter-district movement of wheat by traders on private account within the State. The executive power of a modern State is not capable of any precise definition. In *Ram Jawaya Kapur v. State of Punjab*, (1955) 2 SCR 225: (AIR 1955 SC 549), Mukherjea, C. J., dealt with the scope of Arts. 73 and 162 of the Constitution. The learned Chief Justice observed that neither of the two Articles contains any definition as to what the executive function is or gives an exhaustive enumeration of the activities which would legitimately come within its scope. It was observed: "Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions."

are taken away." It is neither necessary nor possible to give an exhaustive enumeration of the kinds and categories of executive functions which may comprise both the formulation of the policy as well as its execution. In other words, the State in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the State. So long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power cannot be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf. Otherwise, the administration would come to a standstill.

21. In *Ram Jawaya Kapur's case* (1955) 2 SCR 225 at p. 236: (AIR 1955 SC 549 at p. 556) (supra) it was contended that the executive power of the State did not extend to the carrying on of trade of printing, publishing and selling of text-books for schools unless such trade was authorised by law. In repelling the contention, Mukherjea, C. J. speaking for the Court, observed:

Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function, comprises both of the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

The learned Chief Justice then went on to observe: *Ibid* at 239 (of SCR): (at p. 557 of AIR):

The Indian Constitution is a written Constitution and even the legislature cannot override the fundamental rights guaranteed by it to the citizens. Consequently, even if the acts of the executive are deemed to be sanctioned by the legislature, yet they can be declared to be void and inoperative if they infringe any of the fundamental rights of the petitioners

guaranteed under Part III of the Constitution. On the other hand, even if the acts of the executive are illegal in the sense that they are not warranted by law, but no fundamental rights of the petitioners have been infringed thereby, the latter would obviously have no right to complain under Article 32 of the Constitution though they may have remedies elsewhere if other heads of rights are infringed.

In *Naraindas Indurkha v. State of Madhya Pradesh*, (1974) 3 SCR 624: (AIR 1974 SC 1232), Bhagwati, J., speaking for the Court, reiterated the principles laid down by Mukherjea, C. J. in *Ram Jawaya Kapur's case* (supra) and held that the State Government could not in exercise of the executive power of the State under Art. 162 of the Constitution in relation to any matter with respect to which the State Legislature has power to make laws even if there was no legislation to support such executive action. There is no denying the fact that the State Legislature is competent to enact a law on the subject covered by Entry 33, List III, which reads:

33. Trade and commerce in, and the production, supply and distribution of,—
(b) foodstuffs, including edible oilseeds and oils.

22. The Essential Commodities Act, 1955 was enacted by Parliament in exercise of concurrent jurisdiction under Entry 33, List III of the Seventh Schedule to the Constitution as amended by the Constitution (Third Amendment) Act, 1954. The exercise of such concurrent jurisdiction would not deprive the State legislature of its jurisdiction thereunder. The State legislature, therefore, could still make a law on the subject regulating trade and commerce in, and the production, supply and distribution of 'foodstuffs' and the only question that would arise is one of repugnancy dealt with in Art. 254 of the Constitution. The executive power of the State being co-extensive with its legislative power under Entry 33, List III, it relates to all matters covered by the subject 'foodstuffs', trade and commerce in, and the production, supply and distribution thereof. This is, of course, subject to the limitation contained in Proviso to Art. 162 which directs that in any matter with respect to which the legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by

the Constitution or by any law made by Parliament upon the Union or authorities thereof.

23. This leads us to another aspect of the problem of considerable difficulty and importance. The subject 'search and seizure', is a field which has not come before the court with considerable frequency, but this is a hard fact of life which the citizen does encounter very often. The executive power of 'search and seizure' is a necessary concomitant of a welfare State. It tends to promote the well-being of the nation. Many questions arising in the field of search and seizure are factual in nature. They involve varying degrees of difference among the infinitely diverse facts. Every factual variation presents not only a new problem, but also a new constitutional question. It is a limitless area in which different issues may arise with vast variations of facts which are involved in each individual case. This is, indeed, a peculiar field in which the decisions of courts do not help in clarifying the law. The decisions in the field are of little precedential value because, the more the cases that are decided, the more new issues arise, through possible factual variations.

24. The check-posts and barriers on the borders of the State of Uttar Pradesh are set up under S. 28 of the U. P. Sales Tax Act, 1948 and are designed and meant to prevent evasion of sales tax and other dues. The constitutional validity of S. 28 and its cognate provisions, Ss. 28A to 28C has, rightly, if we may say so, not been challenged before us. From the point of view either of Entry 54, List II, or of Art. 301 of the Constitution, there is no question of any lack of competence in the State legislature to set up the check-posts and barriers on the State's borders. These provisions, read with the requirements of R. 83 (4) of the U. P. Sales Tax Rules, 1948 require that the owner, driver or any other person in charge of the vehicle or vessel shall, in respect of such goods carried in the vehicle or vessel as are notified under sub-sec. (1) of S. 28A, carry with him, a declaration in Form XXXI, a certificate in Form XXXII, a transit pass in Form XXXIV in duplicate, cash memo, bill of sale or challan and a trip-sheet in triplicate. The factual existence of these check-posts or barriers on the State's borders is not denied, nor their legality challenged. It is not suggested that the setting up of these check-posts is a restriction on the freedom of

trade, commerce and intercourse guaranteed under Art. 301 of the Constitution, or is such as directly and immediately restricts or impedes the free flow or movement of goods. It is also not suggested that these regulatory measures in setting up the check-posts on the State's borders are such as impede freedom of trade, commerce and intercourse. Just as inter-State trade and commerce must pay its way and be subject to taxation, persons engaged in such inter-State trade or commerce are equally subject to all regulatory measures. There is no reason why the check-posts or barriers set up by the State Government under S. 28 of the U. P. Sales Tax Act, 1948, cannot be utilised as a machinery for due observance of the laws, e.g. for verification and control of movement of wheat by traders on private account from the State of Uttar Pradesh to various other States.

25. The instructions conveyed by the State Government by the impugned teleprinter message dated March 31, 1981, were a direct sequel to the Centre's directives contained in its earlier teleprinter message. It was intended and meant to achieve three main objectives, namely, (1) to provide price support in wheat to purchasers with view to sustain, maintain and maximise the procurement of wheat; (2) to prevent hoarding and blackmarketing; and (3) to provide for equitable distribution and availability of wheat at fair prices. These directions were obviously meant to subserve the object of the legislation and were in public interest.

26. These cases were argued with much learning and resources, particularly with reference to the rule of law and the consequent limitations on the executive power of the State under Art. 162 to 'trench' upon the fundamental right to carry on trade or business guaranteed under Art. 19 (1) (g) and the freedom of trade, commerce and intercourse throughout the territory of India guaranteed under Art. 301 of the Constitution. It necessarily involves a claim by the State that the measures taken by the State Government by the impugned teleprinter message were nothing but regulatory measures to ensure that the excess stock of wheat held by a wholesale dealer, commission agent or a retailer is not transported to a place outside the State or from one district to another within the State and therefore were not a 'restriction' on the fundamental right to carry on trade or business guaranteed

under Art. 19 (1) (g) or on the freedom of trade, commerce and intercourse under Art. 301.

27. The quintessence of our Constitution is the rule of law. The State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts. In *State of Madhya Pradesh v. Thakur Bharat Singh*, (1967) 2 SCR 454: (AIR 1967 SC 1170), the Court repelled the contention that by virtue of Art. 162, the State or its officers may, in the exercise of executive authority, without any legislation in support thereof, infringe the rights of citizens merely because the legislature of the State has power to legislate in regard to the subject on which the executive order is issued. It was observed (at p. 1174 of AIR):

"Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority."

The same principle was reiterated by the Court in *Satwant Singh Sawhney v. Dr. Ramarathnam*, Assistant Passport Officer, New Delhi, (1967) 3 SCR 525 at p. 542: (AIR 1967 SC 1836 at p. 1845) and *Smt. Indira Nehru Gandhi v. Raj Narain*, (1976) 2 SCR 347 at p. 524: (AIR 1975 SC 2299 at p. 2324).

28. There can be no doubt that the Essential Commodities Act, 1955, as a 'law' within the meaning of Art. 302 of the Constitution imposing reasonable restrictions on the right to carry on trade and commerce as guaranteed by Art. 19 (1) (g) and Art. 301 of the Constitution. The object of the Act is to provide, in the interests of the general public, for the control, production, supply and distribution of, and trade and commerce in, certain essential commodities. To appreciate the points involved, it is necessary to set out the material statutory provisions. Sub-s. (1) of S. 3 of the Act provides as follows:

"3 (1). If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof any trade and commerce therein."

Sub-sec. (2) thereof provides that without prejudice to the generality of the powers conferred by sub-sec. (1) an order made thereunder may provide for any of the matters enumerated therein. Sub-sec. (5) provides that any order made under this section shall in the case of an order of a general nature or affecting a class of persons, be notified in the official Gazette. By virtue of the delegation of powers under S. 5 of the Act the State Government in relation to such matters and subject to such conditions as may be specified, may exercise the powers of the Central Government under S. 3. Cl. (j) of sub-sec. (2) of S. 3 provides that the Central Government or the State Government, as the case may be, may by order provide:

"For any incidental and supplementary matter, including, in particular, the entry, search or examination of premises, aircraft, vessels, vehicles or other conveyances and animals, and the seizure by a person authorised to make such entry, search or examination....."

Sub-secs. (1) and (2) of S. 6A of the Act, in so far as material, provide as follows:

"6A (1). Where any essential commodity is seized in pursuance of an order made under Section 3 in relation thereto, a report of such seizure shall, without unreasonable delay, be made to the Collector of the district or the Presidency town in which such essential commodity is seized and whether or not a prosecution is instituted for the contravention of such order, the Collector may, if he thinks it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied that there has been a contravention of the order, may order confiscation of—

(a) the essential commodity so seized;

6A (2). Where the Collector, on receiving a report of seizure or on inspection of any essential commodity under sub-sec. (1), is of the opinion that the essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do, he may—

(i) order the same to be sold at the controlled price, if any, fixed for such essential commodity under this Act or under any other law for the time being in force; or

(ii) where no such price is fixed, order the same to be sold by public auction:

Provided that in case of foodgrains, the Collector may, for its equitable distribu-

tion and availability at fair prices, order the same to be sold through fair price shops at the price fixed by the Central Government or by the State Government, as the case may be, for the retail sale of such foodgrains to the public."

29. Learned counsel for the State Government, in all fairness, does not assert that the impugned teleprinter message having regard to the requirements of sub-sec. (5), has the effect of a notified Order under S. 3 of the Act placing a ban on export of wheat from the State or imposing a restriction on inter-district movement of wheat. It is submitted that it only conveyed the instructions of the State Government requiring the Regional Food Controllers to be more vigilant to secure due observance of the laws. The question still remains whether the instructions conveyed by the teleprinter message had the force of law.

30. It is, therefore, to be considered whether the instructions conveyed by the State Government by the impugned teleprinter message were relatable to the two Control Orders and, therefore, could be considered to be a 'law' or an order having the force of law placing reasonable restrictions on the freedom to carry on any occupation, trade or business guaranteed under Art. 19 (1) (g) read with Art. 19 (6) of the Constitution or on the freedom of trade, commerce and intercourse throughout the territory of India guaranteed under Art. 301 of the Constitution. It is further to be considered whether the seizure of wheat in transit was with authority of law.

31. It is submitted that although the impugned teleprinter message dated March 31, 1981 was in the nature of executive instructions of the State Government to the Regional Food Controllers of the various regions to secure compliance with the two Control Orders, it had the force of law. It is pointed out that under licence conditions Nos. 11, 12 and 13 of the licence issued in Form B under cl. 4 of the 1976 Order, a dealer is required to comply with any direction that may be given by the State Government in regard to purchase, sale or storage for sale of foodgrains, to furnish such information relating to his business as may be demanded of him and to carry out such instructions as may, from time to time, be given, by the State Government or the licensing authority, and to give all facilities at all reasonable times, to the enforcement officer or the licensing

authority or any officer authorised by him or the State Government for the inspection of the stocks etc. It is further pointed out that the State Government of Uttar Pradesh has by Notification No. P-XXIX-Food-5-5 (42)/80 dated April 21, 1981, in exercise of the powers conferred by S. 3 read with S. 5 of the Act, with the prior concurrence of the Central Government, issued the Uttar Pradesh Foodgrains (Procurement and Regulation of Trade) (First Amendment) Order, 1981. By cl. 2 thereof, a new cl. 4 has been substituted in the 1978 Order by which the stock limit of dealers in foodgrains has been re-fixed, as it was of the opinion that it was necessary and expedient so to do for securing equitable distribution and availability of wheat at fair prices. The new cl. 4 provides that no wholesale dealer, commission agent or retailer, shall have in stock, wheat more than 250 quintals, 250 quintals and 20 quintals respectively, at any time. The re-fixation of the stock limit of a wholesale dealer at 250 quintals, at any time, is to ensure that wholesale dealers in the State of Uttar Pradesh do not try to corner stocks of wheat for purposes of speculation. The submission is that the State Government without placing any restriction on movement of wheat from the State of Uttar Pradesh to various other States, has virtually frozen the excess stock of wheat lying with wholesale dealers of foodgrains in the State. There is, in our opinion, considerable force in these submissions.

32. The real question at issue is whether or not the seizure of wheat was with the authority of law. The fundamental right to carry on trade or business guaranteed under Art. 19 (1) (g) or the freedom of inter-State trade, commerce and intercourse under Art. 301 of the Constitution, has its own limitations. The liberty of an individual to do as he pleases is not absolute. It must yield to the common good. Absolute or unrestricted individual rights do not and cannot exist in any modern State. There is no protection of the rights themselves unless there is a measure of control and regulation of the rights of each individual in the interests of all. Whenever such a conflict comes before the Court, it is its duty to harmonise the exercise of the competing rights. The Court must balance the individual's rights of freedom of trade under Art. 19 (1) (g) and the freedom of inter-State trade and commerce under Art. 301 as against the national interest.

Such a limitation is inherent in the exercise of those rights.

33. Under Art. 19 (1) (g) of the Constitution, a citizen has the right to carry on any occupation, trade or business and the only restriction on this unfettered right is the authority of the State to make a law imposing reasonable restrictions under cl. (6). The principles underlying in cls. (5) and (6) of Art. 19 are now well settled and ingrained in our legal system in a number of decisions of this Court, and it is not necessary to burden this judgment with citations. The expression 'reasonable restriction' signifies that the limitation imposed on a person enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable in all cases. The restriction which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19 (1) (g) and the social control permitted by cl. (6) of Art. 19, it must be held to be wanting in that quality.

34. The nature of the right alleged to have been infringed is that wholesale dealers in foodgrains from the State of Uttar Pradesh or elsewhere are prevented from moving their stock of wheat to various other States or from one district to another without the transaction being verified and duly endorsed by the Deputy Marketing Officer or the Senior Marketing Officer concerned. The other restriction on the enjoyment of their right placed by the impugned teleprinter message is that there should be physical verification at the check-posts on the State's borders. These steps were designed to prevent a price rise in wheat in the State of Uttar Pradesh and to prevent outflow of wheat from the State to various other States and from one district to another district within the State. The whole object was to ensure that the wholesale dealers in foodgrains did not corner stocks of wheat for the purpose of speculation. It cannot be said that they do not contain the quality of reasonableness or were not in the interests of the general public. In judging the validity of these restrictions, the Court has to strike a proper balance between the freedom

guaranteed under Art. 19 (1) (g) and the social control permitted by Art. 19 (6).

35. If, therefore, the seizure can be justified on the basis of any valid law, it cannot be held to be illegal. This is equally true of Art. 301. Art. 301 imposes a general limitation on all legislative power in order to secure that trade, commerce and intercourse throughout the territory of India shall be free. Having placed a general limitation on the legislative powers of Parliament and the State Legislatures, Art. 302 relaxes that restriction in favour of Parliament by providing that that authority may, by law, impose such restrictions on the freedom of trade, commerce and intercourse between one State and another and within any part of the territory of India in the public interest. Likewise, Art. 304 (b) provides that notwithstanding anything in Art. 301 or Art. 303, a legislature of a State may, by law, impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest, provided that no Bill or amendment for the purpose of cl. (b) shall be introduced or moved in the legislature of a State without the previous sanction of the President. Although Art. 301 guarantees that trade, commerce and intercourse throughout the country shall be free, the right to carry on inter-State trade and commerce may be subject to reasonable restrictions in the interests of the general public.

36. The word 'free' in Art. 301 does not mean freedom from laws or from regulations. Art. 301 guarantees freedom of trade, commerce and intercourse throughout the country from any State barriers. It declares that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. The whole object was to bring about the economic unity of the country under a federal structure, so that the people may feel that they are members of one nation. One of the means to achieve this object is to guarantee to every citizen the freedom of movement and residence throughout the country. That is achieved by Art. 19 (1) (d) and (e). No less important is the freedom of movement or passage of commodities from one part of the country to another. The progress of the country as a whole also requires free flow of commerce and intercourse as between different parts, without any bar-

rier. This freedom of trade, commerce and intercourse throughout the country without any 'State barriers' is not confined to inter-State trade but also includes intra-State trade as well. In other words, subject to the provisions of Part XIII, no restrictions can be imposed upon the flow of trade, commerce and intercourse, not only between one State and another, but between any two points within the territory of India whether any State border has to be crossed or not.

37. It is now well settled that the regulatory measures or measures imposing compensatory taxes do not come within the purview of the restrictions contemplated by Art. 301. The regulatory measures should, however, be such as do not impede the freedom of trade, commerce and intercourse. It cannot be said that the instructions conveyed by the State Government by the impugned teleprinter message imposing the requirement for the making of an endorsement by the Deputy Marketing Officer or the Senior Marketing Officer or the physical verification of stocks of wheat during the course of transit, are a 'restriction' on the freedom of trade, commerce and intercourse within the country, i.e., across the State or from one part of the State to another. These are nothing but regulatory measures to ensure that the excess stock of wheat held by a wholesale dealer, commission agent or a retailer is not transported to a place outside the State or from one district to another. Even if these requirements are construed to be a 'restriction' on the inter-State or intra-State trade the limitation so imposed on the enjoyment of the right cannot be considered to be arbitrary or of an excessive nature. Nor can it be said that such restrictions do not satisfy the test of reasonableness.

38. The question whether or not the seizure of the wheat was contravention of any order issued under S. 3 of the Act is pending investigation before the Additional District Magistrate (Civil Supplies), Agra. For the establishment of their rights the petitioners have still to establish that the wheat in question was bought by them in open market in Delhi and elsewhere and was being merely transported through the State of Uttar Pradesh in the course of inter-State trade and commerce. If that be so, then there was no contravention of any order issued by the Central Government under S. 3 or by the State Government under S. 3 read with S. 5 of the Act. If, on the contrary,

the wheat had been purchased by them at Agra or nearby places within the State of Uttar Pradesh, the question would arise whether such purchase, storage or sale of wheat was in contravention of any of the two Control Orders. In case there was such contravention of any of the provisions of the two Control Orders, then there was undoubtedly the power of search and seizure. The case of the State Government before us was that the source of power to effect the seizure was the two Control Orders. It was asserted that the wheat was not being transported during the course of inter-State trade and commerce from the Union Territory of Delhi to various other States, but had, in fact, been purchased at Agra and was being lifted from the State of Uttar Pradesh and had, therefore, to be seized at the check-post at Saiyan and at Agra. Under cl. 3 of the 1976 Order, no person can carry on business as a dealer or commission agent except and in accordance with the terms and conditions of a licence issued in that behalf by the licensing authority. The term 'dealer' is defined in S. 2 (c) of the Order to mean a person engaged in the business of purchase, sale or storage for sale of foodgrains. According to the State, the seized wheat had been purchased at Agra in the course of trade and they were not isolated transactions and, therefore, the Delhi traders committed contravention of cl. 3 of the 1976 Order. Cl. 14 thereof confers the power of search and seizure on an enforcement officer or the licensing authority or any other officer authorised by the State Government in that behalf. The expression 'enforcement officer' is defined in cl. 2 (e) of that Order and it includes the Chief Marketing Officer and in that capacity the Chief Marketing Officer, having reason to believe that contravention of the provisions of the Order had been, was being, or was about to be committed, had the power to seize the trucks at the check-post at Saiyan and effect the seizure of the trucks laden with wheat and bring them to the purchase point at Agra.

39. Furthermore, under cl. 4 of the 1978 Order, as amended, no person who is a wholesale dealer, commission agent or a retailer, shall have in stock wheat in quantities exceeding 250 quintals, 250 quintals and 20 quintals respectively at a time. Cl. 6 confers the power of search and seizure on an enforcement officer which term as defined in cl. 2 (d) likewise includes the Chief Marketing Inspector.

Under cl. 6 (d), the Chief Marketing Inspector, as an enforcement officer, had the power to seize any article in respect of which he had reason to believe that a contravention of the Order had been, was being, or was about to be committed. The fixation of the maximum limits of stocks of wheat at 250 quintals, 250 quintals and 20 quintals respectively, which a wholesale dealer, commission agent or a retailer may hold, at any one time, has necessarily the effect of freezing the excess stock of wheat lying with such dealer. This also results in preventing the movement of such excess stock of wheat from the State of Uttar Pradesh to various other States or from one district to another. The excess stock of wheat lying with such dealer, that is, a wholesale dealer, commission agent or a retailer, in truth and substance, became their 'unlicensed stock'. If really the Delhi traders had purchased the excess stock of wheat from wholesale dealers, commission agents or retailers in the State of Uttar Pradesh, as is alleged, it is possible to contend that there was a contravention of the provisions of cl. 4 of the 1978 Order. The question whether the seizure was for any contravention of any Order issued under S. 3 of the Act has to be determined by the Additional District Magistrate (Civil Supplies), Agra, on the evidence adduced by the parties before him.

40. The facts being controverted, the petitioners have no right to relief under Art. 32 of the Constitution. Each of the petitioners has filed a sheaf of documents showing that the wheat had been purchased in the open market in Delhi and elsewhere, that the trucks laden with their wheat were accompanied by the relevant bills, goods receipts, inter-State transit passes etc., that the trucks in question were allowed to cross the check-post at Kotwan on the border between the Union Territory of Delhi and the State of Uttar Pradesh but were seized either at the check-post at Saiyan on the border between the States of Uttar Pradesh and Madhya Pradesh or at Agra, while they were in transit through the State of Uttar Pradesh. It was also asserted that all the documents were seized and taken away by the Senior Marketing Inspector, and that he had given an acknowledgment of the same. Learned counsel appearing for the State vehemently contends that these documents were not shown to the authorities concerned and it is for the petitioners to

prove these documents before the Additional District Magistrate (Civil Supplies), Agra, in support of their claim. We cannot act on the documents because the transactions are still to be proved. It is asserted on behalf of the State Government that such documents could always be brought into existence, particularly when none of the transactions was effected through a Bank. This Court cannot obviously pronounce upon the genuineness of the transactions or record any finding on the basis of the documents when the facts are in dispute.

41. There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Art. 300A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Art. 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Art. 300A. The word 'law' in the context of Art. 300A must mean an Act of Parliament or of a State Legislature, a rule, or a statutory order, having the force of law, that is positive or State-made law. The decisions in *Wazir Chand v. State of Himachal Pradesh*, (1955) 1 SCR 408: (AIR 1954 SC 415) and *Bishan Das v. State of Punjab*, (1962) 2 SCR 69: (AIR 1961 SC 1570) are an authority for the proposition that an illegal seizure amounts to deprivation of property without the authority of law. In *Wazir Chand's* case (supra) the police in India seized goods in possession of the petitioner in India at the instance of the police of the State of Jammu and Kashmir. The seizure was admittedly not under the authority of law, inasmuch as it was not under the orders of any Magistrate; nor was it under Ss. 51, 96, 98 and 165 of the Code of Criminal Procedure, 1898, since no report of any offence committed by the petitioner was made to the police in India, and the Indian police were not authorised to make any investigation. In those circumstances, the Court held that the seizure was not with the authority of law and amounted to an infringement of the fundamental right under Art. 31 (1). The view was reaffirmed in *Bishan Das's* case (supra).

42. The effect of the Constitution (Fourth) Amendment Act, 1955, is that there can be no 'deprivation' unless there is extinction of the right to property. It is urged that the seizure of wheat was not with a view to extinction of the rights of the petitioners, but the property in the seized wheat was theirs. No doubt, the wheat had to be sold, as it was subject to speedy and natural decay, but the petitioners are entitled to the sale proceeds, if ultimately it is found by the Additional District Magistrate (Civil Supplies), Agra, that there was no contravention by them of an order issued under Sec. 3 of the Act. It is not necessary for us to deal with the question whether an illegal seizure amounts to 'deprivation' of property within the meaning of Art. 300A for purposes of this case, as the State Government does not dispute the right of the petitioners to the sale proceeds. It is true that the seizure was with intent to confiscate under S. 6A of the Act, but that would not make the seizure illegal. If, ultimately, it is found that there was contravention of an order issued under S. 3 of the Act.

43. If the facts were not in controversy and if the petitioners were able to prove that there was wrongful seizure of wheat by the State Government of Uttar Pradesh at the check-post of Saiyan on the border, while in transit, in the course of inter-State trade and commerce from the Union Territory of Delhi, perhaps, they would be entitled to the return of the seized wheat, or, in the alternative, to the payment of price thereof. The State contests the right of the Court to investigate into the facts, particularly when the matter is a fact in issue in the aforesaid proceedings before the Additional District Magistrate (Civil Supplies), Agra. Normally, it is not the function of this Court to investigate into facts in proceedings under Art. 32 of the Constitution when they are controverted with a view to discerning the truth. The matter must, in a situation like this, be left to the fact-finding body. For the establishment of their right to relief under Art. 32, the petitioners must, in our opinion, establish the necessary facts before the said Additional District Magistrate in the proceedings under S. 6A of the Act. If they fail to get relief in such proceedings, their obvious remedy lies in a suit for damages for wrongful seizure.

44. The question that the seizure were in reality for procurement of wheat

in furtherance of the directive of the Central Government, and not for breach of the two Control Orders and, therefore, were nothing but a 'colourable exercise of power', is dependent on facts to be found on investigation. Further, the question that there being no control price for wheat, the wheat should have been sold by public auction, is again a question that must be raised before the Additional District Magistrate (Civil Supplies), Agra, in the proceedings pending before him under S. 6A of the Act.

45. Turning to the petitions under Art. 32 of the Constitution by wholesale dealers of foodgrains from the State of Uttar Pradesh, learned counsel appearing for these petitioners challenged the impugned teleprinter message dated March 31, 1981, and the Notification No. P-XXIX-Food-5-5 (42)/80 dated April 21, 1981, issued by the State Government of Uttar Pradesh, by which cl. 4 of the Uttar Pradesh Foodgrains (Procurement and Regulation of Trade) Order, 1978, has been amended, particularly on three grounds, namely, (1) the impugned notification fixing the maximum limit of wheat permitted to be possessed by a wholesale dealer at 250 quintals, at a time, is an unreasonable restriction on the freedom of trade guaranteed under Art. 19 (1) (g) of the Constitution; (2) there is no distinction made between a wholesale dealer and a commission agent inasmuch as the maximum limit of wheat allowed to be possessed by them is the same, i.e., 250 quintals at a time and the fixation of such limit in the case of wholesale dealer is arbitrary, irrational and irrelevant and thus violative of Art. 14 of the Constitution; and (3) the instructions conveyed by the State Government by its teleprinter message dated March 31, 1981, placing restrictions on movement of wheat by traders on private account from the State of Uttar Pradesh to various other States and on inter-district movement of wheat within the State, were in breach of their fundamental right under Art. 19 (1) (g) read with Art. 301 of the Constitution.

46. The first and second contentions may conveniently be dealt with together. In order to appreciate these contentions, it is necessary to state a few facts:

During the year 1979-80, the country was victim to a very serious drought which affected both Kharif as well as Rabi crops. The Government of India, therefore, fixed a target of 9.5 million

tonnes of wheat to be purchased in the summer months of 1981 for the national buffer stock. It fixed the procurement price at Rs. 130 per quintal as against the support price of Rs. 127 per quintal recommended by the Agricultural Price Commission to provide a better incentive to the farmers. The procurement was carried out as a measure of price support without any restriction on movement from one State to another. However, some of the States were implementing local laws with regard to ensuring that the private trade adhered to the stock limit restrictions on them and did not try to corner stocks for speculation purposes. The original target fixed for procurement was 9.5 million tonnes but at the end of June only 6.5 million tonnes had been purchased, leaving a deficit of 3 million tonnes. The result was that the Government of India was thus forced to buy 1.5 million tonnes of wheat in the world market. The Government's procurement drive was mainly frustrated by wholesale dealers of foodgrains cornering the stocks of wheat by paying a price higher than the procurement price to the farmers.

47. The imperatives of the situation demanded that the speculative tendencies of the trade were curbed by strictly enforcing the stock limits of traders. Under original cl. 4 of the Uttar Pradesh Foodgrains (Procurement and Regulation of Trade) Order, 1978, a wholesale dealer, commission agent or a retailer could have in stock wheat not more than 750 quintals, 750 quintals and 100 quintals respectively, at any time. In view of the worsening situation in the national buffer stock and in the light of the experience gained during the past few years, the State Government was of the opinion that it was necessary and expedient to re-fix the stock limits of such dealers. This was expected to maximise procurement of wheat to meet the requirement of public distribution, as well as, the buffer stock.

48. It cannot be asserted that the restriction imposed by the State Government on wholesale dealers of wheat is either arbitrary or is of an excessive nature. The fixation of the stock limit of wheat to be possessed by wholesale dealers, at any time, at 250 quintals is an important step taken by the State Government to obviate hoarding and black-marketing in wheat which is in short supply. It is hardly necessary to emphasise the extent and urgency of the

evil sought to be remedied thereby. Perhaps fixation of the maximum limit of wheat permitted to be possessed by a wholesale dealer at 250 quintals, at a time, is too low, but the restriction so imposed cannot be treated to be arbitrary or of an excessive nature, beyond what is required in the national interest. It is a matter of common knowledge that wholesale dealers of foodgrains mainly operate in large cities and towns and have the means and capacity to manipulate the market by withholding stocks of a commodity. There was need to check such speculative tendencies in the trade. It was therefore felt expedient to re-fix the stock limit of wheat for wholesale dealers at 250 quintals at a time, as in the case of a commission agent. The underlying idea is that the wholesale dealers should be allowed to continue their trading activities within reasonable limits. The fixation of stock limit at 250 quintals implies that wholesale dealers can have at any time, in stock, a wagon-load of wheat. In *Krishan Lal Praveen Kumar v. State of Rajasthan*, W. P. Nos. 4839-4845/81, decided on September 4, 1981, this Court has interpreted the words 'at any time' as meaning 'at any given time'. This means that a wholesale dealer should not have in stock more than 250 quintals at a time. But there is nothing to prevent a wholesale dealer from entering into a series of transactions during the course of the day. This Court in *Krishan Lal Praveen Kumar's case* (supra) and *Suraj Mal Kailash Chand v. Union of India*, W. Ps. 3334-43/81, decided on September 25, 1981* has upheld the validity of a similar notification dated March 23, 1981, issued by the State Government of Rajasthan in exercise of the powers conferred by cl. 18 of the Rajasthan Trade Articles (Licensing and Control) Order, 1980, fixing the maximum limit of wheat to be possessed by a dealer at any one time at 200 quintals, on the ground that it is a reasonable restriction by the State Government within the meaning of Art. 19 (6) of the Constitution. In view of these decisions, it is difficult to conceive as to how the contention based on Art. 19 (1) (g) of the Constitution can survive.

49. True it is, if the governmental action is arbitrary or there is no rational nexus to the object sought to be achieved it is liable to be struck down as violative of Art. 14 of the Constitution. The State Government has adopted vari-

*Reported in 1981 UJ (SC) 725

ous measures in the interest of the general public for the control of production, supply and distribution of, and trade and commerce in, essential commodities. To obviate hoarding and blackmarketing in foodstuffs, it has promulgated the Order. It introduces a system of checks and balances to achieve the object of the legislation, i.e., to ensure equitable distribution and availability of essential commodities at fair prices. It cannot be said that looking to the prevailing conditions, the imposition of such restrictions does not satisfy the test of reasonableness. Nor can it be said that the fixation of such stock limit is arbitrary or irrational having no nexus to the object sought to be achieved and is, therefore, violative of Art. 14. On the contrary, the limitation imposed fixing a stock limit for a wholesale dealer at 250 quintals is a reasonable restriction within the meaning of Art. 19 (6) of the Constitution.

50. One further point requires to be noticed. The contention that the action taken by the State Government in issuing the impugned teleprinter message amounts to an 'intrusion' on the fundamental right to carry on trade or business under Art. 19 (1) (g) or on the freedom of trade, commerce and intercourse under Art. 301 of the Constitution appears to be wholly misconceived. As already stated the instructions conveyed by the State Government by the impugned teleprinter message imposing the requirement for the making of an endorsement by the Deputy Marketing Officer or the Senior Marketing Officer or the physical verification of stocks of wheat during the course of transit, are not a 'restriction' on the fundamental right to carry on trade or business guaranteed under Article 19 (1) (g) or on the freedom of trade, commerce and intercourse under Art. 301. These are nothing but regulatory measures to ensure that the excess stock of wheat held by a wholesale dealer, commission agent or a retailer is not transported to a place outside the State or from one district to another. Even if these requirements are considered to be a 'restriction' on inter-State or intra-State trade, that is, across the State or from one part of the State to another, the limitation so imposed on the enjoyment of the right cannot be considered to be arbitrary or of an excessive nature and thus violative of Art. 19 (1) (g) or Art. 301 of the Constitution. The State Government in its return has stated that there

is no ban on the export of wheat from the State of Uttar Pradesh to various other States or from one district to another within the State, subject to the making of an endorsement by the Deputy Marketing Officer or the Senior Marketing Officer concerned. The petitioners who are wholesale dealers of foodgrains in the State of Uttar Pradesh are, therefore, free to carry on their business within the permissible limits, i.e., they may carry on their trade or business or enter into inter-State or intra-State transactions of wheat subject to the stock limit of 250 quintals, at a time.

51. In the result, the writ petitions must fail and are dismissed. The stay orders passed by the Court, from time to time, stand vacated. Formal orders for vacating stay granted in these matters need not be issued. There shall be no order as to costs.

Petitions dismissed.

AIR 1982 SUPREME COURT 51

(From: Madras)

S. MURTAZA FAZAL ALI AND
V. B. ERADI, JJ.

Criminal Appeal No. 213 of 1981, D/- 25-2-1981.

K. Duraiswamy, Appellant v. State of Tamil Nadu, Respondent,

Penal Code (45 of 1860), S. 53 — Sentence — Mitigating circumstance — Accused Government servant losing service consequent on conviction — Accused likely to lose pensionary benefits — Sentence reduced to period already undergone i.e. about three months — In lieu of sentence remitted, fine of Rs. 500 imposed and in default accused to undergo three months' R. I. (Para 2)

FAZAL ALI, J.:— This appeal by special leave is confined to the question of sentence only.

2. After having heard learned counsel for the parties and going through the judgment of the courts below we feel that there is some room for reduction in the sentence of the appellant. The appellant was a Government servant and by virtue of his conviction he has lost his service and is also likely to lose his pensionary benefits. He has already served three months. In the peculiar facts and circumstances of this case, we therefore uphold the conviction and reduce the

KY/LY/F303/81/MVJ

sentence to the period already served which, according to the appellant, is about three months. In lieu of the sentence remitted we impose a fine of Rs. 500, in default three months' rigorous imprisonment. The fine to be paid within two months from today and the entire fine realised shall be paid to the temple.

3. The appeal is disposed of accordingly.

Sentence modified.

AIR 1982 SUPREME COURT 52

A. C. GUPTA AND R. B. MISRA, JJ.

Transfer Petn. (Civil) No. 46 of 1980, D/- 9-3-1981.

Beni Shankar Sharma and others, Petitioners v. Surya Kant Sharma and others, Respondents.

Civil P. C. (5 of 1908), S. 25 — Suit for declaration that impugned family settlement was void and for its cancellation and fresh partition — Suit filed in Court at Gauhati — Petition under S. 25 to Supreme Court for transfer of suit to High Court at Calcutta — Deed of settlement executed and registered in Calcutta — Bulk of properties situated in Calcutta — Records relating to properties maintained at Calcutta — Attesting witnesses residing in Calcutta and it was difficult for them to find time to go to Gauhati — Plaintiff also having business in Calcutta — Petitioner having no residence at Gauhati and one of them the karta was very old — On facts and circumstances, held, it would be expedient for the ends of justice to have the suit tried at Calcutta — Case directed to be transferred to Calcutta High Court. (Para 3)

ORDER:— This is an application under Section 25 of the Code of Civil Procedure seeking transfer of title Suit No. 26 of 1980 (Surya Kant Sharma v. Beni Shankar Sharma) filed in the Court of Additional District Judge No. I, at Gauhati to an appropriate Court in Calcutta. The suit is for a declaration that the deed of family settlement executed on June 9, 1978 is void, for cancellation of the same and fresh partition of the properties mentioned in the deed. The suit has been instituted by a minor who was aged about five years and five months when the suit was filed with his mother as next friend. It appears that the deed was signed by the minor's father and grandfather who

have been impleaded as some of the defendants in the suit.

2. The reasons for seeking transfer of the suit as stated in the application are as follows: Petitioner 1 who is the Karta of the joint family of the petitioners is about 75 years old. The petitioners have no place of stay in Gauhati and it would be impossible for the petitioners who are all residents of Calcutta to defend the suit if it is tried in Gauhati. The deed of family settlement was executed and registered in Calcutta. Almost all who are likely to be witnesses in the suit live in Calcutta. The records relating to the properties in question were all maintained at Calcutta. It would be extremely difficult for the two attesting witnesses to the deed, one a practising advocate of the Calcutta High Court and the other a merchant of Calcutta, to find time to go to Gauhati to depose. On the other hand the respondents who have their place of business in Calcutta would have no difficulty if the suit were tried in Calcutta. According to the petitioners the suit was filed in Gauhati only with a view to preventing the petitioners from properly defending the suit in Gauhati. It is also alleged in the application for transfer that the respondents who in their counter-affidavits filed in this Court oppose the transfer of the suit from Gauhati to Calcutta in fact resides in Calcutta. From the addresses of the defendants (as plaintiffs) as appearing from the cause title of the plaint this statement seems to be correct. However, in their counter-affidavits these defendants-respondents (sic plaintiffs-respondents) assert that they now live in Assam. Some documents have also been filed to show that the minor plaintiffs and his parents now live in Jorhat in Assam but these documents are not supported by an affidavit. It further appears from the list of properties mentioned in the schedules to the deed of family settlement which is sought to be cancelled that the bulk of the properties is situate in Calcutta.

3. Considering the facts and circumstances of the case we think that it would be expedient for the ends of justice to have the suit tried at Calcutta. Accordingly we direct that Title Suit No. 26 of 1980 pending in the Court of the Additional District Judge, No. I at Gauhati be transferred from the said court to the original side of the Calcutta High Court. The suit will proceed in the transferee court from the stage at which it was

transferred to it. There will be no order as to costs.

Petition allowed.

AIR 1982 SUPREME COURT 53

V. D. TULZAPURKAR, J.

Criminal Writ Petn. No. 1793 of 1981, D/-12-5-1981.

Sunil Dutt, Petitioner v. Union of India and others, Respondents.

(A) Constitution of India, Arts. 32, 226 — Dismissal of earlier writ petition for habeas corpus — Does not operate as bar to maintainability of another writ petition for that purpose. (Para 3)

(B) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 (3) — Preventive detention — Copies of documents and material in support of grounds of detention not supplied along with grounds of detention — Detention order is illegal. (Constitution of India, Arts. 21 and 22 (5)).

Where the documents and materials in support of the grounds on the basis of which the detention order has been made, the same being *ex hypothesi* in existence at the time of the issuance of the detention order and framing of the grounds, were not supplied to the detenu along with the grounds and consequently the detenu was prevented from making effective representation against his detention, the detention order was illegal as such non-supply would clearly amount to a violation of the safeguard guaranteed under Art. 22 (5) of the Constitution. AIR 1981 SC 814, Rel. on. (Para 6)

It is true that under sub-sec. (3) of S. 3 of the Act it is provided that for the purpose of Art. 22 (5) of the Constitution, the communication to a person detained in pursuance of the detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention. But, this provision under which five days' period in normal circumstances and fifteen days' period in exceptional circumstances has been provided relates to the supply or communication of the grounds on which the order of detention has been made to the detenu. It has no reference to

the documents and material on the basis of which the detention order has been made. (Para 6)

Cases Referred: Chronological Paras
AIR 1981 SC 814; 1981 Cri LJ 353 5

TULZAPURKAR, J.:— By this petition for issuance of a writ of habeas corpus, the petitioner has challenged his father's continued illegal detention under S. 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, 'the COFEPOSA Act') and has sought his release.

2. A few facts giving rise to the petition may be stated. Bakshi Balraj Dutt, the detenu, was arrested and detained on July 11, 1980 pursuant to a detention order passed by the Administrator, Delhi Administration on July 9, 1980 under S. 3 (1) of the COFEPOSA Act. On the very date on which he was detained i.e. on July 11, 1980, grounds of detention running into 8 closely typed pages were supplied to him. However, copies of the documents and the statements relied upon by the detaining authority, on the basis of which the grounds of detention were made out, were served upon the detenu as late as on July 19, 1980. The detenu made an incomplete representation on July 26, 1980—incomplete because copies of documents referred to in the grounds were served on him on August 4, 1980. The detention was confirmed by the Central Government on Aug. 23, 1980 after obtaining the Advisory Board's opinion. It appears that on September 12, 1980 the detenu filed a writ petition by way of habeas corpus seeking release but the same was dismissed by this Court in limine on Sept. 24, 1980. Thereafter another representation was made by the detenu through his wife to the detaining authority (the Administrator) in Jan., 1981 and that representation was disposed of by rejection on April 25, 1981. The present petition seeking release of the detenu has been filed by the petitioner on April 3, 1981.

3. It is well settled that the dismissal of the earlier writ petition of habeas corpus on Sept. 24, 1980 will not operate as a bar to the maintainability of the present writ petition and no point in that behalf was raised before me by counsel for the respondents.

4. Counsel for the petitioner has raised two contentions in support of the writ petition. In the first place he has contended that all the documents, whether relied upon or referred to in the grounds

of detention, had not been supplied to the detenu along with the grounds of detention and such failure constituted a breach of the guarantee under Art. 22 (5) of the Constitution and since such failure has affected the right of the detenu to make a proper and effective representation any further detention in breach of the safeguard would be illegal. Secondly, it is contended that there has been an undue and unexplained delay of more than four months in the matter of consideration of the representation which the detenu had sent through his wife and further that the said representation has been disposed of by the detaining authority (the Administrator) by not applying its independent mind but after getting influenced by the Central Government decision in the matter. It is unnecessary for me to consider the second contention urged by counsel for the petitioner as, in my view, the first contention is sufficient to dispose of this habeas corpus petition.

5. It was not disputed before me that along with the grounds of detention which were served on the detenu on July 11, 1980, none of the documents, either relied upon or referred to in the grounds, were served upon him. Admittedly, the service of such documents was delayed up to July 19, 1980. It is obvious that those very documents must have formed the basis of making out the grounds of detention and ex hypothesi these documents were in existence and available for being served upon the detenu along with grounds of detention. Further, documents referred to in the grounds were served as late as on August 4, 1980, with the result that the detenu was required to send his incomplete representation which he did on July 26, 1980. Clearly the safeguard guaranteed under Art. 22 (5) of the Constitution was violated. In *Kamla Kanyalal Khushalani v. State of Maharashtra*, (1981) 1 SCC 748: (AIR 1981 SC 814) this Court has observed as follows:

"It is of the utmost importance that all the necessary safeguards laid down by the Constitution under Article 21 or Article 22 (5) should be complied with fully and strictly and any departure from any of the safeguards would void the order of detention. The law of preventive detention has now to satisfy a two-fold test: (1) that the protection and the guarantee afforded under Art. 22 (5) is complied with, and (2) that the procedure is just and reasonable. If a procedure under Article 21 has to be rea-

sonable, fair and just, then the words 'effective representation' appearing in Article 22 (5) must be construed so as to provide a real and meaningful opportunity to the detenu to explain his case to the detaining authority in his representation. In this view of the matter, unless the materials and documents relied on in the order of detention are supplied to the detenu along with the grounds, the supply of grounds simpliciter would give him not a real but merely an illusory opportunity, to make a representation to the detaining authority."

6. It is true that under sub-sec. (3) of S. 3 of the COFEPOSA Act it is provided that for the purpose of Art. 22 (5) of the Constitution, the communication to a person detained in pursuance of the detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention. This provision under which five days' period in normal circumstances and fifteen days' period in exceptional circumstances has been provided relates to the supply or communication of the grounds on which the order of detention has been made to the detenu. It has no reference to the documents and material on the basis of which the detention order has been made and it is quite clear that there is no reason why the documents and materials in support of the grounds on the basis of which the detention order has been made, the same being ex hypothesi in existence at the time of the issuance of the detention order and framing of the grounds, should not be supplied to the detenu along with the grounds. Non-supply of such material and documents along with the grounds would clearly amount to a violation of the safeguard guaranteed under Art. 22 (5) of the Constitution. Since in the instant case that safeguard afforded to the detenu has been violated, further detention of the detenu would be illegal and void.

7. In the circumstances the writ petition succeeds and the detenu is directed to be released forthwith.

Petition allowed.

AIR 1982 SUPREME COURT 55

(From : Punjab and Haryana)

D. A. DESAI AND**BAHARUL ISLAM, JJ.**

Criminal Appeal No. 763 of 1981,
(arising out of SLP (Cri) No. 890 of
1981). D/- 18-9-1981.

Randhir Singh, Appellant v. State of
Punjab, Respondent.

Penal Code (45 of 1860), Ss. 300
Cls. (1), (3); 302 and 304 Part II — Mur-
der — Only one injury — Accused a
young college going boy — Some al-
tercation between his father and de-
ceased — Held, in the circumstances
that the accused committed offence un-
der Sec. 304 Part II — Conviction al-
tered from Sec. 302 to Sec. 304 Part II.
Decision of Punjab & Haryana High
Court, Reversed.

In order to bring the case within
Cl. (3) of S. 300, I.P.C. it must be pro-
ved that there was an intention to inflict
that particular bodily injury which in
the ordinary course of nature was suf-
ficient to cause death. In other words,
that the injury found to be present was
the injury that was intended to be in-
flicted, AIR 1958 SC 465 and AIR 1981
SC 1552 Foll. (Para 8)

Having regard to the totality of cir-
cumstances, viz., there is only one in-
jury, that the weapon was not carried
by the accused in advance, that there
was no premeditation, that he was a
young college going boy, that there was
some altercation between the deceased
and his father and that the death oc-
curred nearly after six days, one can
only say that the accused must be at-
tributed the knowledge that he was like-
ly to cause an injury which was likely
to cause death. It cannot be said that
the accused intended to cause that parti-
cular injury. Under these circumstan-
ces, the appellant is shown to have com-
mitted an offence under Sec. 304,
Part II. Decision of Punjab & Haryana
High Court, Reversed. (Paras 8, 9, 10)
Cases Referred: Chronological Paras
AIR 1981 SC 1552: 1981 Cri LJ 1136 8
AIR 1958 SC 465: 1958 SCR 1495: 1958
Cri LJ 818 8

DESAI, J.:— Appellant Randhir Singh
alias Dhire has been convicted for hav-
ing committed an offence under S. 302.

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Indian Penal Code in that on July 4,
1979, he gave a blow with a Kassi on
the head of Mohan Singh who under the
impact of the blow fell down on the
ground. He was removed to the hospital
where he died on July 10, 1979. Autopsy
on the dead body of Mohan Singh was
conducted by P. W. 1 Dr. S. C. Garg on
the very day. He noticed the following
injuries:

1. A stitched wound on the right
frontal parietal region 2" in length. It
was approximately bone deep.

2. A surgical wound on the right tem-
poral region for burr (sic) hole.

3. There was bruising of the right eye
with ecchymosis of the bulbar con-
junctive.

On internal examination the autopsy
surgeon found under the seat of injury
No. 1 a fissured fracture extending from
the side of the wound to the base of the
skull covering the middle cranial fossa.

2. The appellant and his father
Shamsher Singh were tried by the learn-
ed Sessions Judge for having committed
an offence under Sec. 302, I.P.C. and
Sec. 302 read with Sec. 34, I.P.C. res-
pectively. The learned Sessions Judge
convicted both of them for the offence
with which each of them was
charged and sentenced each of them to
suffer imprisonment for life. Shamsher
Singh, the second accused was also
directed to pay a fine of Rs. 3,000/- in
default to suffer rigorous imprisonment
for one year.

3. In the appeal preferred by both
the accused a Division Bench of the
High Court of Punjab & Haryana held
that the charge against Shamsher Singh
was not brought home and he was given
benefit of doubt and acquitted. Convic-
tion of the appellant and the sentence
imposed upon him were confirmed.

4. When the special leave petition
came up before this Court, a notice was
issued limited to the nature of offence
and sentence only and special leave
was also limited to the same.

5. Appellant was aged about 18½
years on the date of occurrence being
July 4, 1979. According to the prosecu-
tion he gave one blow with kassi. This
blow was given on July 4, 1979, at about
12 noon. Victim Mohan Singh died in
the hospital on July 10, 1979. In the
opinion of the medical officer who car-
ried out the autopsy death occurred on
account of intra-cranial haemorrhage as

a result of injury No. 1. In the opinion of medical officer this injury was sufficient in the ordinary course of nature to cause death. In the background of these facts, the question arises, as to what is the offence committed by the present appellant. Unfortunately the High Court has not dealt with this aspect. The High Court took into consideration the fact that there were three injuries on the dead body and that injury no. 1 is attributed to the present appellant. Thereafter there is an observation which is contrary to record. It reads as under:—

"Other two injuries are just bruises and simple in nature."

This is factually incorrect because injury No. 2 is not an injury caused by any one but was a surgical wound caused for the purpose of performance of an operation on the deceased. Injury No. 3 is a bruise and is an injury of a trivial character. It is not even the prosecution case that the present appellant gave more than one blow with kassi or with any other weapon.

6. It is at this stage necessary to recall the circumstances under which the appellant is alleged to have given one blow with kassi. Facts alleged and held proved are that deceased Mohan Singh had constructed a house in the phirni (outer circuitous road) of village Khasi Khurd. He had installed a water pump near his house. Appellant and his father belonged to village Khasi Kalam and they had purchased agricultural land adjacent to the Phirni of village Khasi Khurd. On the date of the occurrence Smt. Amar Kaur widow of the deceased was cleaning utensils at the water pump and the deceased was washing his hands and face. Appellant started digging earth from village Phirni and started throwing it towards the water pump. Mohan Singh asked him not to do so but he did not desist and in the meantime the father of the appellant arrived there with a kassi. There ensued an altercation between the father of the appellant on the one hand and deceased Mohan Singh on the other. At that stage according to the prosecution Shamsher Singh, father of the appellant exhorted the appellant to attack the deceased and under these circumstances the appellant is alleged to have given one blow with sharp edge of Kassi on the head of Mohan Singh and this blow proved fatal after a period of six days.

7. In the circumstances discussed herein it is not possible to hold that the appellant intended to cause death of the deceased and Para I of Sec. 300, Indian Penal Code would not be attracted.

8. The contention is that Para III of Sec. 300, I. P. C. would be attracted in that the appellant not only intended to cause that particular injury which is alleged to have been inflicted and the injury alleged to have been inflicted was sufficient in the ordinary course of nature to cause death. In a small village upon a minor quarrel, the appellant a young boy aged 18½ years, studying in the engineering college and not shown to have been armed, gave one blow by Kassi brought by his father; could it be said that he intended to cause that particular injury? Merely because the blow landed on a particular spot on the body divorced from the circumstances in which the blow was given it would be hazardous to say that the accused intended to cause that particular injury. The weapon was not at hand. He did not possess one. Altercation took place between his father and the deceased and he gave blow with a Kassi. In our opinion in these circumstances it would be difficult to say that the accused intended to cause that particular injury. True it is that the injury proved fatal and was opined in the ordinary course of nature to be sufficient to cause death. We need not dilate upon this subject in view of a very recent decision of this Court in Jagrup Singh v. State of Haryana decided on May 7, 1981 (reported in AIR 1981 SC 1552). Sen. J. speaking for the Court, after referring to various previous decisions on the subject including the one relied upon in this case, Virsa Singh v. State of Punjab, 1958 SCR 1495: (AIR 1958 SC 465), observed that in order to bring the case within Para III of Sec. 300, I. P. C., it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. In other words, that the injury found to be present was the injury that was intended to be inflicted. We find it difficult to hold in the circumstances herein set out that such was the intention of the appellant.

9. In our opinion, having regard to the totality of circumstances, viz., there is only one injury, that the weapon was not carried by the appellant in advance.

that there was no premeditation, that he was a young college going boy, that there was some altercation between the deceased and his father and that the death occurred nearly after six days, one can only say that the appellant must be attributed the knowledge that he was likely to cause an injury which was likely to cause death. Under these circumstances, in our opinion, the appellant is shown to have committed an offence under Sec. 304, Part II of the Indian Penal Code and he must be convicted for the same and sentenced to suffer rigorous imprisonment for five years,

10. Accordingly this appeal is allowed and the conviction of the appellant is altered from Sec. 302, I. P. C. to Sec. 304, Part II, I. P. C. and the sentence of life imprisonment is reduced to rigorous imprisonment for five years.

Appeal allowed.

AIR 1982 SUPREME COURT 57

(From: Delhi)

Y. V. CHANDRACHUD C. J. AND
A. VARADARAJAN, J.

Jagdish Prasad, Appellant v. State of Delhi and another, Respondents.

Criminal Appeal No. 17 of 1980, D/- 15-9-1981.

Prevention of Food Adulteration Act (36 of 1954), Ss. 2 (ia) (f) and 7 -- Insect infested — Proof — Sample of Amchoor Sabat found insect infested by Public Analyst three days after taking of sample — Extent of insect infestation not mentioned in his report — About one year thereafter Director of Central Food Laboratory reporting that sample was "highly insect infested" — Held that there was no evidence to show the extent of insect infestation in the sample when it was taken — It was, however, found highly insect infested by the Director, Central Food Laboratory — These circumstances lead to conclusion when sample was taken it was insect infested within the meaning of S. 2 (ia) (f). (Para 4)

CHANDRACHUD, C. J.:— A sample of Amchoor Sabat, made from the peels of unripe mangoes, was taken from the appellant's shop on October 3, 1970. Three days later the analyst found that the sample was "insect infested." He

did not mention in his report the extent of insect infestation but he stated that 23.8 per cent of the pieces of Amchoor Sabat were insect infested. The report did not mention that any living or dead insects were discovered in any part of the sample.

2. The case was fixed for arguments in the trial court on Aug. 5, 1971. On August 17, the prosecution applied to the learned trial Judge under Section 13 (2) of the Prevention of Food Adulteration Act, 1954 asking that the sample should be sent to the Director of Central Food Laboratory for analysis. The sample was accordingly sent to the Director on August 23, who reported on September 1, 1971 that the sample was 'highly insect infested'.

3. The learned trial Judge convicted the appellant by his judgment dated November 26, 1971 but in appeal the appellant was acquitted by the learned Additional Sessions Judge by a judgment dated February 10, 1972 on the ground mainly that the sample was not stated to be unfit for human consumption and secondly, that there was no evidence on the record to show as to what was the state of the sample on the date on which it was taken, that is to say, on October 3, 1970. The Municipal Corporation of Delhi filed an appeal in the High Court of Delhi against the judgment of the learned Additional Sessions Judge. The High Court set aside that judgment and restored that of the trial court under which the appellant was sentenced to six months' rigorous imprisonment and to pay a fine of Rs. 1,000/-. Being aggrieved, the appellant has filed this appeal by special leave.

4. The offence took place nearly eleven years ago and there is no evidence on the record to show what was the extent of insect infestation in the sample when it was taken. A rather interesting feature of this case is that when, on the application of the prosecution, the report of the Director of Central Food Laboratory was brought on the record of the case, the earlier report of the analyst was replaced by that report. The result is that though there is evidence on the record to show that the sample was "highly insect infested" on September 10, 1971 when the Director of the Central Food Laboratory gave his report there is no evidence on the record to show as to what was the state of the

sample on October 3, 1970. Shri Bawa Gurcharan Singh argues that in this state of affairs the appellant is entitled to an acquittal but we are not inclined to accept that submission. The evidence on the whole can be accepted as justifying the conclusion that on the date on which the sample was taken, it was insect infested within the meaning of section 2 (ia) (f) of the Act.

5. At the time when the offence was committed on October 3, 1970 Court could pass less than the minimum sentence if there were good reasons for doing so and they had also the power to release the offender on probation in appropriate cases. Taking all the circumstances of the case into account we are of the opinion that this is not proper case for imposing any substantive sentence. While upholding the conviction therefore, we set aside the sentence of imprisonment and fine imposed on the appellant and direct that he should be released on probation on his executing a bond for a period of one year in the sum of Rs. 2000/-. We may mention that the appellant has stopped his grocery business long since.

Order accordingly.

AIR 1982 SUPREME COURT 58

(From : Patna)

D. A. DESAI AND R. B. MISRA, JJ.

Criminal Appeal No. 571 of 1981,
D/- 24-7-1981.

State of Bihar, Appellant v. Gulab Chand Prasad, Respondent,

Essential Commodities Act (10 of 1955), Ss. 3 and 7 — Bihar Essential Articles (Display of Prices and Stocks) Order (1977), Sch. I, Item 24 — Prosecution for possessing unaccounted soda ash — Omission to mention provisions of Order which was violated — Proceedings not liable to be quashed on that ground, Decision of Patna High Court Reversed.

A complaint was filed against a dealer for possessing unaccounted soda ash but the Order, provision of which was violated, was not mentioned. It was alleged that accused was liable to be punished under S. 7 of the Act. Order was not shown to be in existence to the High Court when the complainant moved the

High Court for quashing the proceedings. High Court quashed the proceedings holding the complaint to be mala fide. In appeal to Supreme Court, the Order was shown to be in existence and in force. Two years had lapsed since prosecution was launched.

Held, that the existence of the Order could not be ignored and proceedings disposed of as if no Order was there. Order of the High Court was liable to be quashed. Complaint was to be proceeded with in accordance with law. Decision of Patna High Court Reversed.

(Paras 5, 6)

JUDGMENT :— We have heard Mr. Bhagat, learned counsel for the appellant-State, and Mr. Goburdhan, learned counsel for the respondent.

2. This is a peculiar case. The State of Bihar had issued an order described as Bihar Essential Articles (Display of Prices and Stocks), Order, 1977 (hereinafter referred to as the Order). It was published in the Bihar Government Gazette Extraordinary dated Sept. 10, 1977. It came into force from the date of publication, as provided in sub-cl. (3) of cl. (1). Sub-cl. (a) of cl. (2) of the Order defines 'article' to mean any essential commodity mentioned in Schs. I and II appended to the Order and further confers powers on the State Government to include any other articles if found necessary. Cl. (3) casts an obligation on the dealer to display at a conspicuous place near the entrance of his business premises a list of prices and stocks of all the articles mentioned in Schedule I in which he deals. Schedule I placitum 24 sets out 'soda ash (for washing purposes)' as one of the articles covered by the Order. This Order is issued in exercise of the powers conferred by S. 3 of the Essential Commodities Act, 1955 (hereinafter referred to as the Act). As a corollary the breach of its provisions would be punishable under S. 7 of the Act.

3. It is alleged by the prosecution that the respondent is a dealer in soda ash. Upon an inspection of his premises on April 13, 1979 the visiting officer found an unaccounted stock of 13 bags of soda ash, in relation to which, according to the complainant, the respondent could not produce the necessary papers. Subsequently, the respondent submitted some cash memos and also pointed out that he had sold soda ash to various parties. May be, that would be for him

to establish. The fact remains that there was unaccounted soda ash as complained of in the possession of the respondent and the complainant alleged that this would be violative of the Order. A complaint was filed alleging the aforementioned fact, though of course not mentioning the Order, provision of which was violated, simultaneously stating that the respondent has committed an offence punishable under S. 7 of the Act. It may be mentioned that further allegations in the complaint were that the respondent has committed offences under Ss. 420 and 471 of I. P. C.

4. It appears that the respondent moved the High Court for quashing the proceedings. It was alleged on his behalf that soda ash is not an essential commodity or an article in respect of which there is any statutory order compelling the dealer in the commodity either to display a list of prices or declare the stock. This submission found favour with the High Court. Surprisingly, learned counsel appearing on behalf of the State did not point out the Order now relied upon as having been issued under the Act or any other Order, if there be one under the Defence of India Rules. The High Court was constrained to observe that not only the complaint is frivolous but it was absolutely mala fide because if there was no order imposing any obligation on the dealer of a commodity to display the price list or to declare the stock, there will be no question of a dealer not accounting the stock of any such article and if there was no such order, absence of explanation in respect of such a commodity or otherwise may not, according to the High Court, entail any liability in law.

5. We are not disposed to make any observation at this stage on any part of the controversy between the parties because a statutory Order covering soda ash is in existence and in force. Mr. Bhagat, learned counsel for the appellant-State, assured us that it is in force. If it is in force, a dealer in any of the commodities mentioned in Schedule I will have to comply with cls. 3 and 4 of the Order. Whether there is any violation of the statutory provisions enacted in cls. 3 and 4 of the Order is a matter to be adjudicated. But it

would be difficult to subscribe in the face of the Order published in the Gazette the copy of the Gazette having been submitted to us to ignore the existence of the Order. The whole basis of the approach of the learned Judge of the High Court gets knocked out once the Order is shown to be existing and in force. May be, the High Court would have acted as we propose to do if the Order was shown to the learned Judge hearing the matter. Undoubtedly, Mr. Goburdhan told us that nearly two years have elapsed since the prosecution was launched. That is a fact. However, it would be unwise to ignore the existence of a subsisting order and to dispose of a proceeding as if no such order is there.

6. We accordingly allow the appeal, set aside the order of the High Court quashing the complaint and direct that the complaint be proceeded with in accordance with law.

Appeal allowed

AIR 1982 SUPREME COURT 59

(From: Bombay)

A. D. KOSHAL AND R. B. MISRA, JJ.

Criminal Appeal No. 804 of 1981, D/- 14-10-1981.

Tukaram Dnyanu Gurav and others, Appellants v. State of Maharashtra, Respondent.

Penal Code (45 of 1860), Ss. 307 and 149 — Members of unlawful assembly armed with deadly weapons — Only one of them firing shots resulting in injuries covered by S. 307 — No proof that other accused used weapons during assault — They were, still, liable to be convicted under Ss. 307 and 149 — However, they did not use their weapons was a mitigating circumstance — Their sentence was reduced to rigorous imprisonment for two years. Decision of Bombay High Court Reversed. (Para 1)

JUDGMENT:— The courts below have found that all the four appellants along with two others were members of an unlawful assembly, each one being armed with a deadly weapon. Accused No. 1 alone is shown to have fired shots which resulted in injuries covered by S. 307 of the Indian Penal Code. No overt act apart from membership of the unlawful

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assembly has been brought home to any of the appellants except that they were also armed with deadly weapons at the time of the occurrence. Their conviction for an offence under S. 307 read with S. 149 of the Indian Penal Code is thus well-founded but the fact that it is not proved that any of them actually used their respective weapons during the assault is certainly a mitigating circumstance. We are of the opinion that the sentence awarded to them by the courts below is excessive. We reduce it in the case of each of them to rigorous imprisonment for two years. The appeal is accepted to that extent only, it being otherwise dismissed.

Order accordingly.

AIR 1982 SUPREME COURT 60

(From: Patna)

**D. A. DESAI AND
BAHARUL ISLAM, JJ.**

Civil Appeal No. 2433 of 1981, D/-
10-9-1981.

Bihar State Electricity Board and others, Appellants v. Bhowra Kankanee Collieries Ltd. and another, Respondents.

Civil P. C. (5 of 1908), Ss. 96, 100 — Appeal — Failure of appellant to file Vakalatnama in spite of Court's instruction — Amounts to non-compliance with procedural directions — Involves negligence — Appellant directed to pay costs to respondents. (Para 6)

JUDGMENT:— We have heard learned Attorney-General for the appellants and learned counsel Mr. K. J. John for the respondents.

2. In our opinion, this is not a matter which should have been dealt with in a highly technical manner as has been done by the High Court. To identify the hypertechncality resorted to by the High Court, a few facts may be stated.

3. Respondents filed a suit against the appellants and the suit ended in a declaration that the present appellants have no right to charge the amount claimed and a refund was decreed to the extent of Rs. 70,897. Against this decree in favour of the respondents, the appellants preferred an appeal, being FA 1248/1972, in the High Court of Patna (Ranchi Bench). During the pendency of the appeal from 1972 to 1978, it

transpired that the letter of authority (Vakalatnama) of the learned advocate appearing for the present appellants, was not placed on record. It appears that there was an order to remove this defect and the order appeared to be of a peremptory character. Probably, there was some laxity on the part of the appellants and the defect was not removed and the appeal was dismissed on Jan. 2, 1978 on the short ground of failure to remove the defect and non-compliance with the peremptory order No. 10 made by the Court on Sept. 30, 1975.

4. An application for restoration of the First Appeal being MJC 17/1978 was moved on behalf of the appellants. Again, there was some peremptory order on Dec. 10, 1979 and it transpired that, there was some failure to comply with the same and the miscellaneous application stood dismissed. A fresh application No. MJC 12 of 1980 (R) was moved for restoration of First Appeal No. 1248/1972. This application was strenuously opposed on behalf of the respondents.

5. It appears that in the meantime the appeal migrated from Patna to Ranchi and the contention was raised that there was no notice of transfer of the appeal from Patna to Ranchi and therefore the appeal should be restored to file. The High Court was not impressed and it dismissed the application observing that in view of the fact that MJC 17/1978 was filed for restoration of First Appeal 1248/1972 and which was dismissed for non-compliance of a peremptory order, another application for restoration of the First Appeal is not maintainable. With this observation the application was dismissed, resulting in confirmation of the order dismissing the First Appeal. Hence this appeal by special leave.

6. Undoubtedly, there is some negligence but when a substantive matter is dismissed on the ground of failure to comply with procedural directions, there is always some element of negligence involved in it because a vigilant litigant would not miss complying with procedural direction more so such a simple one as filing Vakalatnama. The decision in the appeal on merits, (sic) appellants will pay the costs of the respondents.

Order accordingly.

AIR 1982 SUPREME COURT 61

(From : Rajasthan)

A. P. SEN AND

A. VARADARAJAN, JJ.

Civil Appeal No. 2483 of 1981, (arising out of Special Leave Petn. No. 9020 of 1980), D/- 22-9-1981.

Abdul Karim Allarkha, Appellant v. State of Rajasthan and another, Respondents.

Rajasthan Land Acquisition Act (24 of 1953). Sec. 18 — Acquisition of land for Government — Award of compensation — Reference by Collector under S. 18 for reduction of compensation at the instance of Government — Reference is competent.

It is clear from S. 18 that a reference may be had not only at the instance of the person interested who has not accepted the award or the amendment thereof, but also at the instance of the authority acquiring land, i.e. on whose behalf or the company for which the acquisition is being made. It could not be contended that the award made by the Land Acquisition Officer being an offer made on behalf of the State Government, the reference by the Collector under S. 18 of the Act for reduction of the amount of compensation awarded by him was not competent, AIR 1979 SC 404 Foll. (Para 3)

No doubt, the award made by the Land Acquisition Officer is in the nature of an offer, but it is subject to the right of the State Government to ask for a reference under S. 18 of the Act. Under S. 18 of the Act, one of the questions that may be referred by the Collector for the determination of the court is as to the objection to the amount of compensation awarded. If the State Government is dissatisfied with the award made by the Land Acquisition Officer, it may apply for a reference under S. 18 for reduction of the amount of compensation. The reference made by the Collector under Sec. 18 of the Act as to the amount of compensation is, therefore, competent, (1905) ILR 32 Cal 605 (PC) Foll.

(Para 3)

Cases Referred : Chronological Paras
AIR 1979 SC 404 : (1979) 2 SCC 572 3
(1905) ILR 32 Cal 605 (PC) 3

SEN, J.:— The two points involved in this appeal by special leave from a judgment from the Rajasthan High

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Court are first as to the competency of the reference made by the Collector under S. 18 of the Rajasthan Land Acquisition Act, 1953 (hereinafter called 'the Act'), at the instance of the State Government, for reduction of the amount of compensation awarded by him and second, as to whether the Collector by his award having made an offer on behalf of the State Government, could have made a reference under S. 18 of the Act at all. For obvious reason, these questions were not raised before the High Court. The acquisition was not under the Land Acquisition Act, 1894, but under the Rajasthan Land Acquisition Act 1953. As compared with S. 18 of the Land Acquisition Act, 1894, the provisions of S. 18 of the Rajasthan Land Acquisition Act, 1953 are much wider in scope.

2. The facts are few and are not in dispute. The Land Acquisition officer awarded a total compensation of Rs. 6,92,317.34. We are not concerned with the compensation awarded for the building and the structures, but only with the compensation for the land acquired. On a reference under S. 18 of the Act made by the Collector at the instance of the State Government Department for which the property was acquired, the learned Civil Judge, Ajmer, reduced the amount of compensation for the land to Rs. 40/- per sq. yd. on appeal, the High Court enhanced the compensation amount to Rs. 42/- per sq. yd. and further granted an amount of Rs. 5,000/- as compensation for the electric fittings and fixtures.

3. There can be no doubt as to the competency of the reference under S. 18 of the Act which reads as follows:

"18 (1). The State Government department on whose behalf or the company for which acquisition is being made or any person interested who has not accepted the award or the amendment thereof may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the court whether his objection be to the measurement of the land, the amount of the compensation, the amount of costs allowed, the persons to whom it is payable, or the apportionment of the compensation among the persons interested."

It is clear upon the plain terms of the Section that a reference may be had

not only at the instance of the person interested who has not accepted the award or the amendment thereof, but also at the instance of the authority acquiring land, i.e. on whose behalf or the company for which the acquisition is being made. The contention that the award made by the Land Acquisition Officer being an offer made on behalf of the State Government, the reference by the Collector under S. 18 of the Act for reduction of the amount of compensation awarded by him was not competent cannot be accepted. In *Mohammed Hassanuddin v. State of Maharashtra*, (1979) 2 SCC 572 : (AIR 1979 SC 404) one of us (Sen, J.) observed : "While it is true that the Collector in making the award under Section 11 acts as an agent of the Government, he in making a reference to the court under Section 18 acts as a statutory authority." Ibid at p. 580 (of SCC) : (at p. 409 of AIR). It is well settled after the decision of the Privy Council in *Ezra v. Secretary of State for India*, (1905) ILR 32 Cal 605 that the legislature has assigned to the Collector the position of an agent of the Government while making an award under S. 11. No doubt, the award made by the Land Acquisition Officer is in the nature of an offer, but it is subject to the right of the State Government to ask for a reference under S. 18 of the Act. Under S. 18 of the Act, one of the questions that may be referred by the Collector for the determination of the court is as to the objection to the amount of compensation awarded. If the State Government is dissatisfied with the award made by the Land Acquisition Officer, it may apply for a reference under S. 18 for reduction of the amount of compensation. The reference made by the Collector under S. 18 of the Act as to the amount of compensation was, therefore, competent. Both the points must, therefore, be answered in favour of the respondent.

4. Two other questions are raised, one relating to award of solatium on the enhanced amount of compensation and the other to the grant of interest thereon. The High Court has enhanced the amount of compensation awarded for the land to Rs. 42/- per sq. yd. as against Rs. 40/- per sq. yd. awarded by the learned Civil Judge, and has also awarded Rs. 5,000/- towards the electric fittings and fixtures. The rest of the judgment passed by the learned Civil

Judge has been maintained. We wish to clarify that the enhanced amount of compensation will carry the usual solatium at the rate of 10 per cent. as also interest at the rate of 4 per cent. per annum thereon from the date of the award of the Land Acquisition Officer till realisation. There shall be no order as to costs.

Order accordingly.

AIR 1982 SUPREME COURT 62

(From: Punjab)

P. N. BHAGWATI AND
A. VARADARAJAN, JJ.

Cri. Appeal No. 444 of 1981, D/- 20-4-1981.

Kundan Singh, Appellant v. State of Punjab, Respondent.

Penal Code (45 of 1860), Ss. 307, 324 — Victims receiving simple injuries from gun shots fired by accused — Accused not intending to injure them — Conviction of accused under S. 307 — Held, not proper in the facts of the case — Conviction altered to one under S. 324 — Sentence reduced to that already undergone. Decision of Punjab High Court, Reversed. (Para 1)

BHAGWATI, J.:— We are of the view that having regard to the facts and circumstances of the present case and particularly in view of the fact that P.W. 6 and P.W. 7 were in the courtyard of their house when the appellant fired gun shots and he could not, therefore, have intended to injure them, the conviction of the appellant under S. 307, I.P.C. was not justified. We think that the conviction of the appellant could be maintained only under S. 324 of the I.P.C. since P.W. 6 and P.W. 7 received simple injuries. We accordingly allow the appeal and alter the conviction of the appellant to one under S. 324 of the I.P.C. for causing simple injuries to P.W. 6 and P.W. 7 and since the appellant has already suffered imprisonment for about 16 months, we direct that the sentence imposed on the appellant be reduced to that already undergone by him and he may be set at liberty forthwith.

Appeal allowed.

KY/KY/F230/81/VNP/MVJ

AIR 1982 SUPREME COURT 63

(From: Andhra Pradesh)

R. S. SARKARIA AND**O. CHINNAPPA REDDY, JJ.**

Civil Appeals, Nos. 1719 to 1720 of 1969, D/- 9-10-1979.

Bangaru Narasingha Rao Naidu etc. etc., Appellants v. The Revenue Divisional Officer, Vizianagaram. Respondent.

Land Acquisition Act (1 of 1894), Section 23 — Acquisition of land — Compensation — Market value — Determination. Decision of Andhra Pradesh High Court, Partly Reversed.

There cannot be any doubt that the best evidence of the market value of the acquired land is afforded by transactions of sale in respect of the very acquired land, provided of course there is nothing to doubt the authenticity of the transactions. (Para 2)

In the instant case, the disputed lands were acquired for the purpose of constructing houses for sweepers and scavengers who had been uprooted from where they were previously living. The Land Acquisition Officer calculated average price of land under deeds of sale of land in the neighbourhood. On reference made under Sec. 18 the Subordinate Judge enhanced compensation. He, primarily, took into account sale deeds in respect of parcels of land out of the very acquired land. In appeal the High Court reduced the award of compensation made by the Subordinate Judge to that of the Land Acquisition Officer.

Held, that the interference with the award by the High Court was illegal. Decision of Andhra Pradesh High Court Partly Reversed. (Para 6)

CHINNAPPA REDDY, J.:— Pursuant to a notification dated 26th Nov. 1952, issued under Sec. 4 of the Land Acquisition Act, land of the extent of one acre 31566 square ft. in T. S. Nos. 1123/1A and 1D and 1123/1B and 1D belonging to the appellants in these two appeals was acquired for the purpose of constructing houses for sweepers and scavengers who had been uprooted from where they were previously living as a result of the extension of the K. S. Hospital in Visakhapatnam. The Land Acquisition Officer first separately calculated the average price of land under

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deeds of sale of land in the neighbourhood in each of the three years 1950, 1951 and 1952 and thereafter took the average of the three figures so contained. He awarded compensation at that final average rate which was Rs. 6.14 annas per sq. yard. On references made under Sec. 18 of the Land Acquisition Act at the instance of the claimants the learned Subordinate Judge of Visakhapatnam enhanced the compensation to Rs. 11/- per sq. yard. The learned Subordinate Judge, primarily, took into account Exhibits B11 and B12 which were sale deeds dated 12th Sept. 1950 and 29th Jan. 1951. in respect of parcels of land out of the very acquired land. Before the learned Subordinate Judge, the Land Acquisition Officer, placed reliance upon certain transactions of sale in respect of plots of land in the neighbourhood of the acquired land. In regard to the plots of land covered by Exhibits B1 to B10, the learned Subordinate Judge expressed the view that those plots of land were purchased by the very squatters who were in possession of the land and, therefore, they did not fetch a good price. Similarly in regard to the plots of land covered by Exhibits B13, B14 and B16 the learned Subordinate Judge observed that they fetched a low price because they were very near the public latrine. The land Acquisition Officer preferred appeals to the High Court of Andhra Pradesh. The High Court reduced the compensation to that awarded by the Land Acquisition Officer. The High Court while not disagreeing with the views of the learned Subordinate Judge that Exhibits B11 and B12 were genuine transactions, also took into consideration the transactions covered by Exhibits B1 to B10, B13, B14, B15 and B16. The claimants have preferred these two appeals.

2. There cannot be any doubt that the best evidence of the market value of the acquired land is afforded by transactions of sale in respect of the very acquired land, provided of course there is nothing to doubt the authenticity of the transactions. In the present case we have two such transactions of sale, of parcels of the acquired land, Exhibits B-11 and B-12. The learned Subordinate Judge relied upon them in assessing the compensation. The High Court also recorded a finding that Exhibits B-11 and B-12 were genuine transactions. The High Court, however, thought that the

price under these documents might have been inflated as it was known even in 1948 that some land was proposed to be acquired for providing houses to the sweepers and scavengers. We are afraid that this was pure speculation on the part of the High Court. In fact what was proposed to be acquired in 1948 was some other land. That proposal was later abandoned and there is nothing to indicate that there was any proposal for the acquisition of land in T. S. No. 1123 at the time when the sales under B-11 and B12 were effected. The Land Acquisition Officer who gave evidence as R. W. 1 stated as follows: "I have no personal knowledge to state that the transactions were not genuine or that the price mentioned in the sale deeds are not genuine. We also have no other evidence to show that the said transactions were not genuine."

3. The High Court appeared to place reliance upon Exhibits B-1 to B-10. We consider the High Court was wrong in thinking that Exhibits B-1 to B-10 could afford proper guidance in the matter of assessing compensation for the acquired land. Apart from the circumstance that they related to plots of land which were not parcels of T. S. No. 1123, the evidence quite clearly shows that those plots of land were in the possession of squatters. The High Court thought that because the sales were voluntary sales the price which was paid under Exhibits B-1 to B-10 was a fair price. That is not true. That is to ignore the circumstance noticed by the learned Subordinate Judge that lands in the occupation of squatters will not fetch a fair price unless the lands are cleared of squatters.

4. In regard to the transactions B-13, B-14 and B-16, the High Court referred to the evidence of P. W. 1 to the effect that the lands covered by them were very near a public latrine but observed that there was no other evidence apart from the evidence of that witness. The High Court gave no reason for rejecting the testimony of P. W. 1.

5. We may also mention here that the High Court stated repeatedly that no objection was taken by the claimants to Exhibits B-1 to B-10, B-13, B-14 and B-16 before the Land Acquisition Officer. We are unable to understand what the High Court precisely meant by this statement. If the High Court meant

that the claimant should have opposed the consideration of these documents by the Land Acquisition Officer a clear answer is that they did not have the opportunity of doing so since the Land Acquisition Officer did not inform them in advance on which documents he proposed to rely for making his award. In any case, whether objection was raised or not before the Land Acquisition Officer it was open to the claimants to adduce evidence before the Court in order to point out that the Land Acquisition Officer ought not have relied upon the transactions on which he relied and that he should have been guided by some other transactions. We notice that the conclusion of the High Court was considerably coloured by the statement repeatedly made that the claimants did not object to these documents before the Land Acquisition Officer.

6. We are satisfied that the High Court should not have interfered with the award of compensation made by the learned Subordinate Judge for the acquired land at the rate of Rs. 11/- per sq. yard. In this regard, the judgment of the High Court is set aside and the judgment of the Trial Court is restored. In regard to certain other matters relating to interests and compensation for severance etc. no argument was advanced before us and the judgment of the High Court is confirmed to that extent. The appeals are allowed as indicated, with cost throughout.

Appeals partly allowed.

AIR 1982 SUPREME COURT 64

(From: Madhya Pradesh)

P. N. BHAGWATI AND

A. VARADARAJAN, JJ.

Criminal Appeal No. 246 of 1981, D/- 6-3-1981.

Jora and another, Appellants v. State of Madhya Pradesh, Respondent.

Penal Code (45 of 1860), S. 302 — Murder — Sentence — Accused about 76 years old — Accused not guilty of any overt act in strangulating deceased — Accused in jail for about 19 months — Held, sentence imposed on him must be reduced to that already undergone by him to meet ends of justice. Decision of (M. P.) High Court, Reversed. (Para 2)

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JUDGMENT:— Special leave granted to Jora.

2. We think that having regard to the peculiar facts and circumstances of the present case and particularly in view of the fact that Jora is about 76 years old and he was not guilty of any overt act in strangulating the deceased Jagrant and he had been in jail for about 19 months, it will meet the ends of justice, if the sentence imposed on Jora is reduced to that already undergone by him. We accordingly allow the appeal so far as Jora is concerned and reduce the sentence imposed on him to that already undergone and direct that he be set at liberty forthwith.

Appeal allowed.

AIR 1982 SUPREME COURT 65

A. D. KOSHAL, A. P. SEN AND
V. BALAKRISHNA ERADI, JJ.

Writ Petns. Nos. 7477-79 of 1981 and Special Leave Petns. (Civil) Nos. 9116 and 8735 of 1981, D/- 2-12-1981.

M/s. Sukhwinder Pal Bipan Kumar and others etc. etc., Petitioners v. State of Punjab and others, Respondents.

(A) Punjab Foodgrains Dealers Licensing and Price Control Order (1978), Cls. 11 (1) Second Proviso (Inserted by First Amendment Order of 1980 with effect from 27-3-1980) and 13 — Second Proviso does not violate Arts. 14, 19 (1) (g) and 301 — Power to suspend of licence without giving opportunity — Not arbitrary, unguided, uncanalised or unreasonable — It is a measure of social control in public interest. (i) Constitution of India, Arts. 14, 19 (1) (g) and (6), 39 (b) and 301; (ii) Essential Commodities Act (1955), S. 3; (iii) Licence — Suspension of).

The second proviso to sub-cl. (1) of cl. 11 of the Order does not confer upon the licensing authority, unguided, uncontrolled and uncanalised power to suspend a licence and is not void by reason of Art. 14 of the Constitution on ground that it dispenses with the requirement of giving reasonable opportunity before suspending the licence. It affords reasonable safeguards.

(Paras 10, 11)

The power of suspension conferred by the second proviso to sub-clause (1) of

Cl. 11 of the Order is by way of an interim measure, pending the holding of an inquiry as to whether there is any breach which must result in cancellation of the licence. It is true that the suspension of licence is a drastic measure, if taken without affording to the dealer a reasonable opportunity of stating his case, but it is a measure of social control in the interests of the community. The power of suspension is a necessary concomitant of the power to grant a privilege or a licence. By reason of cl. 3 of the Order, no dealer can engage in the business of purchase and sale of foodgrains except under and in accordance with the terms and conditions of a licence issued by the licensing authority in that behalf. The dealers are free to carry on their trade or business in foodgrains, subject to their complying with the terms and conditions of their licence and the provisions of the Order. But, if they commit a breach, they must face the consequence that their licence may be cancelled or suspended under sub-cl. (1) of Cl. 11 of the Order. They must face the further consequence of suspension of their licence during the pendency or in contemplation of the proceedings for cancellation of the licence, if the breach is of such a nature that it must result in the cancellation of a licence. In view of the acute shortage of foodstuffs in the country, the Government is bound to take all effective steps to implement the provisions of the Essential Commodities Act and the various Orders issued under S. 3 thereof, from time to time. The conferral of the power of suspension of the licence of a foodgrains dealer under the second proviso to sub-cl. (1) of Cl. 11 of the order during the pendency or in contemplation of the proceedings for cancellation of his licence, is an important step taken by the Government to subserve the object of the legislation and is in public interest. It cannot be said that the second proviso to sub-cl. (1) of Cl. 11 of the Order does not satisfy the test of reasonableness. It seeks to strike a proper balance between the freedom of trade or business guaranteed under Art. 19 (1) (g) and the social control permitted by cl. (6) of Art. 19 of the Constitution.

(Para 9)

It cannot be said that repeated orders of suspension of a licence can be passed under the second proviso in respect of the same breach. (Para 10)

The second proviso carves out an exception to the first proviso. It dispenses with the requirement of affording a reasonable opportunity to the licensee in case of suspension of his licence during the pendency or in contemplation of the proceedings for cancellation. It must, however, be read along with the main enacting provision in sub-cl. (1), and, if so construed, the power of suspension during the pendency of an inquiry cannot be exercised unless there is contravention of any of the terms and conditions of the licence or any of the provisions of the Order. Secondly, it provides for a reasonable safeguard, in that it limits the period of suspension. The period of suspension would necessarily depend upon the nature of the breach, and in no case, can it exceed ninety days. During this period, the licensing authority is expected to complete the inquiry and take a decision as to the cancellation or otherwise of the licence. Thirdly, as a check upon possible injustice that might result from an improper exercise of the power of suspension of a licence by the licensing authority under the second proviso, there is an additional safeguard to a dealer by way of an appeal to the Director, Food and Supplies, under Cl. 13 of the Order. It will be presumed that the discretion vested in such highest authority will not be abused. (Para 11)

(B) Constitution of India, Arts. 32, 226 — Mala fides — Proof — Onus lies heavily on person alleging it — Facts constituting mala fides supported by affidavit that they are "correct to the best knowledge" of deponent — Nature and source of knowledge not disclosed with sufficient particularity — Affidavit will not be one as required by law — Court justified in refusing to investigate allegations of mala fides. (i) Civil P. C. (1908), O. 19, R. 3 — (ii) Administrative law — Bias). (Para 12)

SEN, J.:— These petitions under Article 32 of the Constitution and the connected special leave petitions mainly challenge the constitutional validity of the second proviso to sub-clause (1) of Cl. 11 of the Punjab Foodgrains Dealers

Licensing and Price Control Order, 1978 (for short 'the Order'), as inserted by the Punjab Foodgrains Dealers Licensing and Price Control (First Amendment) Order, 1980, with effect from March 27, 1980, as violative of Arts. 14 and 19 (1) (g) of the Constitution, as also the legality and propriety of the action of the licensing authorities in suspending the licences held by the petitioners.

2. It appears that the licences held by the petitioners who are foodgrains dealers in the State of Punjab, have been suspended by orders passed by the District Food and Supplies Controllers, Faridkot and Bhatinda, for a period not exceeding ninety days under the second proviso to sub-cl. (1) of Cl. 11 of the Order. The orders of suspension of licence in each of these cases rest on the allegation that the licensee has committed a breach of conditions Nos. 4, 8 and 10 of the licences. The petitioners have all been served with notices under the first proviso to sub-cl. (1) of Cl. 11 of the Order to show cause why their licences should not be cancelled.

3. Some of the petitioners accept that in the recent past their licences were suspended under the second proviso to sub-cl. (1) of Cl. 11 of the Order for alleged breach of the licence conditions for having sold large quantities of wheat to dealers outside the State without disclosing the names of the purchasers in their stock registers. It, therefore, appears that the present suspension is for a repeated breach. These petitioners have filed the petitions under Art. 32 of the Constitution for protection of their fundamental rights to carry on trade or business as foodgrains dealers within the meaning of Art. 19 (1) (g) read with Art. 301 thereof.

4. The other petitioners allege that because they approached the High Court by way of petitions under Art. 226 of the Constitution, complaining against restrictions placed on movement of wheat by rail, their licences have been suspended under the second proviso to sub-cl. (1) of Cl. 11 of the Order as a punitive measure. Incidentally, these petitioners had first moved the High Court under Art. 226 of the Constitution, but the High Court dismissed their writ petitions summarily. The connected spe-

cial leave petitions are directed against the order of the High Court.

5. The State of Punjab in the counter-affidavits filed by the Deputy Secretary to the Government of Punjab, Food and Supplies Department, Chandigarh, and the District Food and Supplies Controller, Faridkot, controvert the allegations of the petitioners. It is stated that the petitioners have been served with show-cause notices under the first proviso to sub-cl. (1) of Cl. 11 of the Order for cancellation of their licences, for breach of the licence conditions.

6. Learned counsel for the petitioners seek to assail the constitutional validity of the second proviso to sub-cl. (1) of Cl. 11 of the Order on two grounds. First of these is that the second proviso to sub-cl. (1) of Cl. 11 of the Order, inserted by the Punjab Foodgrains Dealers Licensing and Price Control (First Amendment) Order, 1980, confers upon the licensing authority unguided, uncontrolled and arbitrary power to suspend a licence and it, therefore, infringes the fundamental right to carry on trade or business guaranteed under Art. 19 (1) (g) of the Constitution. It is also urged that the conferral of such unguided, uncanalised and arbitrary power on the licensing authority, without any guidelines whatsoever, makes the impugned proviso unconstitutional as offending Art. 14 of the Constitution. The second contention is that the suspension of the foodgrains dealers' licences held by the petitioners was mala fide and motivated, as in reality it was not on account of any breach of the licence conditions on their part, but on extraneous considerations. It is said that the real purpose was to prevent them from exporting wheat from the State of Punjab to various other States in the course of inter-State trade and commerce within the meaning of Art. 301 of the Constitution. We are unable to accept any of these contentions.

7. To make the point intelligible, it is necessary to deal with the scheme of the Order. Cl. 3 of the Order provides that no person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence granted by the licensing authority. Cl. 7 (3) thereof provided that where an application for grant of a li-

cence is not refused, the licensing authority shall grant a licence in Form B subject to the conditions specified therein. Condition No. 4 of the licence enjoins that the licensee shall submit to the licensing authority concerned fortnightly returns in Form C of the stock receipts and deliveries. Condition No. 8 of the licence lays down that the licensee shall exhibit the price list of foodgrains held by him for sale and it shall indicate separately the prices of different varieties of foodgrains. Condition No. 10 thereof interdicts that the licensee shall give all facilities at all reasonable times to the licensing authority or any officer authorised by it or the State Government for the inspection of his stocks and accounts at any shop, godown or other place used by him for the storage, sale or purchase of foodgrains etc. Cl. 11 of the order provides for cancellation or suspension of a licence. The power of cancellation or suspension of a licence which was subject to the giving of a reasonable opportunity to the licensee of stating his case was not adequate and sufficient to effectively check and control flagrant breaches of the provisions of the order, during the pendency of the proceedings for cancellation of a licence. The State Government, therefore, inserted the second proviso to sub-cl. (1) of Cl. 11 of the Order. Clause 11 of the Order, as amended, in so far as material, reads:

"Cancellation or suspension of licence:

(1) If a licensee or his agent or any person acting on his behalf contravenes any of the terms and conditions of his licence or any provision of this Order then, without prejudice to any action that may be taken against him, the licensing authority may by an order in writing, cancel or suspend licence in so far as it relates to the foodgrains in respect of which contravention has been made:

Provided that no order shall be made under this clause unless the licensee has been given a reasonable opportunity of stating his case;

Provided further that the licensing authority may suspend a licence without giving a reasonable opportunity to the licensee of stating his case for a period not exceeding ninety days during the pendency or in contemplation of the proceedings for cancellation of his licence."

8. It is plain upon the terms of sub-cl. (1) of Clause 11 of the Order that it deals with the substantive punishment of cancellation or suspension of a licence. The power of cancellation or suspension of a licence of a foodgrains dealer under sub-cl. (1) of Cl. 11 or the order is, however, subject to the limitation contained in the first proviso. The power of cancellation or suspension of a licence is, therefore, not exercisable by the licensing authority until it affords a reasonable opportunity to the licensee of stating his case. This necessarily entails the holding of an inquiry into the question of the alleged breach. The making of an inquiry into the breach of licence conditions by a foodgrains dealer is a time-consuming process which may many a time verily frustrate the purpose and object of the order. The State Government was evidently of the opinion in the light of the experience gained in the recent past, that for effective control and regulation of the trade in foodgrains, it was necessary and expedient that the licensing authority should be clothed with powers to suspend a licence on the spot when it detects contravention of any of the terms and conditions of the licence or any of the provisions of the order. Otherwise, a foodgrains dealer after committing flagrant breaches of the terms and conditions of his licence and the provisions of the order, may, with impunity, carry on his trading activities without any check or control.

9. The power of suspension conferred by the second proviso to sub-cl. (1) of Cl. 11 of the Order is by way of an interim measure, pending the holding of an inquiry as to whether there is any breach which must result in cancellation of the licence. It is true that the suspension of licence is a drastic measure, if taken without affording to the dealer a reasonable opportunity of stating his case, but it is a measure of social control in the interests of the community. The power of suspension is a necessary concomitant of the power to grant a privilege or a licence. By reason of Cl. 3 of the Order, no dealer can engage in the business of purchase and sale of foodgrains except under and in accordance with the terms and conditions of a licence issued by the licensing authority in that behalf. The dealers are free to carry on their trade or business

in foodgrains, subject to their complying with the terms and conditions of their licence and the provisions of the Order. But, if they commit a breach, they must face the consequence that their licence may be cancelled or suspended under sub-cl. (1) of Cl. 11 of the Order. They must face the further consequence of suspension of their licence during the pendency or in contemplation of the proceedings for cancellation of the licence, if the breach is of such a nature that it must result in the cancellation of a licence. As already stated, the power of suspension is a necessary adjunct of the power to grant a licence. In view of the acute shortage of foodstuffs in the country, the Government is bound to take all effective steps to implement the provisions of the Essential Commodities Act (1955) and the various orders issued under Sec. 3 thereof, from time to time. The conferral of the power of suspension of the licence of a foodgrains dealer under the second proviso to sub-cl. (1) of Cl. 11 of the Order during the pendency or in contemplation of the proceedings for cancellation of his licence, is an important step taken by the Government to subserve the object of the legislation and is in public interest. It cannot be said that the second proviso to sub-cl. (1) of Cl. 11 of the Order does not satisfy the test of reasonableness. It seeks to strike a proper balance between the freedom of trade or business guaranteed under Art. 19 (1) (g) and the social control permitted by Cl. (6) of Art. 19 of the Constitution. It is, therefore, difficult to hold that the second proviso to sub-cl. (1) of Cl. 11 of the Order is of an excessive nature beyond what is required in the interests of the general public.

10. There is no warrant for the submission that the second proviso to sub-cl. (1) of Cl. 11 of the Order confers upon the licensing authority unguided, uncontrolled and uncanalised power to suspend a licence and is, therefore, void by reason of Art. 14 of the Constitution. It is urged that the impugned orders of suspension in these cases are for a period of 89 days, and the licensing authority would, as in the past, pass fresh orders of suspension ad infinitum completely paralysing the business of the petitioners. There is no substance in the contention that repeated orders

of suspension of a licence can be passed under the second proviso in respect of the same breach. The second proviso expressly states that the licensing authority may suspend a licence for a period not exceeding ninety days. It, therefore, fixes the period of suspension. From its very terms, it is obvious that these cannot be repeated orders of suspension of a licence under the second proviso in respect of the same breach. Normally, the order of suspension under the second proviso to sub-cl. (1) of Cl. 11 of the Order after the expiry of the period of 90 days, would automatically lapse. However, if the licensee commits another breach, after the expiry of the period of suspension, there is nothing to prevent the licensing authority to suspend his licence afresh.

11. On a fair reading of the second proviso to sub-cl. (1) of Cl. 11 of the Order, it cannot be said that it commits to the unrestrained will of the District Food and Supplies Controller, who is the licensing authority, the power of suspension of a licence. It does not confer arbitrary and uncontrolled power because the suspension can only be for specified reasons and the second proviso lays down the circumstances or grounds on which the power may be exercised. Such guidelines are expressly and specifically stated. In the first place, the power of suspension is not exercisable unless there is a breach and the breach is of such a nature that it must entail cancellation of the licence. The substantive provision contained in sub-cl. (1) of Clause 11 of the Order provides for the power of cancellation or suspension, if any dealer commits any contravention of the 'terms and conditions of his licence or any provisions of this Order'. The first proviso is in the nature of limitation on the power contained in sub-cl. (1), and there can be no cancellation or suspension of a licence unless the licensee is afforded a reasonable opportunity of stating his case. The proper function of the second proviso is to carve out an exception to the first proviso. It dispenses with the requirement of affording a reasonable opportunity to the licensee in case of suspension of his licence during the pendency or in contemplation of the proceedings for cancellation. It must, however, be read along with the main enacting provision in sub-cl. (1), and, if so construed, the

power of suspension during the pendency of an inquiry cannot be exercised unless there is contravention of any of the terms and conditions of the licence or any of the provisions of the Order. Secondly, it provides for a reasonable safeguard, in that it limits the period of suspension. The period of suspension would necessarily depend upon the nature of the breach, and in no case, can it exceed ninety days. During this period, the licensing authority is expected to complete the inquiry and take a decision as to the cancellation or otherwise of the licence. Thirdly, as a check upon possible injustice that might result from an improper exercise of the power of suspension of a licence by the licensing authority under the second proviso, there is an additional safeguard to a dealer by way of an appeal to the Director, Food and Supplies, under Cl. 13 of the Order. This Court has repeatedly laid down that where the discretion to apply the provisions of a particular statute is left with the Government or one of the highest officers, it will be presumed that the discretion vested in such highest authority will not be abused. It would, therefore, appear that the second proviso to sub-cl. (1) of Cl. 11 of the Order furnishes sufficient guidelines for the exercise of the power of suspension of a licence during the pendency of or in contemplation of the proceedings for cancellation thereof, and it does not suffer from the vice of arbitrariness and is, therefore, not violative of Art. 14 of the Constitution. On the contrary, as already indicated, it affords reasonable safeguards.

12. There still remains the question whether the impugned orders of suspension are mala fide or motivated. We are unable to hold from the material on record the licensing authorities acted with improper motives or were actuated with bias in directing the suspension of the licences held by the petitioners. All that is averred in para 9 is :

"(U)nder oral instructions of the Punjab Government from the Civil Supplies & Food Department to all the Licensing Authorities, including the Food Department and Supplies Controllers, instructions were issued that if any one dealer is found exporting wheat to an-

other State, there being no direct or indirect ban on such movement, he should be punished at the spot by way of suspension of licences so that the dealer may not export wheat to any other State for which there are no restrictions imposed by any law or notified order or even the terms and conditions of the licence."

The petitioners then go on to say in para 12:

"Under oral instructions from the Secretary, Food & Supplies Department, the Director, Food & Civil Supplies, and up to the District Food and Supplies Controller, the Punjab Government has imposed restriction on inter-State movement of foodgrains. There are already restrictions on stock holding and dealer to dealer sale. The petitioners have never violated any conditions of the licence except that they have been, in exercise of their fundamental rights, exporting foodgrains to various destinations outside the State of Punjab.....". In the case of M/s. Sukhwinder Pal Bipan Kumar in support of the petition, there is an affidavit of one Raj Kumar, claiming to be a partner, who asserts that the allegations in paras 9 and 12 are 'correct to the best of my knowledge'. To say the least, this is no affidavit at all. Under Order XIX, Rule 3, of the Code of Civil Procedure, 1908, it was incumbent upon the deponent to disclose the nature and source of his knowledge with sufficient particularity. The allegations in the petition are, therefore, not supported by an affidavit as required by law. That being so, the State Government was fully justified in stating in answer, 'Denied. There is no restriction on the movement of wheat'. The Deputy Secretary in his counter-affidavit has further denied that the impugned orders of suspension were passed on the direction of the State Government. In our view, the allegations in the writ petitions are not sufficient to constitute an averment of mala fides so as to vitiate the impugned orders of suspension. The Court would be justified in refusing to carry out investigation into allegations of mala fides, if necessary particulars of the charge making out a prima facie case are not given in the petition. The burden of establishing mala fides lies very heavily on the person who alleges it. The petitioners who seek to invalidate

the impugned orders of suspension must establish the charge of bad faith or bias or misuse by the Government of its powers. The impugned orders of suspension ex facie show breaches of conditions Nos. 4, 8 and 10 of the licence by the petitioners. The question whether or not, they committed the breaches is a matter for inquiry by the licensing authorities under sub-cl. (1) of Cl. 11 of the Order.

13. In the result, the petitions must fail and are dismissed with costs.

Petitions dismissed.

AIR 1982 SUPREME COURT 70

(From : Punjab & Haryana)

P. N. BHAGWATI AND

A. VARADARAJAN, JJ.

Criminal Appeal No. 443 of 1981, D/-15-4-1981.

Jarnail Singh, Appellant v. State of Punjab, Respondent.

Penal Code (45 of 1860), Ss. 302, 34, 324 — Murder case — Neither pre-concert nor meeting of minds between S and J before offence took place — Conviction of J under S. 302/34 — Not sustainable — J merely giving a takwa blow on ear causing simple injuries — Conviction of J altered to one under S. 324 — J already in jail for 2½ years — Sentence reduced to period already undergone. (Para 1)

P. N. BHAGWATI, J.:— We are of the view that having regard to the circumstances which the offence took place it is not possible to convict the appellant Jarnail Singh of the offence under Section 302 read with Section 34 of the I. P. C. since there was no pre-concert between Sarwan Singh and the appellant; nor a meeting of minds between them before the offence took place. We, therefore, set aside the conviction of the appellant under Section 302 read with Section 34 I. P. C., and since he merely gave a takwa blow on the ear and caused simple injuries, we alter his conviction to one under Section 324 of the Indian Penal Code. We are told that the appellant has already been in jail for about 2½ years and we, therefore, reduce the sentence imposed upon him

KY/LY/F194/81/SSG

to that already undergone by him and direct that he may be set at liberty forthwith.

Order accordingly.

AIR 1982 SUPREME COURT 71

(From : Delhi)

V. D. TULZAPURKAR, BAHARUL ISLAM AND A. VARADARAJAN, JJ.

Civil Appeal No. 1472 of 1980, D/- 8-12-1981.

M/s. Jain Malleables, Appellants v. Bharat Sahay, Respondent.

Delhi Rent Control Act (59 of 1958), S. 14A — Government servant occupying Government accommodation owning house — Vacation of Government accommodation — Notification by Central Government — Government servant asked by special order to vacate Government accommodation — Resort to S. 14A — Permissible — Subsequent notification modifying charging of penal rent — Not material, 1980 (1) Ren CR 90 (Delhi), Overruled.

Where under the first notification of the Central Government dated 9-9-1975 the Government servant occupying Government accommodation and owning house at the place of their posting were obliged to vacate the Government accommodation by a particular date failing which they were required to pay penal rent at market rate and by a special order dated 22-1-1976 the concerned Government servant was asked to vacate the Government accommodation by 31-12-1975 failing which he was to be charged penal rent at market rate with effect from 1-1-1976, it could not be said that the said Government servant could not have resort to S. 14A to evict the tenant from his own house. Fact that the said Government servant was getting rent of Rs. 2100/- from his own house and that subsequent notification dated 14-7-1977 modified the earlier notification in respect of charging of penal rent did not deprive that Government servant to have resort to S. 14A. He could not be compelled to exercise option under second notification to continue to remain in Government accommodation by paying heavier penal rent. Second notification did not in any way take away the

obligation imposed by the first notification. 1980 (1) Ren CR 90 (Delhi), Overruled. (Paras 14, 13)

Cases Referred : Chronological Paras
(1980) 1 Ren CR 90 : (1979) 2 Ren LR 339 (Delhi) 11
(1980) 2 Ren CR 527 : (1980) 2 Ren CJ 385 (Delhi) 13
AIR 1977 SC 1569 : (1977) 3 SCR 312 : (1977) 2 SC WR 139 10

A. VARADARAJAN, J.:— This appeal by special leave is directed against the one word order dated 1-2-1980 of the learned single Judge of the Delhi High Court dismissing Civil Revn. Petn. No. 122 of 1980 in limine. The tenants who were respondents in the Rent Control Eviction Petition, filed the Civil Revision Petition against the Rent Controllers' order dated 30-10-1979, declining to permit them to raise certain grounds of defence while granting leave to defend the eviction petition on certain other grounds. Special leave to appeal against the order of the learned single Judge of the High Court has been granted by this Court only on the question whether S. 14A of the Delhi Rent Control Act, 1958 is applicable or not to the facts and circumstances of the case "in view of the later Circular of 1977". The "later Circular of 1977" mentioned in the special leave granted by this Court on 5-8-1980 is the Office Memorandum dated 14-7-1977 of the Joint Secretary to the Government of India, Ministry of Works and Housing, Directorate of Estates, hereinafter referred to as the "second notification". The same Joint Secretary to the Government of India in the same Ministry had issued the earlier Memorandum dated 9-9-1975, hereinafter referred to as the "first notification".

2. The respondent-landlord filed the petition for eviction of the appellants under S. 14A read with S. 25B of the Delhi Rent Control Act, 1958, hereinafter referred to as the "Act". In the Eviction Petition the respondent had alleged that by virtue of his being a Government servant he has been allotted residential accommodation at No. 83 Lodhi Estate, New Delhi since November 1971. Under the first notification he is required to vacate the Government accommodation and shift to his own house No. 11-B Maharani Bagh, New Delhi, which is now in the occupation of the appellants, and if he

failed to do so he is to incur the obligation of paying rent/licence fee of Rupees 1,448/- per mensem on the ground that he owns a residential building in the Union Territory of Delhi and still continues to occupy Government accommodation. The appellants have not vacated the premises occupied by them in spite of several assurances given by them since February 1976. The respondent is paying penal rent of Rs. 1,448/- per mensem for the Govt. accommodation because he had not vacated that accommodation provided to him by the Government as a Government servant.

3. After presentation of the Eviction Petition and service of notice under Section 25B of the Act, the appellants filed a Petition for grant of leave to defend the main Petition. One of the objections disallowed, with which we are concerned in this appeal, is that in view of the second notification the respondent is not required to vacate the Government accommodation now available to him and that he is, therefore, not entitled to evict the appellants under the provisions of Sec. 14A of the Act. The Civil Revision Petition filed by the appellants against the order of the Additional Rent Controller has been dismissed by the learned single Judge of the High Court as mentioned above. The appellants have, therefore, filed this appeal by special leave against that order.

4. We are concerned in this appeal with S. 14A (1) of the Act, which reads thus:

"14A (1). Where a landlord who, being a person in occupation of any residential premises allotted to him by the Central Government or any local authority is required, by, or in pursuance of, any general or special order made by that Government or authority, to vacate such residential accommodation, or in default, to incur certain obligations, on the ground that he owns, in the Union territory of Delhi, a residential accommodation either in his own name or in the name of his wife or dependent child, there shall accrue, on and from the date of such order to such landlord, notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force in any contract (whether express or im-

plied), custom or usage to the contrary, a right to recover immediately possession of any premises let out by him :

Provided that nothing in this section shall be construed as conferring a right on a landlord owning, in the Union territory of Delhi, two or more dwelling houses, whether in his own name or in the name of his wife or dependent child, to recover the possession of more than one dwelling house and it shall be lawful for such landlord to indicate the dwelling house, possession of which he intends to recover.....".

5. There is no dispute that the respondent is the owner of the premises in question, namely, 11-B Maharani Bagh, New Delhi, now occupied by the appellants on a rent of Rs. 2,100/- per mensem and that he is at present in occupation of Government accommodation at No. 83, Lodhi Estate, New Delhi and is obliged to pay penal rent/licence fee of Rs. 1,448/- per mensem. The relevant portion of the first notification reads thus :

"That undersigned is directed to say that the question of allotment of Government residential accommodation to officers owning houses at or near the stations of their posting has been under consideration of Government for some time past. It has now been decided, in supersession of all previous orders on the subject, as follows :—

(i) Those Government servants, who build houses in future at the place of their posting, within the limits of any local or adjoining municipality, whether with or without Government assistance, or who become owners of houses in future — either in their own names or in the names of any members of their families—shall be required to vacate Government accommodation in their occupation from the date their own houses are fit for occupation.

(ii) Those Government servants, who have already built houses at the place of their posting within the limits of any local or adjoining municipality, whether with or without Government assistance, or who own houses — either in their own names or in the names of any members of their families — shall be required to vacate the Government accommodation allotted to them, within three months from the 1st October 1975. If they do not vacate Government ac-

accommodation after that period, they would be charged licence fee at market rates.

(iii) Hence onward, no Government accommodation should be allotted to an officer owning a house at the place of his posting within the limits of any local or adjoining municipality. A certificate shall be obtained from a prospective allottee that he has no house at the station of his posting within the limits of any local or adjoining municipality — either in his own name or in the name of any member of his family.

(iv)-(v)

2.

3. The Ministry of Home Affairs, etc. are requested to bring the above decision of Government to the notice of all their attached and subordinate offices, and ensure that the decision is implemented in respect of different pools of Government residence under their control.

4. In so far as general pool accommodation is concerned, the Ministry of Home Affairs, etc., are requested to bring this to the notice of all Government Servants who are eligible for general pool accommodation as well as those who have already been allotted accommodation from the general pool, asking them by 15th October, 1975 to indicate whether they have their own houses as covered by these orders. In case they have, a declaration may be obtained from them in the prescribed pro forma and forwarded to the Directorate of Estates (Co-ordination I Section) by 15th November, 1975. Other officers who do not own houses should also furnish a declaration to that effect. All officials who have been allotted general pool accommodation may be advised that it is their responsibility to inform the Directorate of Estates, when they or any member of their families becomes owners of houses in future, within one month from the date of becoming such owners. All officers eligible for general pool accommodation may also be warned that severe action will be taken against them in case they furnish any incorrect information".

6. In addition to this general first notification relating to Government accommodation in the occupation of Govern-

ment employees there is a special order dated 22-1-1976, of the Assistant Director of Estates, New Delhi calling upon the respondent to vacate the Government accommodation No. 83 Lodhi Estate allotted to him since 31-12-1975, failing which he would be charged market rent with effect from 1-1-1976 at the rate fixed by Government from time to time and informing him that a bill at the market rate of licence fee for the said premises will follow.

7. In the affidavit filed in support of the Petition for grant of leave to defend the main Eviction Petition the appellants have stated that the respondent is occupying a huge, massive and palatial bungalow in the Lodhi Estate, New Delhi built on an area of about two acres and allotted to him by the Government and that whereas he is paying an alleged rent of Rs. 1,448/- per mensem for that accommodation, he is getting a rent of Rs. 2,100/- per mensem for his premises occupied by the appellants and he is thereby gaining a sum of Rs. 652/- per mensem. The appellants have further stated in that affidavit that there is a clear shift in the policy of the Government whereby Government accommodation is made available to even those employees who happen to have their own houses at Delhi and that Government have modified the notification relied upon by the respondent whereby house owning officials have become eligible for allotment of Government accommodation at the places of their posting with effect from 1-6-1977.

8. The notification said to modify the first notification is the second notification. The relevant portion of that notification reads thus:

"The undersigned is directed to say that the orders contained in this Ministry's office Memorandum No. 12031 (1)/74-Pol. II, dated 9-9-1975, as modified from time to time have been reconsidered. Government has decided that the restrictions on allotment of accommodation to house owning officers should be modified with effect from 1-6-1977, making house owning officers eligible for Government accommodation as communicated in this Ministry's Office Memorandum of even number dated 29th June, 1955. It has also been decided that allotment of such accommodation to a house owning official will

be on normal rent if the income from his own house does not exceed Rupees 1,000/- p. m. or half the market rent if the income exceeds Rs. 1,000/- p. m. but does not exceed Rs. 2,000/- p.m. and on full market rent if the income is above Rs. 2,000/- p.m. Rent will be recovered on the same basis w. e. f. 1-6-1977 also from those house owning officials who are retaining Government accommodation on payment of market rents. These decisions will apply equally whether the house is owned by the officer or his/her wife/husband or by his/her dependent children.

2.

3. Allotment of accommodation to house owning officers who have already vacated Government accommodation.

Such officers will be considered for allotment of accommodation in their turn on the basis of their priority date under the allotment rules. No preference should be shown to them in the matter of allotment in consideration of the fact that they were earlier in occupation of Government accommodation and had vacated it in compliance with the earlier orders to which the officers are normally entitled without restriction of any locality or without any reference to the types of accommodation which the officers were occupying previously. As usual, officers eligible for types V and above should also be considered for allotment in the types next below on the basis of their priority for such types. After accepting initial allotment, they will be eligible for change in the normal manner in accordance with the allotment rules.

4-5.

6. In so far as the general pool is concerned officers who have already vacated Government accommodation may submit fresh applications for allotment of accommodation in the prescribed application form, indicating the details of the houses owned by them or their spouses or dependent children along with documentary proof of the income they derive from the houses they own. House owning officers, who are continuing in Government accommodation, should also furnish suitable documentary proof of the income they get from their private houses, to enable the Director of Estates to fix the license fee recoverable from them w.e.f. 1-6-1977".

9. Mr. Madan Bhatia, learned counsel for the appellants, submitted that while under the first notification the respondent was required to vacate the Government accommodation within three months from 1-10-1975 on pain of being liable to pay licence fee at the market rate if he failed to vacate within that time, Government employees like the respondent have become eligible for Government accommodation under the second notification and are, therefore, not obliged to vacate the Government accommodation and that the respondent is, therefore, not entitled to seek eviction of the appellants from his premises under Section 14A of the Act though may file a Petition for eviction under S. 14 (1) (e) of the Act which is a general provision applicable to all landlords who seek to evict their tenants on the ground that they require the premises for their own bona fide occupation. Section 14 (1) (e) reads thus:

"14 (1). Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or Controller in favour of the landlord against a tenant:

Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely:—

(a) to (d)

(e) that the premises let for residential purposes are required bona fide by the landlord for occupation as a residence for himself or for any member of his family dependent on him, if he is the owner thereof, or for any person for whose benefit the premises are held and that the landlord or such person has no other reasonably suitable residential accommodation:

Explanation:— For the purposes of this clause, "premises let for residential purposes" include any premises which have been let for use as a residence are, without the consent of the landlord, used incidentally for commercial or other purposes;

10. In support of the contention that in view of the second notification the respondent is not entitled to have re-

course to the provisions of S. 14A of the Act, Mr. Madan Bhatia relied upon the decision of this Court in *Busching Schmitz Pvt. Ltd. v. P. T. Menghani* (1977) 3 SCR 312: (AIR 1977 SC 1569). where the Court has observed at p. 323 (of SCR) : (at p. 1577 of AIR) thus:—

"Supposing the landlord, after exploiting the easy process of S. 14A, relets the premises for a higher rent; the social goal boomerangs because the tenant is ejected and the landlord does not occupy, as he would have been bound to do, if he had sought eviction for bona fide occupation under S. 14 (1) (e). Section 19 obligates the landlord in this behalf. In literal terms, that section does not apply to eviction obtained under S. 14A. But the scheme of that section definitely contemplates a specific representation by the petitioner-landlord to the Controller that because he has been ordered to vacate the premises where he is residing, therefore, he requires immediate possession for his occupation Once we grasp this cardinal point, the officer's application for eviction under S. 14A can be entertained only on his averment that he, having been asked to vacate, must get into possession of his own.....the cause of action is not only the government order to vacate, but his consequential urgency to recover his own building."

11. Mr. Madan Bhatia relied also on the decision of learned single Judge of the Delhi High Court in *K. D. Singh v. Hari Babu Kanwal* (1980) 1 Ren CR 90, where the learned Judge has observed thus:

"At the time when this application was brought in February 1977, the Circular of 9-9-1975 held the field. Unfortunately, for the landlord this position underwent change when the Central Government issued a revised Circular dated 14-7-1977 by which the orders contained in the earlier circular dated 9-9-1975 were modified after reconsideration..... A vital change thus took place by the Circular of 14-7-1977, namely, that there is no direction to a person who owns a house and who is in occupation of a residential premises allotted to him by the Central Government to vacate such residential accommodation Once therefore, the revised Circular of 14-7-1977 has come,

the very basis on which the Eviction Application under S. 14A of Act was brought has ceased to exist and cannot avail him..... It must be realised that S. 14A was brought in only for a limited purpose to enable the Government servants in getting immediate possession of their house when they had been directed to vacate the Government accommodation. The special legislation was made to serve special purpose in pursuance of the Circular of 9-9-1975. Once that purpose has been modified and the Government has revised its decision and there is no direction to vacate such residential accommodation, it is impermissible in law to allow a Government servant to invoke S. 14A and frustrate the beneficial Act of the Rent Control legislation like the Delhi Rent Control Act."

12. We do not agree with this view of the learned Judge.

13. It is seen from paragraph 3 of the Order of the Additional Rent Controller, which was sought to be revised by the High Court, that the respondent is paying a rent of Rs. 1,448/- per mensem for the Government accommodation No. 83 Lodhi Estate, New Delhi. In the reply affidavit filed in the Special Leave Petition the respondent has stated that he is liable to pay Rupees 1,543/- per mensem for the Government accommodation as penal rent on account of his failure to vacate the same. The respondent has produced in this Court a communication addressed to him by the Assistant Director of Estate, New Delhi saying that without prejudice to any other action which may be taken in respect of the Government accommodation which has been allotted to him, his liability will continue to increase to Rs. 2,898/- per mensem and three times that rate on the expiry of 15 days from the date of service of orders of eviction under the Public Premises (Eviction of Unauthorised Occupants) Act 1971 till he vacates and restores the premises to the Central Public Works Department. These facts and the liability of the respondent to pay full market rent for the Government accommodation with effect from 1-6-1977 and the second notification in the light of his getting a rental income exceeding Rs. 2,000/- per mensem from his own premises show that the respondent has to incur certain ob-

ligations on his failure to vacate Government accommodation on the ground that he owns in the Union Territory of Delhi a residential accommodation either in his own name or in the name of his wife or dependent child. We do not find anything in the second notification taking away the obligation which has been imposed on the respondent by the first notification to vacate the Government accommodation within three months from the 1st of October 1975. We are of the opinion that the second notification, without taking away the obligation imposed by the first notification on Government employees owning houses in their own names or in the name of any other member of their families, within the limits of their place of posting, to vacate the Government accommodation within three months from the first of October 1975, has given an option to those employees to continue to occupy the Government accommodation subject to the obligation mentioned in the second notification, namely, that the house owning Government employee will have to pay normal rent for the Government accommodation if the income from his own house does not exceed Rs. 1,000/- per mensem or half the market rent if the income from his own house exceeds Rs. 1,000/- per mensem but does not exceed Rs. 2,000/- per mensem and full market rent if the income from his house is above Rupees 2,000/- per mensem with effect from 1-6-1977. In the present case the market rent/licence fee which the respondent had to pay for the Government accommodation occupied by him on the date of institution of Eviction Petition was Rs. 1,448/- per mensem and it had been increased to Rs. 1,543/- per mensem as stated in the counter-affidavit filed by the respondent in the Special Leave Petition and it has been further enhanced to Rs. 2,898/- per mensem by the letter dated 17/18-7-1981 of the Assistant Director of Estates addressed to the respondent and referred to above. The respondent has thus an option to continue to occupy the Government accommodation subject to the said obligation without vacating the Government accommodation within a period of three months from the 1st of October, 1975. We are of the opinion that it is not open to the appellants to compel the

respondent to exercise his option and continue to occupy the Government accommodation in order that they may continue to occupy the premises in question as the tenants. Even apart from the first notification which is general in nature and has been modified by the second notification as mentioned above, there is the special order dated 22-1-1976, which required the respondent to vacate the Government accommodation by 31-12-75, failing which he is to pay market rent with effect from 1-1-1976 as mentioned above. In these circumstances it is not possible for us to accept the argument of Mr. Madan Bhatia that the respondent is not entitled to have recourse to S. 14A of the Act for seeking eviction of the appellants from the premises in question, having regard to first and second notifications and the special order dated 22-1-1976. Dr. L. M. Singhvi, learned counsel for the respondent invited our attention to the decision of another learned single Judge of the Delhi High Court in *J. L. Paul v. Ranjit Singh* (1980) 2 Ren CR 527, where we find the following observations:

"The last objection of the petitioner is that the notifications granting a right to the Government employee to seek eviction under Section 14A of the Act have been withdrawn, that this defence raises a triable issue and, therefore, the Controller ought to have granted leave to contest so that he may produce evidence on record in support of this part of his defence. The right to claim eviction accrues to a landlord under S. 14A of the Act and not under any notification issued by the Government. The Government notification, general or special only requires a landlord Government allottee to vacate the accommodation as he owns his house or pay penal rent. The respondent submits that the general notification dated September 9, 1975 and the special order dated December 26, 1975, have never been withdrawn. His contention is that there has been a notification about the rate of rent/licence fee to be paid by a Government employee, if he is also owner of his own house at the place of his posting and does not vacate allotted premises. In short his contention is that right of eviction is available to a landlord allottee of Government accommodation if he fulfils

the conditions mentioned in S. 14A of the Act. According to him there is modification that if the income of the landlord from his own house does not exceed Rs. 1,000/- per month, he is liable to pay only the normal rent of the Government allotted accommodation, but if his income from his own house exceeds Rs. 1,000/- and does not exceed Rs. 2,000/- he is liable to pay half the market rent and in cases where his income from his own house is above Rs. 2,000/- per month, he is liable to pay full market rent. The respondent contends that S. 14A of the Act conferring upon a landlord/Government allottee (a right) to get his own house vacated has never been repealed. The learned counsel for the respondent further contends that mere assertion of the petitioner that the notifications have been withdrawn is vague and does not give him any right to leave to contest and lead any evidence.....If any notification has been withdrawn or cancelled, such an order must be in writing. The petitioner/tenant in his application does not disclose any notification under which the Government notification requiring a landlord/Government employee to vacate has been withdrawn.

Thus the notification dated September 9, 1975, stands modified to the extent as to what rate of rent would be payable by the respondent Government allottee/landlord owning his own house if he retains the allotted premises, that is, if he fails to vacate the Government accommodation in pursuance of the general order dated September 9, 1975 and the special order dated December 26, 1975. The income of the respondent from his own house, that is, suit property No. 164 Greater Kailash-1, New Delhi is Rs. 1,950/- per month. He is getting Rs. 850/- per month from the petitioner occupying first floor and Rs. 1,100/- per month from 'Escorts' occupying the ground floor. In accordance with the notification dated July 14, 1977, the respondent/landlord is thus liable to pay half the market rent from June 1, 1977 if he does not vacate the Government allotted accommodation. In fact after the issue of notification dated July 14, 1977 the respondent has been directed to pay half the market rent by means of an order dated

September 20, 1977 issued by the Directorate of Estates, Government of India with effect from June 1, 1977. In short, it is certain that there is the general notification dated September 9, 1975 and the special order dated December 26, 1975 requiring the respondent/landlord to vacate the Government allotted residential accommodation or in default to pay half the market rent. In other words he is to incur certain obligations. The liability is on account of the fact that he owns the house in suit in the Union Territory of Delhi, his place of posting.

On December 12, 1979 Directorate of Estates was required to state whether the notification dated September 9, 1975, stands withdrawn or it was simply modified. The Directorate of Estates in his letter dated December 14, 1979, informed that the Memorandum dated September 9, 1975 was not withdrawn but was only modified by the Memorandum dated July, 14, 1977.....

So if the two notifications dated September 9, 1975 and July 14, 1977 are read together, it appears that there is no cancellation of the earlier notification and that it is only a notification of the rate of rent payable by an allottee owning his own house. Under this notification dated July 14, 1977 it is further provided that with effect from June 1, 1977 rent of allotted premises shall be recovered from the house owning officials retaining the premises at the rates mentioned therein. The respondent is, therefore, liable to pay the rent accordingly and thus liable to incur obligation in default of vacating the premises.

The respondent satisfies the requirement of S. 14A of the Act. There is no defence available to the petitioner against the eviction application under S. 14A of the Act."

14. In the present case also there is nothing on record to show that the obligation imposed upon respondent by the first notification to vacate the Government accommodation within three months from the 1st of October, 1975 and by the special order dated 22-1-1976 by 31-12-1975, has been withdrawn. The respondent can continue to occupy the Government accommodation only subject to certain obligations. We, therefore, hold that the respondent is entitled

ed to have recourse to S. 14A of the Act for evicting the appellants from the premises in question. Accordingly the appeal fails and is dismissed with costs. Appeal dismissed.

AIR 1982 SUPREME COURT 78

V. D. TULZAPURKAR, BAHARUL ISLAM AND A. VARADARAJAN, JJ.

Civil Appeals Nos. 351 and 352 of 1976, D/- 7-12-1981.

Workmen of M/s. Williamson Magor and Co. Ltd., Appellant v. M/s. Williamson Magor & Co. Ltd. and another, Respondents.

(A) Industrial Disputes Act (14 of 1947), S. 11 — Effective award to meet justice — Duty of Industrial Court to pass such award.

The industrial tribunals are intended to adjudicate industrial disputes between the management and the workmen, settle them, and pass effective awards in such a way that industrial peace between the employers and the employees may be maintained so that there can be more production to benefit all concerned. For the above purpose, the industrial tribunals, as far practicable, should not be constrained by the formal rules of law and should avoid inability to arrive at an effective award to meet justice in a particular dispute. (Para 6)

(B) Industrial Disputes Act (14 of 1947), Sch. 2, Item 6 — Promotion — Objective criteria — Necessity of.

Although promotion/upgradation is a managerial function, it must not be on the subjective satisfaction of the management but must be on some objective criteria. (Para 7)

If there are grades and scopes of upgradation/promotion and there are different scales of pay for different grades in a private undertaking, and, in fact, promotion is given or upgradation is made, there should be no arbitrary or unjust and unreasonable upgradation or promotion of persons superseding the claims of persons who may be equally or even more, suitable. (Para 8)

(C) Industrial Disputes Act (14 of 1947), Sch. 2, Item 6 — Victimization — Meaning — Victimization in the matter of promotion.

The word "victimization" must be given normal meaning of being the victim of unfair and arbitrary action. AIR 1978 SC 474 and AIR 1950 SC 188, Rel. on. (Para 8)

Even if promotion may not be a condition of service in a private company and promotion may be the function of the management, it may be recognised that there may be occasions where the Tribunal may have to cancel the promotions made by the management where it is felt that persons superseded have been so superseded on account of legal mala fide or victimization. AIR 1966 SC 668, Rel. on. (Para 9)

Held on facts that although the union had not been able to prove factual mala fide, in this case malice in law and effectual victimization were obvious due to the fact that unjustified promotions of some junior persons were made superseding, without any reason or necessity, the cases of a large number of senior persons. (Para 9)

Cases Referred : Chronological Paras

AIR 1978 SC 474 :	(1978) 2 SCC 42 :	
1978 Lab IC 518		8
AIR 1966 SC 668 :	(1966) 2 SCR 465 :	9
AIR 1950 SC 188 :	1950 SCR 459	8

BAHARUL ISLAM, J.:— These two connected appeals by special leave are on behalf of Workmen of M/s. Williamson Magor & Co. Ltd. (renamed as M/s. Magneill & Magor Ltd.) represented by Williamson Magor & Company Employees' Union (hereinafter called 'the union') and are directed against the award of the 7th Industrial Tribunal, West Bengal.

2. The material facts may be stated thus :

According to the union, all the employees of the aforesaid company, the respondent before us (who will hereinafter be called 'the management') are the members of the union. Disputes had arisen between the workmen and the management but they ended in a number of agreements as a result whereof the employees derived some benefits. Subsequently the management appointed one Mr. P. K. Kaul as a staff officer, who, according to the union, started to create a cleavage between the workmen, and with that end in view, at his instance, the management started giving indiscriminate and arbitrary promotions

and/or upgradations to some of the employees who were its favourites, disregarding the rightful claims of a number of other employees so much so that even junior members were given promotions superseding the rightful claims of the senior employees. The union took up the cause of the workmen with the management. According to the union, there is no norm and/or standard guiding promotion and/or upgradation of the employees. According to the union, the action of the management is arbitrary, mala fide and intended to victimize the employees who are loyal to the union.

At the material time there were two grades of employees namely; Special Grade, with a higher scale of pay and General Grade.

3. This is an admitted position that the management do not have any norm to determine how many clerks should be in each of the said grades or in each of the scales of pay; nor is there any fixed quota in the Special Grade to be filled up by promotion from the General Grade; nor is there any rule determining the number of vacancies to be filled up by promotion or upgradation. According to the union, the normal rule should be promotion/upgradation by seniority. As this was not done, unrest cropped up. On the management having upgraded/promoted two junior clerks, namely; Anil Chandra Ghosh and Parameshwar Banerjee from General Grade to Special Grade on 1-3-1972, superseding the claims of senior clerks, without assigning any reason, the union protested. Far from rectifying the unjust action, the management again promoted/upgraded another person, Shri Saroj Mukherjee to Special Grade on 1-7-1972, superseding the claims of many others who were senior to him. According to the union, the management arbitrarily promoted/upgraded the aforesaid three persons and unjustly denied promotion/upgradation to twelve senior clerks. This was, according to the union, victimization and unfair labour practice. According to the union, the aforesaid three favoured clerks and the twelve superseded clerks were doing exactly similar work. The three promoted/upgraded persons after their promotion/upgradation used to do the same work as before, occupying the same chairs and working on the same tables as they had

done before the date of upgradation/promotion. According to the union, there were no jobs related to grades or scales of pay, and the promotion/upgradation has no impact except mere increase of pay consequent upon the higher scale of pay given to each person promoted. As a dispute arose between the management and the union, the Government of West Bengal referred the following issue to the 7th Industrial Tribunal, West Bengal for adjudication :

"Whether promotion of Sharbashree Saroj Kumar Mukherjee, Anil Chandra Ghosh and Parameshwar Banerjee from General Grade clerks to Special Grade Clerks in preference to the twelve (12) workmen marked in Annexure "A" attached herewith is justified? To what relief, if any, are the workmen marked in Annexure "A" entitled? The names of the persons in said Annexure "A" were the same as mentioned in paragraph 10 above".

4. During the pendency of the aforesaid reference before the Tribunal, the respondent on 23-5-1974 again promoted from the General to the Special Grade two clerks, namely; Sudhir Ranjan Chakraborty and Jyoti Prasad Paul superseding 56 senior and efficient clerks of the General Grade inclusive of the twelve senior grade clerks already superseded in 1972 and concerned in the reference, aforesaid. As a dispute arose, the Government of West Bengal made a reference to the same Industrial Tribunal for adjudication of the following issue:

"Whether promotion of the workmen mentioned in Annexure "A" attached herewith from General Grade to Special Grade or Supervisory Grade in preference to the workmen mentioned in Annexure "B" attached herewith is justified?

To what relief, if any, are the workmen mentioned in Annexure "B" entitled?"

5. Before the Tribunal, the parties led evidence and proved Exts. K-1 and K-2, settlements arrived at between the management of the union earlier. On a consideration of the oral and documentary evidence adduced before it, the tribunal has arrived at the following findings:—

(1) No agreed norm for promotion/upgradation was formulated;

(2) Both the parties felt that it was desirable that certain norms should be laid down for promoting and/or up-grading workmen.

(3) That in spite of the fact that no norm had been formulated, the management promoted as many as 15 workmen during the pendency of the first reference.

(4) That promotion and/or upgradation is a managerial function and that the union can have no say in such matter. The Tribunal has found "it is now more or less well settled that the promotion/upgradation is the administrative function of the management and it can be hardly disputed before any court of law and/or tribunal unless it is proved that in effecting such promotion, the management violated the principles of natural justice and/or existing rules or norms". The Tribunal also has found, on a consideration of the evidence of the management witness, Shri P. K. Kaul, that although the witness said that at the time of giving promotion, recommendations of the departmental heads and other authorities were taken into account, his evidence was not supported by any document. The tribunal has also found that although in terms of earlier agreements, it was the duty of the management to investigate allegations by the union of discriminatory and unfair promotion and/or upgradation, the management did not do so. It further found that Ext. B disclosed that on 21-12-1972, the union demanded of the management investigation into the matter of the said discriminatory promotions but "curiously enough, there is nothing before me to show that the management did, in compliance with the said agreement, investigate into the matter as agreed upon."

(5) Ultimately the Tribunal held that the promotions of the three persons mentioned in the first reference "cannot be justified because when it was agreed upon that the management would investigate in case any complaint is made, but even in spite of the complaint lodged by the union, the management did not investigate". The Tribunal has even found that the management did not care to establish the justification of the promotions of the aforesaid three persons superseding the claims of others.

(6) The Tribunal has also found, "It is not their (management's) case before

me that, in fact, the management found those three persons suitable to the rest of the workmen".

(7) Similarly, with regard to the second reference, the Tribunal came to the finding that "junior persons were given promotions superseding the claims of a number of senior workmen, but there is nothing before me from where I can say that the management was justified in giving promotion to them."

6. The above enumeration of the findings of the Tribunal clearly shows that the action of the management in promoting junior clerks of the General Grade superseding the claims of the senior clerks of the same Grade was arbitrary and unjustified. The Tribunal has categorically found, "I am constrained to observe that no material has been placed before me nor it has been claim-in evidence that the management found that these people were more efficient and competent than the rest of the workmen."

In the premises, I am bound to hold that I cannot justify the promotion of the said persons named in the two references and dispose of the first issue accordingly" (emphasis added). But to our amazement, it failed to pass any consequential order, and instead held, "I cannot give any relief to these workmen when their positive case is that there is no standard or norms for giving promotion". In other words, although the Tribunal categorically held that the actions of the management were unjustified, it expressed its inability to give any relief to the workmen in the case. We do not think that the Tribunal should be so powerless. The industrial tribunals are intended to adjudicate industrial disputes between the management and the workmen, settle them, and pass effective awards in such a way that industrial peace between the employers and the employees may be maintained so that there can be more production to benefit all concerned. For the above purpose, the industrial tribunals, as far as practicable, should not be constrained by the formal rules of law and should avoid inability to arrive at an effective award to meet justice in a particular dispute. The Tribunal, in the instant case, in view of its findings, first of all should have declared that the promotions of the aforesaid

fifteen persons were illegal and unjustified, their promotions being the result of arbitrary action of the management which was nothing but unfair labour practice, and the promotions in question should have been cancelled. The Tribunal also, in our opinion, in consultation with the management and the union, should have framed norms/rules of promotions and directed the management to give promotions/upgradations in accordance with those norms/rules.

7. We do not agree with the claim of the union that promotions or upgradations should be on the basis of seniority alone. The National Industrial Tribunal in its award gave the following wholesome directions:—

"I give the general formula which has been accepted by many concerns, namely, all things being equal, seniority shall count for promotion. If the senior person, has been overlooked in the question of promotion, he is at liberty to ask the concern for reason why he has been overlooked, in which case the concern shall give him the reasons provided that it does not expose the concern or the officer giving any reasons to any civil or criminal proceedings".

The management has failed to follow this direction in the case in hand.

Although we agree that promotion/upgradation is a managerial function, it must not be on the subjective satisfaction of the management but must be on some objective criteria.

8. Mr. Pai, learned counsel appearing for the management, made two submissions before us. Firstly, he submitted that unlike in public sector undertakings, promotion is not a condition of service in a private company. We are unable to accept the submission of Mr. Pai in toto. If there is no scope of any promotion or upgradation or increase in salary in a private undertaking, the submission of the learned counsel may be justified but if there are grades and scopes of upgradation/promotion and there are different scales of pay for different grades in a private undertaking, and in fact, promotion is given or upgradation is made, there should be no arbitrary or unjust and unreasonable upgradation or promotion of persons superseding the claims of persons who may be equally or even more, suitable.

The second submission of Mr. Pai is that although there were no norms, the promotions of the persons in question were not arbitrary and that the findings of the Tribunal in this regard were incorrect. He led us through the material evidence of the witnesses examined. We are unable to agree with learned counsel and do not find any reason to differ from the findings of the learned Tribunal that the promotions of the fifteen persons were arbitrary and unjustified. Mr. Pai also submitted that unless victimization was proved by the union, the management's action should not be disturbed. The word 'victimization' has not been defined in the statute. The term was considered by this Court in the case of *Bharat Bank Limited v. Employees of Bharat Bank Ltd.* reported in 1950 SCR 459: (AIR 1950 SC 188). This Court observed, "It (victimization) is an ordinary English word which means that a certain person has become a victim, in other words, that he has been unjustly dealt with". A submission was made on behalf of the management in that case that 'victimization' had acquired a special meaning in industrial disputes and connoted a person who became the victim of the employer's wrath by reason of his trade union activities and that the word could not relate to a person who was merely unjustly dismissed." This submission, however, was not considered by the Court. When, however, the word 'victimization' can be interpreted in two different ways, the interpretation which is in favour of the labour should be accepted as they are the poorer section of the people compared to the management.

This Court in the case of *K. C. P. Employees' Association, Madras v. Management of K. C. P. Ltd.*, Madras reported in (1978) 2 SCC 42: (AIR 1978 SC 474 at p. 475) observed:

"In Industrial Law, interpreted and applied in the perspective of Part IV of the Constitution, the benefit of reasonable doubt on law and facts, if there be such doubt, must go to the weaker section, labour. The Tribunal will dispose of the case making this compassionate approach but without over-stepping the proved facts".

We would therefore accept the interpretation of the word 'victimization' in the normal meaning of being the victim.

of unfair and arbitrary action, and hold that there was victimization of the superseded workmen.

9. Even if promotion may not be a condition of service in a private company and promotion may be the function of the management, it may be recognised that there may be occasions where the Tribunal may have to cancel the promotions made by the management where it is felt that persons superseded have been so superseded on account of legal mala fide or victimization (See (1963) 2 SCR 465): (AIR 1966 SC 668)). Although in spite of the allegations of mala fide, the union has not been able to prove factual mala fide, in this case malice in law and effectual victimization are obvious due to the fact that unjustified promotions of some junior persons were made superseding, without any reason or necessity, the cases of a large number of senior persons.

10. As a result of the foregoing considerations, we allow the appeals and, accepting the findings of the Tribunal, give the following directions:

(1) The management, in consultation with the workmen or their representatives and under the direction, supervision and control of the Labour Commissioner of the region, shall frame norms/rules fixing quota for the grades and for promotion/upgradation of its workmen, in the light of the observations made above, within two months from the date of the receipt of a copy of this judgment by the Labour Commissioner.

(2) The upgradation and/or promotion shall be made by the management in terms of the norms/rules so framed.

(3) That meanwhile the promotions/upgradations of Sharbashree Saroj Kumar Mukherjee, Anil Chandra Ghosh and Parameshwar Banerjee from General Grade to Special Grade clerks in preference to the twelve workmen mentioned in Annexure 'A', which is the subject matter of the first reference, namely, Reference No. 3278-IR/IR/11L-132/71 dated April 2, 1974, and the promotions/upgradations of the persons mentioned in Annexure 'A' from the General Grade to Special Grade or Supervisor Grade in preference to the workmen mentioned in Annexure 'B', which is the subject matter of the

second reference, namely, Reference No. 7537-IR/IR/11L-132/71 dated December 10, 1974, are cancelled; and the workmen whose promotions are cancelled and the workmen who were superseded shall be at par with effect from the date of this judgment till promotions/upgradations are made by the management in terms of the norms/rules to be prepared; and no future promotions/upgradations shall be made until the norms/rules are framed.

11. The appeals are allowed with costs.

12. (Send a copy of this judgment to the Labour Commissioner forthwith).

Appeals allowed.

AIR 1982 SUPREME COURT 82

(From: 1980 Lab IC 372 (Mad))

D. A. DESAI AND R. B. MISRA, JJ.

Civil Appeal No. 1808 of 1980, D/-3-8-1981.

V. Vellaswamy, Appellant v. Inspector General of Police, Tamil Nadu, Madras and another, Respondents.

Constitution of India, Art. 226 — Alternative remedy — Compulsory retirement of Police Officer — Writ petition — It cannot be dismissed on the only ground of existence of alternative remedy i.e. review petition under R. 15-A of Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1980 Lab IC 372 (Mad), Reversed. (Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules (1955), Rule 15-A). (Para 1)

JUDGMENT:— The only point that survives for consideration at this stage is whether the High Court was right in dismissing the writ petition on the only ground that there was an alternative remedy, namely, that a review petition could have been filed before the Government under R. 15-A of the Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955. Maybe, there was considerable substance in this view under Art. 226 of the Constitution as amended by the Fortysecond Constitution (Amendment) Act. But Art. 226 has undergone a further amendment. As the article now stands, it would be a serious question whether a right to review a proceeding by itself would

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provide such alternative efficacious remedy to disentitle a petitioner to move the High Court under Art. 226. We think it would be rather harsh.

2. In the circumstances, the only course open to us is to allow this appeal, set aside the order of the High Court and remand the writ petition to the High Court to dispose it of in accordance with law on merits. There shall be no order as to costs. In view of the fact that some time has elapsed, we hope that the High Court would dispose of the writ petition as expeditiously as possible.

Appeal allowed.

AIR 1982 SUPREME COURT 83

(From : Karnataka)

D. A. DESAI AND A. P. SEN, JJ.

Civil Appeal No. 2650 of 1980, D/- 31-10-1981.

P. V. Shetty, Appellant v. B. S. Giridhar, Respondent.

Constitution of India, Art. 133 — Karnataka Rent Control Act (22 of 1961), S. 14 — Application for fixation of fair rent by tenant paying Rs. 640/- as monthly rent — Subsequent eviction suit by landlord alleging that protection of Act is not available to tenant — Application by tenant for stay of suit pending disposal of his application rejected by High Court — Appeal under Art. 133 — Application of tenant if allowed and fair rent if fixed at Rs. 500/- or less he would be entitled to protection of Act — Disposal of application thus has impact on suit — In the circumstances stay granted. Decision of Karnataka High Court, Reversed. (Civil P. C. (1908), Sections 10, 151). (Paras 2, 3)

JUDGMENT :— Procedural wrangle has been brought to this Court, and that too at an interlocutory stage wherein this Court is most reluctant to interfere but this "hands off" attitude may cause irreparable injustice and that is the justification for interference. The respondent-landlord filed a suit for eviction on the allegation that tenancy of appellant-tenant is determined and he is not entitled to protection of Karnataka Rent Control Act 1961 (Rent Act for short). Prior to the institution of this suit, the appellant claiming to be a tenant on a monthly rent of Rs. 650/-, had filed an application before the Rent

Controller for fixation of fair rent. Learned counsel on both sides agree that if fair rent is fixed in an amount exceeding Rs. 500/- per month such a tenant is not entitled to the protection of the Rent Act. If, on the other hand, fair rent is fixed at Rs. 500/- or below per month and if other ingredients of expression tenant are satisfied, he will be entitled to the protection of Rent Act. In the suit filed by the respondent-landlord subsequent to the filing of application for fixation of fair rent an application was moved for an interim stay of further proceedings in the suit till the disposal of the application for fixation of fair rent, pending before the learned Rent Controller. This application was rejected and a revision petition at instance of the appellant to the High Court failed and hence this appeal.

2. The very narration of facts in this case would show what should be the correct approach in this matter. If the stay of further proceedings in the suit, as prayed for by the appellant, is not granted and the suit proceeds and results in eviction, the application for fixation of fair rent becomes infructuous. On the other hand, if the application for fixation of fair rent is allowed holding that the appellant is a tenant as understood under the Rent Act, and the fair rent is Rs. 500/- or less per month he would be entitled to the protection of the Rent Act which determination will have impact on the suit, subject, of course, to other contentions that may be raised in the suit. Now it is an admitted position that the application for fixation of fair rent preceded the filing of this suit. Obviously, therefore, the just and fair approach, balancing the equities would be to stay further hearing of the suit till the application for fixation of fair rent is decided. But as Mr. Datar, learned counsel for the respondent, voices a serious apprehension that in that event the suit may not be decided for years. That is a recurring phenomenon in our courts and we must guard against it.

3. We accordingly direct that further proceedings in the suit filed by the respondent against the appellant be stayed. The learned Rent Controller is directed to give top priority to the application for fixation of fair rent filed by the appellant against the respondent and dispose it of as early as possible,

latest within four months from today. We dispose of the appeal accordingly with no order as to costs.

Order accordingly.

AIR 1982 SUPREME COURT 84

(From: Madras)

D. A. DESAI AND R. B. MISRA, JJ.

Civil Appeals Nos. 1102 and 1103 of 1970, D/- 8-12-1981.

Prasad and others, Appellants v. V. Govindaswami Mudaliar and others, Respondents.

(A) Constitution of India, Art. 133 — Findings of fact — Interference by Supreme Court — Material circumstances ignored by High Court — Supreme Court will interfere. (Para 55)

(B) Transfer of Property Act (1882), S. 53 — Sale deed — Genuineness — Sale deed not supported by adequate consideration — Document executed nominally with a view to stave off creditors — Transaction held vitiated — Decision of Madras High Court, dated 6-11-1968, Reversed.

From the evidence, both oral and documentary and circumstantial, held that the sale deed dated 22nd of Aug. 1955 was true and it was supported by consideration but only in part and that even the recited consideration in the sale deed was thoroughly inadequate, that the sale deed was executed only nominally for a collateral purpose and with a view to stave off creditors with the express understanding that the properties sold would be reconveyed to the vendors after the pressure of the creditors had subsided. In view of the finding arrived at there was no question of giving any equities to the vendees even if some of the amounts paid by the vendees to some of the creditors of vendor were genuine. As the transaction of sale was itself vitiated for the reason given above, no relief in equity would be granted to the vendees. Decision of Madras High Court, dated 6-11-1968, Reversed. (Paras 54, 56)

(C) Hindu Law — Antecedent debts of father — Pious duty of sons to discharge such debts — Decision of Madras High Court, dated 6-11-1968, Reversed.

A natural guardian of a Hindu minor has power in the management of his

estate to mortgage or sell any part thereof in case of necessity or for the benefit of the estate. If the alienee does not prove any legal necessity or that he does not make reasonable enquiries, the sale is invalid. But the father in a joint Hindu family may sell or mortgage the joint family property including the sons' interest therein to discharge a debt contracted by him for his own personal benefit and such alienation binds the sons provided (a) the debt was antecedent to the alienation, and (b) it was not incurred for an immoral purpose. The validity of an alienation made to discharge an antecedent debt rests upon the pious duty of the son to discharge his father's debt not tainted with immorality. "Antecedent debt" means antecedent in fact as well as in time, that is to say, that the debt must be truly independent of and not part of the transaction impeached. The debt may be a debt incurred in connection with a trade started by the father. The father alone can alienate the sons' share in the case of a joint family. The privilege of alienating the whole of the joint family property for payment of an antecedent debt is the privilege only of the father, grandfather and great-grandfather qua the son or grandson only. No other person has any such privilege. There is, however, another condition which must be satisfied before the son could be held liable, i.e., that the father or the manager acted like a prudent man and did not sacrifice the property for an inadequate consideration. In the instant case on the finding arrived at that the consideration for the sale deed in question was thoroughly inadequate, the sale could not be upheld. Decision of Madras High Court, dated 6-11-1968, Reversed. (Paras 57, 58, 59, 63)

Cases Referred : Chronological Paras

AIR 1966 All 315 : 1966 All LJ 107 (FB) 63

AIR 1953 SC 487 : 1954 SCR 177 : 1954 All LJ 54 : 1953 SCJ 700 60

AIR 1937 Mad 140 : (1937) 1 Mad LJ 278 62

AIR 1924 PC 50 : 51 Ind App 129 : 26 Bom LR 500 61

(1885) 13 Ind App 1 : ILR 13 Cal 21 (PC) 60

MISRA, J.:— The present appeals by certificate are directed against the judgment dated 6th November, 1968 of the Madras High Court.

2. The dispute between the parties centres around 48.70 acres of land, partly wet and partly dry in village Pichanur, Gudiyattam Taluk, North Arcot District and one house in Gudiyattam town. Admittedly the said properties belonged to one Varadayya Chetty. He had two sons, K. V. Purushotham and K. V. Sriramulu. K. V. Purushotham in his turn had four sons while K. V. Sriramulu had three sons. They constituted a joint Hindu family. The family owned and possessed 48.70 acres of land and three houses. Varadayya Chetty died about 30 years prior to the institution of the suits giving rise to these appeals. At the time of his death his eldest son K. V. Purushotham was the only adult male member, the other son, K. V. Sriramulu being only 4-5 years old. Purushotham thus came into the sole management of the entire family affairs and he brought up his younger brother Sriramulu. Their ancestral family business (Kulachara) was that of tobacco and money lending.

3. It appears that immediately after the second world war Purushotham started a new business of lungi. In connection with his new venture he borrowed money from others either on promissory notes or on the security of the family properties. He, however, suffered loss in that business. When his creditors began to press for immediate discharge of the debts, K. V. Purushotham and his brother K. V. Sriramulu on their behalf and on behalf of other minors in the family entered into an agreement on 7th July, 1955 with V. Govindaswami Mudaliar, V. Shanmugha Mudaliar and V. Nataraja Mudaliar, sons of Vaidinankuppam Venugopala Mudaliar. This agreement was evidenced by a writing, Ext. B-4. Under the agreement K. V. Purushotham and K. V. Sriramulu were to sell their entire property, except one acre of land, and a house, to Mudaliar brothers for a sum of Rs. 14,000/- to discharge their debts. They received a sum of Rs. 500/- by way of advance and the balance of Rupees 13,500/- was to be paid within two months. It was further stipulated that in case the vendees defaulted they would lose the advance money, on the other hand if the vendors defaulted they would have to pay to the vendees a liquidated damage of Rs. 2,000/-.

4. Pursuant to the aforesaid agreement, a sale deed was executed on 22nd of Aug, 1955 marked Ext. B-5 for an enhanced consideration of Rs. 16,500/-. The sale deed referred to various debts owed by the vendors which were to be discharged by the vendees and the balance, if any, was to be paid to the vendors. The recital in the sale deed indicated that Rs. 250/- was paid in cash to the vendors at the time of execution of the sale deed. The sale deed further recites that the vendors have not shown the exact amount of debts which the vendees have agreed to pay. The amounts specified therein are only approximate. The sale deed further authorised the vendees to discharge the mortgage debts mentioned in the sale deed in the first instance, if they had no sufficient funds to clear off all the debts at one time and clear off the ordinary debts later.

5. The validity of the aforesaid sale deed, Ext. B-5 dated 22nd Aug. 1955 and a mortgage deed Ext. B-49 in favour of A. M. Vasudeva Mudaliar had been challenged by the sons of K. V. Purushotham and K. V. Sriramulu respectively by two suits : Suit No. 107 of 1958 and Suit No. 108 of 1958. There was yet another suit by one of the creditors, M. V. Chinnappa Mudaliar for annulment of the said sale. As mentioned earlier, the original suit No. 107 of 1958 was filed by the four sons of Purushotham impleading Purushotham and Sriramulu as defendants Nos. 1 and 2 and three minor sons of Sriramulu as defendants Nos. 3 to 5 under the guardianship of their mother; V. Govindaswami Mudaliar, V. Shanmugha Mudaliar and V. Nataraja Mudaliar, the three vendees as defendants Nos. 6 to 8 in Suit No. 107 of 1958 and defendants Nos. 8 to 10 in Suit No. 108 of 1958; A. M. Vasudeva Mudaliar, defendant No. 9 and the Official Receiver of the North Arcot District as defendant No. 10.

6. Suit No. 108 of 1958 was filed by the three minor sons of Sriramulu. The plaintiffs and other defendants of original Suit No. 107 of 1958 were impleaded as defendants in this suit. The relief claimed in these suits was for partition after setting aside the sale deed dated 22nd of Aug. 1955, Ext. B-5 and the mortgage deed Ext. B-49 in favour of

A. M. Vasudevan Mudaliar. The allegations in the plaint of the two suits are on the same pattern. It will, therefore, suffice to refer to the allegations made in Suit No. 107 of 1958.

7. It is alleged in the plaint that the ancestral property of the family consisted of 48 acres and 70 cents of land and three houses detailed in Schedules B and C to the plaint. The said land fell in two blocks, one consisting of 43 acres, 21 cents and the other of 5 acres 49 cents. There were two wells in the first block and one well in the second block. There were two pumpsets with electric motors installed in the two wells in the first block at a cost of Rupees 3,000/- each. The net cultivation yield from the land in any case would not be less than Rs. 6,000/- per year which was more than sufficient for the maintenance of the family leaving even some surplus. The father of the plaintiffs started a new business of lungi which was not the business 'Kulachara' of the family. In connection with the new venture he had to borrow large sums of money either on promissory notes or on the security of the aforesaid property. In course of the said business Purushotham sustained a heavy loss. When the mortgagees and unsecured creditors started pressing for immediate discharge of the debts, defendants 6 to 8, who happened to be friends of Purushotham, induced him to create a nominal sale of the house and the entire land, except an acre, in order to stave off the immediate pressure. Purushotham seemed to have and consequently executed first an agreement to sell and then a registered sale deed dated 22nd of Aug. 1955 for a nominal consideration of Rs. 16,500/- in respect of the entire land in Schedule B with electric pump sets, with the exception of one acre, and a house which is item No. 1 of Schedule C. Defendants 6 to 8 represented that they would execute a formal deed of reconveyance of the properties after the pressure from creditors was staved off. The sale deed was not supported by consideration and even recited consideration of Rs. 16,500/- was grossly inadequate and extremely low considering the extent of land and the house and their market value. The entire joint fa-

mily property was not worth less than Rs. 35,000/- and its annual yield was worth more than Rs. 6,000/-. The house mentioned at item No. 1 of Schedule C was also worth Rs. 5,000/- though the consideration for the same in the sale deed was only Rs. 2,000/-. Defendants 1 and 2 continued in possession of the properties sold, for about a year when suddenly defendants Nos. 6 to 8 conceived the idea of defrauding the defendants 1 and 2 and by force and violence trespassed upon the lands and took forcible and unlawful possession thereof along with the standing crops worth Rupees 6,000/-. Defendants 1 and 2 were, however, still in possession and enjoyment of the house mentioned in item No. 1 of Schedule C. Defendants 6 to 8 were bound to deliver the possession of the land to the plaintiffs and defendants 1 to 5 together with the mesne profits from June 1956, the date of trespass.

8. It was further alleged that except the two mortgages mentioned in the sale deed the other debts shown as consideration were false and fictitious. Even the said mortgages were paid by defendants 6 to 8 out of the standing crops. There was absolutely no necessity for borrowing the large sums considering the large income from the joint family properties. Even if the alleged debt due on the promissory note executed by defendant No. 1 in favour of the 9th defendant was true, it was not binding on the plaintiffs to the extent of the cash consideration as it was not for necessity. Defendant No. 2 joined the execution of sale deed and the mortgage deed at the behest of the 1st defendant and on misrepresentations made by defendants Nos. 6 to 8 and in fact he had not derived any benefit from the borrowings. As M. V. Chinnappa Mudaliar had filed a petition against Purushotham, being insolvency petition No. 20 of 1955, and Purushotham was adjudged insolvent so the Official Receiver was impleaded as a defendant in this case.

9. The third suit being suit No. 4 of 1960 was filed by M. V. Chinnappa Mudaliar, a creditor of defendants K. V. Purushotham and K. V. Sriramulu against the vendees V. Govindaswami Mudaliar and his two brothers arrayed as defendants 1 to 3. He first filed an insolvency petition in which Puru-

shotham was adjudged as insolvent. The said creditor had approached the Official Receiver for filing a suit for the annulment of the said sale but as Official Receiver demanded a lot of expenses he, therefore, sought the permission of the Insolvency Court to file suit No. 4 of 1960 himself for a declaration that the sale deed dated 22nd of August, 1955 executed by Purushotham in favour of vendees was void or voidable at the instance of the creditors of Purushotham and for annulment of the same. According to him Purushotham had borrowed a sum of Rs. 1,000/- from him and had executed a bond for that amount on 17th Sept., 1947 carrying interest at 13 annas per cent per mensem. Barring some payments a substantial amount was still due from him as principal and on account of interest in the middle of 1955. Purushotham, however, executed a sham, nominal and fraudulent sale deed dated 22nd Aug., 1955 in respect of almost all the family properties in favour of the defendants Nos. 1 to 3 with an intent to defeat and delay his creditors, including the plaintiff. It was also pleaded that property worth Rs. 50,000/- was alienated for a nominal price obviously for discharge of fictitious debts. So, the plaintiff claimed a relief under S. 53 of the Transfer of Property Act.

10. The claim of the plaintiffs in all the three suits was resisted by the transferees. In substance their defence was that the alienation by Purushotham was for payment of antecedent debts which were untainted by illegality or immorality; that the father under the Hindu law possessed a special power to alienate joint family property including the shares of his sons for payment of his own debts not incurred for immoral or illegal purposes; that in exercise of that power he had sold all his interest and the interest of his minor sons, that a registered agreement of sale was entered into on 7th of July 1955 and the period of two months was provided for the performance of the contract and the vendees had investigated before entering into the transaction; that the transaction was normal, regular and bona fide one; that the vendees had in fact paid off the full consideration applying it for discharge of antecedent debts obtaining from several creditors vouchers for such due payment and cancellation.

A. M. Vasudevan Mudaliar who had been arrayed as defendant No. 9 in suit No. 107 and as defendant No. 7 in suit No. 108 of 1958 resisted the claim of the plaintiffs in those suits on the ground that the mortgage in his favour was incurred for the discharge of antecedent debts and for the need of the Hindu family, which was binding upon the members of the family. The plaintiffs in both the suits Nos. 107 and 108 of 1958, the sons of the vendors, were bound by the said alienation.

11. The pleadings of the parties gave rise to a number of issues. Some of the issues were common in all the three suits. On the request of the parties all the three suits were jointly tried.

12. Before the trial commenced a joint memo was filed in original suit No. 4 of 1960 whereby the parties agreed that the evidence in original suit No. 4 of 1960 regarding lack of consideration for the sale deed dated 22nd of Aug., 1955 and the value of the properties be treated as evidence in original suits Nos. 107 and 108 of 1958. They also agreed that the evidence regarding the mortgage deed dated 2nd of March 1952 be treated as common evidence for original suits Nos. 107 and 108 of 1958. After this statement by the counsel for the parties, the original issues framed in the three suits were recast and additional issues were also framed.

13. The Subordinate Judge came to the following conclusions in suit No. 4 of 1960:

(1) At the time of execution of the sale deed, Ext. B-5, the fourth defendant, that is Purushotham, owed some creditors in whose favour he had executed Exts. A-3, A-4, A-12, A-13 and the bond debts involved in Exts. A-7 to A-11, but no provision had at all been made for those creditors either in the agreement of sale Ext. B-4 dated 7th of July, 1955 or in Ext. B-5, the sale deed dated 22nd of Aug., 1955.

(2) Ext. B-54, the letter written by Purushotham in favour of Veerasami Naidu dated 27th of July, 1955 along with other oral evidence clearly establishes the intention of Purushotham to defeat and delay the claim of some of the creditors in screening his property by a nominal sale in favour of defendants 1 to 3.

(3) The ingredients of S. 53 (1) of the Transfer of Property Act have been

satisfied by the plaintiff inasmuch as impugned transfers have been made with intent to defeat or delay the creditors of the transferor. The Court, however, came to the conclusion that the suit was wrongly framed inasmuch as the plaintiff did not seek any relief on behalf of or for the benefit of all the creditors and, therefore, the Court decreed the suit No. 4 of 1960 as against defendants 1 to 3, that is, alienees annulling the sale transaction dated 22nd Aug. 1955 as fraudulent preference under S. 54 of the Provincial Insolvency Act, insofar as the insolvent's share was concerned.

14. His conclusions in suits Nos. 107 and 108 of 1958 were as follows:—

(1) The value of the land and house including the pump sets, wells etc. comprised in Ext. B-5 could have been in Aug. 1955 worth anywhere between Rupees 35,000/- to Rs. 50,000/-, but the same had been sold at a grossly low and inadequate price of Rs. 16,500/-.

(2) Purushotham and Sriramulu with the help of Shri Rangaswami, who was their friend, approached the vendees for help and on their suggestion they agreed to execute a nominal sale of all their properties with an understanding for reconveyance after ten years on payment of the sums advanced by them and that in that connection they had thought of executing the two bogus bonds, one in favour of Veeraswami Naidu, DW 12, and another in favour of Deivasigamani Mudaliar, DW 3 and certain other documents to make the sale probable.

(3) The sale deed dated 22nd August, 1955 is true and it is supported by consideration but only partly. It is, however, liable to be set aside wholly as an imprudent transaction.

(4) The mortgage deed dated 2nd of March 1952 is true and binding only so far as shares of K. V. Purushotham and Sriramulu are concerned and the extent of Rs. 2,000/- so far as the plaintiffs in original suit No. 107 of 1958 are concerned.

(5) The alienees under the sale transaction dated 22nd of Aug. 1955 are not entitled to any equities in this suit. But the alienee under Ext. B-49 would be entitled to have his two items of house allotted to the share of K. V. Purushotham and K. V. Sriramulu to work

out his equities but this will be easily done in the final decree proceedings in original suits Nos. 107 of 1958 and 108 of 1958.

(6) The plaintiffs would be entitled to past profits from the alienees of the sale transaction dated 22nd of August, 1955 from the year 1956-57 as it is in evidence that they entered possession in that year.

15. On these findings the Subordinate Judge passed a preliminary decree for partition and division of their respective shares in suits Nos. 107 of 1958 and 108 of 1958 which was 2/5th and 3/8th respectively in both the suits after setting aside the sale transaction dated 22nd of August, 1955 and directing the alienees to work out their remedies outside the scope of these suits and declaring that the alienation dated 2nd March, 1952 was binding only on the shares of K. V. Purushotham and K. V. Sriramulu and to the extent of Rs. 2,000/-. The plaintiffs were held entitled to a decree for past profits from 1956-57 as against the alienees of the sale transaction dated 22nd August, 1955, the quantum to be determined in a separate enquiry in the final decree proceedings as was agreed to by the parties under Order 20, Rule 12, C. P. C. The court declined to give any relief to the alienees even in respect of the amount actually paid by them to discharge some of the debts incurred by Purushotham on the ground that the transaction has been vitiated by fraud.

16. The alienees-defendants feeling aggrieved by the judgment and decree of the Subordinate Judge preferred appeals in all the three suits. The mortgagee Vasudevan Mudaliar, however, submitted to the judgment and decree and did not prefer any appeal presumably because he could realise the amount due to him by virtue of the decree granted to him. The High Court was, therefore, concerned only with the validity of the sale deed Ext. B-5 in favour of the appellants.

17. The High Court reversed the findings of the trial court in suits Nos. 107 and 108 of 1958 and set aside the decree passed by the Subordinate Judge but confirmed the finding and decree in suit No. 4 of 1960. The High Court came to the conclusion that the purchase of the suit land under Ext. B-5

was for a reasonable price and the consideration of Rs. 16,500/- mentioned in Ext. B-5 was not a grossly low price. The lungi business started by Purushotham was new venture of Purushotham and not his family business. His father had only a tobacco and money-lending business. The genuine debts mentioned in Ext. B-5 were antecedent debts from the point of view of the plaintiffs in original suit No. 107 of 1958. Therefore, they are binding on them. As the debts evidenced by Exts. B-13 and B-14 were genuine debts the alienation, Ext. B-5, is clearly binding on the plaintiffs in original suit No. 107 of 1958 as the sale deed was executed by their father in discharge of antecedent debts. The alienation under Ext. B-5 can be supported not only against the plaintiffs in original suit No. 107 of 1958 but also against the plaintiffs in original suit No. 108 of 1958 as it was made in discharge of antecedent debts of their respective fathers.

18. On these findings the High Court allowed the appeals filed by the alienees in suits Nos. 107 and 108 of 1958 but dismissed the appeal filed in suit No. 4 of 1960. The plaintiffs have now come in appeal to challenge the judgment of the High Court.

19. The contention raised on behalf of the appellants is that the High Court has omitted to take into consideration various circumstances which had been taken into consideration by the trial court and as such the findings of the High Court on material issues are vitiated. The High Court further omitted to consider whether the impugned sale was an imprudent transaction, if not fictitious. The counsel for the respondents, on the other hand has contended that the findings recorded by the High Court are pure findings of fact based on appraisal of evidence and this Court cannot reverse the findings recorded by the last Court of facts. We have to consider the findings of the High Court in the light of the contentions raised by the parties.

20. The question for consideration in these appeals is about the genuineness of the sale deed Ext. B. 5 dated 22nd of August, 1955 executed by Purushotham and Sriramulu in favour of respondents 1 to 3. As stated earlier, the sale deed was challenged by the plain-

tiffs on grounds: (a) that it was executed only nominally for a collateral purpose and with a view to stave off creditors with the express understanding that the properties sold would be re-conveyed to the vendors after the pressure of the creditors had subsided; (b) that even the recited consideration in the impugned sale deed was grossly inadequate; (c) that the debts under the promissory notes Ext. B-13 in favour of Veeraswami Naidu and Ext. B-14 in favour of Deivasigamani Mudaliar were fictitious.

21. The burden squarely lay on the vendees to prove that the impugned sale deed was valid and binding on the plaintiffs and their respective shares. To discharge this burden the vendees have produced both oral and documentary evidence. The vendors have also produced both oral and documentary evidence in support of their case.

22. Before dealing with the oral evidence of the parties in detail, it is pertinent to refer to Ext. B-54 which is the most important document supporting the vendors. This is an inland letter dated 27th of July, 1955 written by K. V. Purushotham in Telugu to Veeraswami Naidu. If this letter is proved to be genuine it will give a death blow to the case of the vendees. This letter has been relied upon by the trial court but has been discarded by the High Court. As this letter is a revealing one it will be appropriate to quote the letter in extenso.

"Gudiyattam,

27-7-55

Letter written by Gudiyattam K. V. Purushotham with salutations to elder brother Sri B. Veeraswami Naidu of Manthangal village. Here all are keeping good health with your blessings. Please write to me your and your children's welfare.

In respect of the debts due to the creditors by me here, I and your son-in-law T. G. Rangaswami Naidu went to see Vaithana Kuppam Venugopala Mudali and his sons V. Govindaswami Mudali and brothers and had a talk with them in respect of the debts due by me. They said to us that I should execute a sale deed in respect of my properties in their favour and that after the creditors demands (troubles) subside the amount that they would be giving us shall be repaid within a period of 10 years and that on such repayment

they would reconvey the property conveyed in their favour. As all of us have desired I and my younger brother entered into an agreement on 7-7-1955 agreeing to execute a deed of sale in pursuance of the talk we had.

Sale deed remains to be executed. In this connection (regard) I and my younger brother both have to create some nominal bonds fixing up to some dates and then set up as though these bonds were cancelled on payments being made by those persons and that those items might be recited in the sale deed to be executed. For resorting to this, we all decided and fixed you up as one such (person) in whose favour bonds have to be drawn up to a fixed date. If such bonds are drawn up in favour of respectable persons like you and if all of us join together, then the other creditors cannot do anything. As you are a trusted person these could be done in your favour as stated. They have agreed to give us great help in this matter. Further he is a very good friend of us. If the amount to which they are entitled to, is paid back within 10 years, without fail, then they will reconvey by way of deed of sale in our favour. They will not fail in their words. All of us have decided that a bond should be executed in your favour nominally fixing up to a particular date for a sum of Rs. 2500/-. Thereafter on some other date you have to make an endorsement of payment on the bond and return the bond after cancelling the same. Further I and my younger brother have executed a nominal bond for Rs. 1000/- on 15-12-1954 in favour of C. R. Deivasigamani too i. e. his junior paternal uncle viz., V. Govindaswami Mudali's mother's sister's husband. Your son-in-law T. G. Rangaswami Naidu has attested as a witness in that.

In respect of the bond in your favour, you have to send a notice to us. V. Govindaswami Mudali, son of Venugopal Mudali told me that such a notice is essential that should be on record to strengthen the sale deed. Further, we are also told that you should write a letter to your son-in-law T. G. Rangaswami Naidu asking him to make demands regarding the amount due to you. The main reason for doing all these is to stop the trouble given by the other creditors to whom I owe.

Therefore, with a view to meet you in person, discuss and arrange regarding the aforesaid matter, I and your son-in-law T. G. Rangaswami Naidu are going over to your village tomorrow. You will have no difficulty in this matter. Therefore, I request that you and your senior son-in-law Raghavulu Naidu to remain in the house. We will inform you the rest of the matters in person. We request you to show faith or kindness (in Telugu) towards this poor family.

Thus with salutations.

Sd/- K. V. Purushotham."

23. The reasons which impelled the High Court to discard this letter are as follows : (1) the author of this letter K. V. Purushotham did not appear in the witness box; (2) the document does not come from proper custody; (3) there is no reason why the letter should have been sent from Gudiyattam to Manthangal village when one could reach the latter village from Gudiyattam within a short time by a bus or other conveyance, (4) the letter was posted on 28th July, 1955 at 5 p. m. and reached its destination on 4th August, 1955 as it appears to have been detained at Ranipet in the interval then how did they come to prepare Ext. B-20 and Ext. B-48 even on 30th July, 1955; (5) in Ext. B-54 Purushotham had expressed that he would be meeting D. W. 12, Veeraswami Naidu, on the very next day and thus there was no real necessity to write the letter Ext. B-54; (6) if Purushotham conspired with the son-in-law of D. W. 12, Veeraswami Naidu to bring into existence fictitious promissory notes, it is unlikely that they would announce it in the letter Ext. B-54 when they were not sure of the attitude of D. W. 12, Veeraswami Naidu, unless they wanted to create evidence for the purpose of the case; (7) there was no necessity for Purushotham and Sriramulu to bring into existence fictitious promissory notes in favour of D. W. 3, Deivasigamani and D. W. 12, Veeraswami Naidu, as they would have easily mentioned the other undisputed debts owed by them to support the recitals of consideration in the sale deed. The counsel for the respondents has reiterated the same reasons for discarding Ext. B-54.

24. The first ground which weighed with the High Court for discarding the

letter Ext. B-54 is that the author of this letter K. V. Purushotham did not appear in the witness box and the document does not come to court from a proper custody. No such objection was raised on behalf of the vendees in the trial court regarding the admissibility of the letter. The evidence of D. W. 13 and D. W. 18 have clearly proved the handwriting of K. V. Purushotham in Ext. B-54. The observation of the High Court that the letter might have been written subsequently is conjectural one. No such case was even set up by the vendees in the written statement or in the evidence. Exhibit B-54 is an inland letter bearing the postal stamps and it could not have been fabricated.

25. A capital has been made out of the delayed delivery of the letter on 4th August, 1955. The letter was posted on 28th of July, 1955 at 5 p. m. and it reached its destination on 4th of August, 1955. It appears to have been detained at Ranipet in the interval. The High Court has attached undue importance to the fact that if Ext. B-54 reached the addressee on 4th of August, 1955 then how did they come to prepare Exts. B-20 and B-48 even on the 30th of July, 1955. The difficulty is solved if we keep in mind the fact that in the last paragraph of the letter the addressee was informed that they were all coming to meet him (D. W. 12) at his place the next day. If in accordance with the recital of the letter Purushotham had reached the next day, 29th of July, 1955, there was nothing improbable in the preparation of the two documents on 30th July, 1955.

26. There is a slight inconsistency in the evidence of D. W. 12 when he says that only on the receipt of Ext. B-54 other documents were prepared. But the evidence of D. W. 12, which otherwise appears to be natural, cannot be discarded merely on this slight inconsistency.

27. The other reason which has appealed to the High Court for not believing Ext. B-54 is that if Purushotham was to meet Veeraswami Naidu the very next day, then there was no real necessity to write the letter Ext. B-54. It could not be expected that the letter would be so unduly delayed and if Purushotham has taken precaution by writing a letter and also by going to his place it cannot detract from the value of Ext. B-54.

28. The observation of the High Court that there was no necessity for Purushotham and Sriramulu to bring into existence fictitious promissory notes in favour of D. W. 3, Deivasigamani and D. W. 12, Veeraswami Naidu as they could have easily mentioned the other undisputed debts owed by him to support the recital of the consideration in the sale deed, also does not hold good inasmuch as there is ample evidence on the record to warrant the conclusion that the promissory notes in favour of D. W. 3, Deivasigamani and D. W. 12, Veeraswami Naidu were fictitious. Most of the debts have neither been referred to in the deed of agreement for sale nor in the sale deed and it was purposely done.

29. If the High Court had taken into consideration the aforesaid tell-tale circumstances there would have been no difficulty in accepting Ext. B-54 as genuine.

30. The circumstances which should have been taken into consideration by the High Court before reversing the findings recorded by the trial court are as follows.

31. In connection with the lungi business started by K. V. Purushotham he had to borrow money from various creditors. When the new business of lungi ended in loss there was pressure from the creditors for the discharge of the debts. K. V. Purushotham was thus in a tight corner. As a prudent man, he would have liked to save his property to the extent he possibly could and pay off the various debts incurred by him. Curiously enough Purushotham and his brother, Sriramulu sold away the entire landed property of about 47 acres and odd, leaving behind only an acre, and a house, owned by the joint family for a paltry sum of Rs. 16,500/-. Out of the total consideration of Rs. 16,500/- the vendees were asked to discharge the various debts mentioned in Ext. B-5, the sale deed. On an examination of the sale deed, Ext. B-5 as well as the deed of agreement Ext. B-4, it is clear that all the debts incurred by Purushotham were not shown in those deeds. Exhibit B-4 detailed only two mortgage debts while Ext. B-5 specified five items of debts. Admittedly there were other debts also incurred by K. V. Purushotham. It passes one's comprehension

why would K. V. Purshotham and his brother Sriramulu sell away the entire landed property of 47 acres leaving behind only one acre, and a house, without making a provision for the discharge of all the outstanding debts. Not only that, there was a stipulation in the sale deed Ext. B-5 that the vendees may first pay debts under the mortgage if the vendees had no money to discharge all the debts at one and the same time and to clear off the ordinary debts at a later date.

32. What was the earthly reason for executing the sale deed of almost all the property owned by the family? If Purshotham wanted to save his reputation by paying off all the creditors then there should have been provision made for discharge of all the debts and at least they should have been specified either in the agreement to sell or in the sale deed, Ext. B-5. Admittedly there were other debts besides the debts specified in the sale deed, Ext. B-5. K. V. Purshotham owed to other creditors in whose favour he had executed promissory notes Exts. A-3, A-4, A-12 and A-13, and the bond debts involved in Exts. A-7 to A-11 but these debts have not been shown either in Ext. B-4 or Ext. B-5 specially when the debts were to be discharged by the vendees under the terms of the sale deed as part of the consideration. If almost the entire property of the joint family was to be sold for the discharge of his debts, and yet a substantial part of the debt remains undischarged, there was no positive gain to the vendors in disposing of almost the entire property of the joint family.

33. The stipulation in the sale deed that the vendees might pay off only the secured debts and clear off the other ordinary debts at their leisure itself indicates that there was no anxiety on the part of the vendors to clear off all the debts. It does not stand to reason why should the vendors adopt such an attitude. These circumstances speak for themselves.

34. If we consider Ext. B-54 in the light of these circumstances, the letter appears to be a sequel to what has been agreed upon between K. V. Purushotham and the vendees or their father. The vendees persuaded Purshotham to execute a sale deed of almost his entire

family property under the pretext of assistance to him with the stipulation that they would re-convey the property to the vendors after the pressure from the creditors was over. This can be the only reason why the vendors would agree to dispose of the entire joint family property for a paltry consideration of Rs. 16,500/- out of which only Rs. 500/- by way of advance and Rupees 250/- at the time of execution of the sale went to the vendors according to the recital in the sale deed itself. The balance of the sale consideration is alleged to have been used by the vendees for paying off some of the creditors. The attempt on behalf of the vendess has been to show that they persuaded the creditors either to forgo the interest or to reduce the principal amount and thus they had cleared off the dues of the various creditors. In proof of this they tried to file the receipts and vouchers from the creditors most of which have been attested by the vendees' own kith and kin. Some of the documents which have been attested by these witnesses, have been belied by D. W. 12 at least in respect of Ext. B-13. He clearly admitted that Purushotham never borrowed any amount from him nor did he pay any amount towards any loan to him. He has given the full account of how Govindaswami Mudaliar and some other persons came to the mango tope of his son-in-law and met him there. They asked him to sign the endorsement of discharge in Ext. B-13. At first he protested and refused but on the assurance of other persons who were there he had to sign the document on their persuasion on the ground that they were setting up these documents in connection with a sale. The same position has been admitted by even Rangaswami Naidu, D. W. 18.

35. It is true that Purushotham, the author of the letter himself has not come to the witness box but the letter has been proved by the addressee himself, D. W. 12, Veeraswami Naidu. He also identified Exts. B-48 and B-48A, the two cards containing his signatures, one addressed to K. V. Purshotham and the other to his brother, K. V. Sriramulu. But he admitted that he had signed those postcards without knowing their contents. This gives a clue how the vendees have been out to get attestations of the endorsements of dis-

charge from creditors in respect of got up documents. The High Court has attached undue importance to the fact that Ext. B-54 has not come to the Court from proper custody, that is, it should have come to the Court through Veeraswami Naidu but instead it was produced by his son-in-law, D. W. 18. Keeping in view the relationship between Veeraswami Naidu and his son-in-law, the production of the letter by his son-in-law cannot be said to be from an improper custody. His two sons-in-law have also appeared as witnesses as D. W. 13 and D. W. 18. D. W. 13, Rajavelu, deposed that on the day Ext. B-54 was received by D. W. 12 he was present. According to him on that day Govindaswami Mudaliar and Purushotham came to their place and Purushotham informed Veeraswami, his father-in-law that as a support for a sale deed they had got up a bond in his favour. He dittoes what has been said by Veeraswami Naidu. The other son-in-law, Rangaswami Naidu, D.W. 18, also appeared as witness. He owns land adjacent to the suit land. He also deposed that the bond debt mentioned in Ext. B-5 in favour of D. W. 12 and the bond debt in favour of D. W. 3, Deivasigamani were got up ones. He also identified Ext. B-54 as a letter written by Purushotham to his father-in-law, Veeraswami Naidu.

36. The various other reasons given by the High Court for discarding Ext. B-54 are only flimsy and the circumstances enumerated above make the letter Ext. B-54 a plausible and natural letter. An adverse inference could have been drawn for non-appearance of Purushotham but the other evidence in the circumstances in our opinion warrant the conclusions drawn by the trial court and we choose to accept the findings of the trial court.

37. This leads us to the other oral and documentary evidence.

38. The vendees have produced seven witnesses besides one of them as D. W. 1. Govindaswami Mudaliar, D. W. 1, has substantiated the case set up by the vendees in their written statement. He, however, for the first time deposed that the family business of the vendors has been weaving and lungi, although this was not their case even in the written statement. He deposed that after the

sale the vendees took possession of the land and the house and later on leased out the land to Deivasigamani vide Ext. B-37, on an annual rent of Rupees 1400/- and the house on a monthly rent of Rs. 12 vide Ext. B-41 and that from the time of purchase the vendees have been paying the kists and taxes for the land and the house.

39. The other witnesses produced by the vendees are Ratna Mudaliar, D. W. 2 Deivasigamani Mudaliar, D. W. 3, G. Rajan D. W. 4, Govindappa Mudaliar, D. W. 5, Vasudevan Mudaliar, D. W. 6, Punyakoti Chettiar, D. W. 7 and V. C. Manivannan, D. W. 8. Ratna Mudaliar D. W. 2, lives only three houses away from the house of Venu-gopal Mudaliar. He had attested Ext. B-4 and Ext. B-5 and also the endorsement of discharge in Exts. B-9, B-14, B-15 and B-17. He had also attested the endorsement in Ext. B-37 Ext. B-41. It was suggested to him that his signatures had been taken on the documents he had attested at a later date. He denied this suggestion. He could not, however, describe the circumstances under which the endorsement of the discharge in Ext. B-9 came to be written. He was so intimate with the vendees that he was asked to attest so many documents but he evaded to reply the question whether Deivasigamani was employed in the shop of Govindaswami Mudaliar when Deivasigamani himself has admitted that he was in the service of D. W. 1.

40. Deivasigamani Mudaliar, D. W. 3, has also attested Ext. B-5 and the endorsement of discharge in Ext. B-9 and Ext. B-13. He is also an attestator of the endorsement of discharge in Ext. B-12. He has admitted that he was related to D. W. 1, the vendee, and also that he was in the service of Govindaswami Mudaliar five years back as his Gumastha. He also admits that he had taken certain lands on lease from the vendees. He appears to have been present on each and every crucial occasion for attesting the documents. He being a close relation and also a servant of defendant No. 1, he is bound to echo the voice of his master.

41. G. Rajan D. W. 4, attested the endorsement of discharge in Ext. B-13, which was a promissory note executed in favour of Veeraswami Naidu. He admitted in cross-examination that he

used to call on D. W. 1, off and on and he happens to be his friend. His evidence also gives the impression that he has come to oblige D. W. 1.

42. Govindappa Mudaliar, D. W. 5, has attested Exts. B-4 and B-5 and the endorsement of discharge of a bond Ext. B-9 to Sambayya Chetty. He admitted that he was a regular visitor to the house of D. W. 1. He used to go there to read newspapers. He is also at the house of D. W. 1, on crucial occasions reading newspapers,

43. Vasudevan Mudaliar, D. W. 6, has deposed that K. V. Purushotham and K. V. Sriramulu had borrowed money from him in 1952 and they had mortgaged a house and a vacant site under Ext. B-49. Exhibit B-50 was a prior promissory note executed by K. V. Purushotham. In renewal of that bond and for a further advance of Rs. 2000/- Ext. B-49 was executed for Rs. 4000/-. He admitted in his cross-examination that there were other big money lenders viz., M. A. Govindaraju Chettiar, Managing Director of Rajeshwari Mills, Gudiyattam; Motiyappa Mudaliar was also equally well-to-do man and had got money lending business; Rajupati Rajagopal Naidu and others. But K. V. Purushotham had not borrowed any money from any of those persons. He also admitted in the cross-examination that the value of the land within the radius of five miles of Gudiyattam had risen in the course of five or six years. He further deposed that his first cousin Vasudeva Mudaliar had purchased six acres for Rs. 24,000/- within two years. He did not deny the suggestion that the transaction might be four years back. The statement was made on 8th of August, 1961 and about four years back would take us to 1956-57.

44. Punyakoti Chettiar, D. W. 7 deposed that Purushotham and his brother Sriramulu had borrowed Rs. 2500/- from him and executed a bond Ext. B-12. They had also executed Ext. B-16 for Rs. 200/-. He further deposed that at the time of discharge of Exts. B-12 and B-16 three persons had come to his place. They were Raju Jaickar, E. A. Ponnusami Mudaliar and Venugopal Mudaliar. But in cross-examination he positively admitted that neither Raju Mudaliar nor Deivasigamani were pre-

sent at the time of discharge and attested the endorsement in Ext. B-12. In the endorsement of discharge, however, one Raju Naidu had attested. He, however, admitted in cross-examination that Rangasami Naidu and Ponnusami Mudaliar alone were present at the time of discharge of Ext. B-12 but neither Raju Mudaliar nor Deivasigamani Mudaliar, who have attested Ext. B-12 were present at the time of discharge.

45. V. C. Manivannan, D. W. 8 is the Secretary of the Land Mortgage Bank, Vellore. He speaks of the circumstances under which the mortgage in favour of his bank was discharged. According to him Venugopal Mudaliar, the father of Govindaswami Mudaliar, came to the bank at the time of the discharge. He enquired whether the penal interest could be given up. He represented that remission, if any, made would enure to the benefit of Purushotham when he gets resale. He also admitted that the valuation of the property was that of the pre-war period and after the war prices had risen three to four times.

46. A scrutiny of the evidence produced on behalf of the vendees reveals that the witnesses are interested in the vendees and they are out to oblige them. In some cases it is even doubtful whether the attesting witnesses were present at the time of attestation. The possibility of obtaining their signature at a later date cannot be ruled out.

47. As against the evidence of the alienees, the evidence supporting the vendors proves that the properties included in the sale deed Ext. B-5 were worth somewhere between Rs. 40,000/- to Rs. 50,000/-. The Village Munsif and Karnam of Pichanur were examined as D. W. 10 and D. W. 17 respectively. According to D. W. 10 the land belonging to the vendors included in the sale deed has a total area of about 46 to 47 acres. They are situated in two blocks, one block consisting of 42 acres and the other block consisting of the balance. Two electric pumps were existing in the block of 42 acres. He himself owns land adjacent to the suit land, owning about 40 acres. According to him, 20 acres out of 42 acres' block were fit for wet cultivation viz., ragi, paddy, plantain and other wet crops could be raised, while in the dry lands dry crops like red gram, groundnut, horse gram etc.

could be grown. He further deposed that in 1955-56 the 20 acres in which wet crops could be raised was worth Rs. 1500/- per acre while the land in which dry crops could be raised was worth Rs. 300/- to Rs. 400/- per acre. According to him it would cost Rs. 2500/- or more to construct each well and Rs. 1000/- or so to construct the pumping set shed. There were about 300 and odd palmyrah trees each of which would fetch Rs. 5/- or so. Besides there were tamarind and banian trees. One tamarind tree would fetch about Rs. 250/- and one banian tree would fetch about Rs. 100/-.

48. He further deposed that for about a year after the sale the vendors alone continued to be in possession and thereafter the vendees took forcible possession which resulted in a criminal complaint by K. V. Purshottam. This witness is a Village Munsif and there is no reason to doubt his veracity. He has got his own land near the land in suit.

49. The evidence of D. W. 17 is also to the same effect. He is a fairly aged person and Karnam of Pichanur for the past 40 years. The Trial Court has observed in its judgment that it was very much impressed by the demeanour of this witness which impressed the Court as a person speaking the truth. He substantially supported the evidence of D. W. 10. Kuppayya Naidu, D. W. 11 is the lessee of defendants 1 to 3. He also supports the evidence of D. W. 10 and D. W. 17 with regard to the valuation of the property.

50. D. W. 14. Changayya Naidu, is the president of the village Panchayat board. He is also an adjacent owner. He had purchased land admeasuring two acres and odd in 1958 for Rs. 4000/- Ext. B-55 being the registration copy of the sale deed. He also speaks of some purchase of 3 acres and odd adjacent land in the name of his undivided brother vide Ext. B-56 in 1960 for Rupees 9000/-. He is very positive in saying that the land of the vendors could be valued at Rs. 50,000/- in 1955.

51. T. L. Narayanasami Chowdri D. W. 15 is the Director of Gudiyattam Taluka Land Mortgage Bank. He stated that he had purchased 25 to 30 acres of dry land for a sum of Rs. 56,500/- under Ext. B-57 in the year 1960 in the name of his undivided brother. Under an-

other sale deed Ext. B-58 dated 19th of March, 1958, 13 acres and odd were purchased by them for Rs. 26,000/-. The land purchased under Ext. B-57 was situated only at a distance of one furlong from the suit land and was similar to the suit land.

52. Anjaneyalu Naidu, D. W. 16, also owns land adjacent to the land owned by the vendors. He also gave evidence with reference to Exts. B. 59, B-60 and B-61. Under Ext. B-59 dated 2nd June, 1953 he had purchased 2.77 acres for Rs. 2500/-, under Ext. B-60 dated 14th February, 1957 he had purchased 2.27 acres for Rs. 3500/- and under Ext. B-61 dated 22nd June, 1960 he had purchased 3.27 acres for Rs. 7000/-. All these lands according to him were punja (dry) lands similar to the lands owned by vendors. He further deposed that in the year 1952-53 or so the fertile part of the disputed land could fetch Rs. 1500/- to Rs. 2000/- while the punja (dry) lands could fetch Rs. 750/- to Rs. 1000/- per acre.

53. From the aforesaid evidence it can easily be concluded that the land comprised in Ext. B-5 was fertile land capable of giving a net return of not less than Rs. 2000/- to Rs. 2500/- per year. In this state of the evidence, we agree with the conclusion drawn by the Trial Court that the property in dispute was worth Rs. 40,000/- to Rs. 50,000/- but it was sold only for Rs. 16,500/- which is an inordinately inadequate consideration.

54. From the evidence discussed above, both oral and documentary and circumstantial, we in agreement with the trial court hold that the sale deed dated 22nd of August, 1955 is true and it is supported by consideration but only in part and that even the recited consideration in the sale deed is thoroughly inadequate; that the sale deed was executed only nominally for a collateral purpose and with a view to stave off creditors with the express understanding that the properties sold would be reconveyed to the vendors after the pressure of the creditors had subsided; that the debts under the promissory notes Ext. B-13 in favour of Veeraswami Naidu and Ext. B-14 in favour of Deivasigamani Mudaliar were fictitious.

55. The contention of the counsel for the respondents that finding of fact cannot be interfered with by the Court

has no force as the finding is being reversed on the ground that material circumstances have been ignored by the High Court.

56. In view of the finding arrived at there is no question of giving any equities to the vendees even if some of the amounts paid by the vendees to some of the creditors of Purushotham were genuine. If the transaction of sale is itself vitiated for the reasons given above, no relief in equity could be granted to the vendees.

57. Now the question crops up about the pious liability of the sons to discharge the antecedent debts of the father. The legal position under the Hindu law is quite clear. A natural guardian of a Hindu minor has power in the management of his estate to mortgage or sell any part thereof in case of necessity or for the benefit of the estate. If the alienee does not prove any legal necessity or that he does not make reasonable enquiries, the sale is invalid.

58. But the father in a joint Hindu family may sell or mortgage the joint family property including sons' interest therein to discharge a debt contracted by him for his own personal benefit and such alienation binds the sons provided (a) the debt was antecedent to the alienation, and (b) it was not incurred for an immoral purpose. The validity of an alienation made to discharge an antecedent debt rests upon the pious duty of the son to discharge his father's debt not tainted with immorality.

59. "Antecedent debt" means antecedent in fact as well as in time, that is to say, that the debt must be truly independent of and not part of the transactions impeached. The debt may be a debt incurred in connection with a trade started by the father. The father alone can alienate the sons' share in the case of a joint family. The privilege of alienating the whole of the joint family property for payment of an antecedent debt is the privilege only of the father, grandfather and great-grandfather qua the son or grandson only. No other person has any such privilege. K. V. Purushotham had contracted the debt in connection with his new personal business and to clear all those debts he had executed the impugned sale deed. Obviously, therefore, the debt in question was antecedent debt so far as his sons were concerned and,

therefore, they were under a pious obligation to pay off those debts. It was open to the father to execute a sale deed in respect of the shares of his sons also unless it was shown that the debt was tainted with immorality or was for an illegal purpose. It is not the case of the sons of Purushotham that the debt was contracted for an illegal or immoral purpose. Obviously the sale would be binding on the sons of Purushotham. But the same is not the position with regard to the sons of his brother, K. V. Sriramulu who were the plaintiffs in suit No. 108 of 1958. It has been found as a fact that lungi business was the individual or private business of Purushotham. In view of the factual position it could not be said that Sriramulu had alienated the joint family property in the capacity as a father of his sons for discharging any antecedent debt incurred by him merely because he has also joined Purushotham in executing the impugned sale. The share of the sons of Sriramulu could not have been alienated by Purushotham for discharging his antecedent debt.

60. In *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh*, 1954 SCR 177 : (AIR 1953 SC 487) this Court laid down the law in the following terms:

"A person who has obtained a decree against a member of a joint Hindu family for a debt to him is entitled to attach and sell the interest of his debtor in the joint family property, and if the debt was not immoral or illegal, the interest of the judgment-debtor's sons also in the joint family property would pass to the purchaser by such sale even though the judgment-debtor was not the Karta of the family and the family did not consist of the father and sons only when the decree was obtained against the father and the properties were sold. It is not necessary that the sons should be made parties to the suit or the execution proceedings.

The rule laid down by the Privy Council in *Nanomi Babuasin's case* (1885) 13 Ind App 1 is not restricted in its application to cases where the father was the head of the family and in that capacity could represent his sons in the suit or execution proceedings, for, subject to the right of the sons to assert and prove that the debt contracted by their father was not such as would be binding on them under the Hindu law,

the father, even if he was not the Karta could represent his sons as effectively in the sale or execution proceedings as he could do if he was the Karta himself.

61. In *Brij Narain v. Mangla Prasad* 51 Ind App 129: (AIR 1924 PC 50) the Judicial Committee, upon a consideration of the authorities, laid down the following propositions:

"(1) The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but (2) if he is the father, and the other members are his sons, he may by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt. (3) If he purports to burden the estate by a mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate. (4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. (5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

62. In *Shanmukam v. Nachu Ammal*, AIR 1937 Mad 140, a Division Bench of Madras High Court laid down:

"The doctrine of pious obligation of a son to pay his father's debts cannot be restricted to cases where father also happens to be the manager. If this limitation was well founded it would also follow that the father's power of disposing of the son's share for the satisfaction of his own debts must be likewise limited. There cannot be any justification for such limitation when it is remembered that the son's obligation to pay his father's debts was under the original Smritis independent of possession of assets of joint family property. It depends purely upon the relationship of father and son. It is only by case law developed during the early part of nineteenth century and by statute law in the Bombay Presidency that the liability of the son for father's debts was limited to assets and to joint family property. The true basis of the obligation therefore is the relationship of father and son and not the accident of

the father being the manager of the joint Hindu family."

63. There is, however, another condition which must be satisfied before the son could be held liable, i.e., that the father or the manager acted like a prudent man and did not sacrifice the property for an inadequate consideration. In *Dudh Nath v. Sat Narain Ram*, AIR 1966 All 315, a Full Bench of the Allahabad High Court observed (at p. 318):

"In order to uphold an alienation of a joint Hindu family property by the father or the manager it is not only necessary to prove that there was legal necessity but also that the father or the manager acted like a prudent man and did not sacrifice the property for an inadequate consideration. A Hindu father or a manager of a joint Hindu family is expected to act prudently. However great the necessity may be, if the joint family property is sacrificed for an inadequate consideration it would be highly imprudent transaction and it would be a case where, though for necessity, the father or the guardian has not acted for the benefit of the estate or the members of the joint Hindu family. The father or the manager is not the sole owner of the property. In fact until the partition takes place even his share does not stand demarcated. The ownership vests in all the co-parceners taken together as a unit. The father and the manager, therefore, only represent the co-parceners. Consequently the co-parceners stand bound by the act of the father or the manager of the family only to the extent the act is prudent or for the benefit of the co-parceners or the estate."

In the instant case on the finding arrived at that the consideration for the sale deed Ext. B-5 was thoroughly inadequate, the sale cannot be upheld.

64. For the reasons given above the appeals must succeed. They are accordingly allowed and the judgment of the High Court dated 6th November, 1968 is set aside, and that of the trial court is restored. In the circumstances of the case the parties should bear their own costs.

Appeals allowed.

AIR 1982 SUPREME COURT 98

(From: Patna)

**S. MURTAZA FAZAL ALI AND
R. B. MISRA, JJ.**

Civil Appeals Nos. 423 of 1979 and 2084-2090 of 1977, D/- 14-12-1981.

(1) Choudhary Sahu (Dead) by Lrs., Appellant v. State of Bihar, Respondent.

And

(2) Surajballi Sah etc., Appellants v. State of Bihar and others, Respondents.

Civil P. C. (5 of 1908), O. 41, R. 22 and O. 41, R. 33 — Power of Court of appeal under — Scope — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), Ss. 10, 30 — Order of Collector allowing certain units to landholder — No appeal filed by State — In appeal filed by Landholder, Commissioner, held, had no power to interfere with finding in favour of landholder. Decision of Patna High Court, Reversed.

Where the Collector on the basis of the material placed before him allowed certain units to the various landholders who feeling aggrieved went up in appeal before the Commissioner of the Division but the State of Bihar submitted to the order and did not go up in appeal nor did it file cross-objection, the Commissioners as well as the High Court, held, committed a manifest error in reversing the finding regarding allotment of units to the various appellants (landholders) in the absence of any appeal by the State of Bihar when the same had become final and rights of the State of Bihar had come to an end to that extent by not filing any appeal or cross-objection within the period of limitation. On the strength of the first part of sub-cl. (1) of R. 22 of O. 41 the State of Bihar could only support the decree not only on the grounds decided in its favour but also on the grounds decided against it. The Commissioner however, could not set aside the findings in favour of the appellant on the strength of O. 41, R. 22 (1). (Paras 7, 14)

Nor was the Commissioner empowered to do it by invoking O. 41, R. 33, C. P. C. as the rule did not confer an unrestricted right to re-open decrees which had become final merely because the appellate Court did not agree with the opinion of the Court appealed from. Decision of Patna High Court Reversed; AIR 1965 SC 1874, Referred.

(Para 12)

Cases Referred: Chronological Paras
AIR 1969 SC 1144 : (1969) 3 SCR 944 11
AIR 1965 SC 1874 : (1965) 3 SCR 550 9

LY/LY/G72/81/GDR

MISRA, J.:— These eight appeals by special leave raise a common question of law regarding the scope of O. 41, R. 22 and O. 41, R. 33 of the Civil P. C. We, therefore, propose to dispose of these appeals by a common judgment. Since these appeals raise similar questions, we will refer to the facts of civil appeal No. 2084 of 1977 only.

2. The appellant in this appeal is a land holder in terms of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (hereinafter referred to as the Act). A notice under S. 8 (1) of the Act was issued to the petitioner calling upon him to submit return with all the particulars of the lands held by him. The petitioner in response to the said notice filed his return. On the basis of the verification report the Additional Collector came to the conclusion that the petitioner was entitled to five units and accordingly ordered for the publication of the draft statement under Section 10 of the Act. The petitioner was again served with a notice under S. 10 (2) of the Act. In response thereto he filed an objection laying inter alia a claim for fifteen units for reasons enumerated therein. The Collector considered the objections filed by the petitioner and by his order dated 23rd of February, 1975 ordered allotment of twelve units to the petitioner. The petitioner feeling aggrieved went up in appeal before the Commissioner of the Division. The State of Bihar submitted to the order and did not go up in appeal. Notices were issued to the respondents who, however, failed to appear on the date fixed. The appeal was heard on 27th of April, 1976 and a final order was passed by the Commissioner on 14th of May, 1976. He allowed the appeal and set aside the order of the Collector and remanded the case to him for disposal according to law.

3. It may be pointed out that the appellant had challenged the order of the Collector on various grounds. He, however, did not challenge the finding recorded by the Collector regarding the units allotted to him. The Commissioner, however, set aside the finding of the Collector even regarding the units allotted to the appellant in spite of the fact that no appeal has been filed by the State of Bihar before the Commissioner. The appellant filed a petition under Art. 226 of the Constn. to challenge the order of the Commissioner but the High Court dismissed the petition and confirmed the order of the Commissioner on the basis of the provisions of O. 41, R. 22.

4. The sole contention raised on behalf of the appellants in the various appeals is that

in the absence of any appeal or cross-objection filed by the State of Bihar the Commissioner was not justified in reversing the finding in favour of the appellants, namely, the finding on the question of allotment of units or regarding the classification of land. This contention, as observed earlier, was raised before the High Court in the writ petition as well. The High Court, however, repelled the contention by applying the provisions of O. 41, R. 22. Reliance has also been placed by the State of Bihar on the provisions of O. 41, R. 33, C. P. C. in support of the order of the Commissioner. The High Court, however, did not rely upon O. 41, R. 33 and rest content by relying on provisions of O. 41, R. 22.

5. By R. 49 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules, 1963, O. 41, C. P. C. has been made applicable in disposing of the appeals under the Act.

6. We will first refer to the provisions of O. 41, R. 22. Insofar as it is material for the purposes of this case, it reads:

"22. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow."

7. The first part of this rule authorises the respondent to support the decree not only on the grounds decided in his favour but also on any of the grounds decided against him in the Court below. The first part thus authorises the respondent only to support the decree. It does not authorise him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part, that is, he has to file a cross-objection if he has not already filed an appeal against the decree. Admittedly, the State of Bihar had neither filed any appeal nor cross-objection. Obviously, therefore, on the strength of the first part of sub-cl. (1) of R. 22 of O. 41 the State of Bihar could only support the decree not only on the grounds decided in its favour but also on the grounds decided against it. The Commissioner however, has set aside the finding in favour of the appellant on the strength of O. 41, R. 22 (1). In our opinion this he could not do.

8. The only other Order on which the State of Bihar could rely upon is O. 41, R. 33, C. P. C. The High Court did not consider the provisions of O. 41, R. 33 as in its opinion the order of the Commissioner could be supported on the strength of O. 41, R. 22. In the view that we have taken regarding the applicability of O. 41, R. 22 it becomes pertinent to consider the applicability of O. 41, R. 33, C. P. C. Insofar as material, it reads:

"33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order, as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

Illustration.— A claims a sum of money as due to him from X or Y, and in a suit against both, obtains a decree against X. X appeals and A and Y are respondent. The appellate Court decides in favour of X. It has power to pass a decree against Y."

This rule is widely expressed and it must be applied with great caution. The object of this rule is to empower the appellate Court to do complete justice between the parties. Under this rule the Court has power to make a proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection.

9. Reliance has been placed on *Nirmala Bala Ghose v. Balai Chand Ghose*, (1965) 3 SCR 550 : (AIR 1965 SC 1874). This Court dealing with the scope of O. 41, R. 33, observed as follows (at p. 1884 of AIR):

"The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by O. 41, R. 33 may properly be invoked. The rule, however, does not confer an unrestricted right to re-open decrees which have become final merely because the appel-

late Court does not agree with the opinion of the Court appealed from."

10. In the case cited above, there were two sets of defendants in the suit and in substance two decrees, though correlated, were passed. One of the decrees could stand apart from the other. One set of defendants were two deities. The suit was decreed against them. They did not go up in appeal nor did they take part in the proceedings either before the High Court or before the Supreme Court, although they were impleaded as respondents. The other set of defendants, Nirmala, sought to invoke the powers of the appellate Court under O. 41, R. 33 to pass a decree in favour of a party not appealing so as to give latter a benefit which she had not claimed. In such a situation this Court observed (at p. 1884 of AIR):

"When a party allows a decree of the Court of First Instance to become final, by not appealing against the decree, it would not be open to another party to the litigation, whose rights are otherwise not affected by the decree, to invoke the powers of the appellate Court under O. 41, R. 33, to pass a decree in favour of the party not appealing so as to give the latter a benefit which he has not claimed. Order 41, R. 33 is primarily intended to confer power upon the appellate Court to do justice by granting relief to a party who has not appealed, when refusing to do so, would result in making inconsistent, contradictory or unworkable orders."

11. Counsel for the State of Bihar, on the other hand, referred to *Giani Ram v. Ramji Lal*, (1969) 3 SCR 944 : (AIR 1969 SC 1144). While construing the provisions of O. 41, R. 33, this Court observed (at p. 1147 of AIR):

"... .. the expression 'which ought to have been passed' means 'what ought in law to have been passed'. If the appellate Court is of the view that any decree which ought in law to have been passed was in fact not passed by the subordinate Court, it may pass or make such further or other decree or order as the justice of the case may require."

12. The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.

13. Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this rule the Court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the Law of Limitation or the Law of Court-fees etc.

14. In these appeals the Collector on the basis of the material placed before him allowed certain units to the various appellants. In the absence of any appeal by the State of Bihar, there was no justification for the Commissioner to have interfered with that finding in favour of the appellants. The facts and circumstances of these appeals are not such in which it would be appropriate to exercise the power under O. 41, R. 33. The Commissioner as well as the High Court committed a manifest error in reversing the finding regarding allotment of units to the various appellants in the absence of any appeal by the State of Bihar when the same had become final and rights of the State of Bihar had come to an end to that extent by not filing any appeal or cross-objection within the period of limitation.

15. For the reasons given above, all the appeals are allowed and the order of the High Court and that of the Commissioner is set aside insofar as it relates to finding of the Collector in favour of the appellants. The remand order will, however, remain intact insofar as other points are concerned. In the circumstances of the case, the parties shall bear their own costs.

Appeals allowed.

AIR 1982 SUPREME COURT 100

(From : (1978) 1 Rent LR 81 (Punjab & Har))

R. S. PATHAK, E. S. VENKATARAMIAH
AND V. BALAKRISHNA ERADI, JJ.

Civil Appeal No. 69 of 1978, D/- 30-7-1981.

Radhey Shyam, Appellant v. Nazar Singh, Respondent.

Constitution of India, Art. 133 — Appeal under — Statutory authorities under Rent Act concurrently holding disputed accommodation as "residential building" — Such finding not challenged before High Court by tenant — He cannot be permitted to challenge it

LY/LY/F668/81/VNP

before Supreme Court. (East Punjab Urban Rent Restriction Act (3 of 1949), S. 2 (g)).

(Para 3)

PATHAK, J.:— This is a tenant's appeal directed against the judgment dated Sep. 21, 1977 of the High Court of Punjab and Haryana dismissing his revision petition in limine.

2. A petition was filed by the landlord for the eviction of the tenant on the ground that he needed the accommodation for his bona fide personal requirement. The accommodation consists of a shop-cum-flat and was leased out @ Rs. 300/- per month. The statutory authorities under the East Punjab Urban Rent Restriction Act concurrently held that the accommodation was a "residential building" by virtue of the definition in sub-sec. (g) of S. 2 of the Act. That finding was not assailed before the High Court.

3. Before us learned counsel for the appellant wants to reopen the finding whether the accommodation in question can be described as a "residential building" within the meaning of S. 2 (g) of the Act. Having refrained from challenging the finding in the High Court we do not see why we should be permitted to do so here.

4. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 101

(From : (1979) 2 Serv LR 583 (Bom))

A. D. KOSHAL, V. BALAKRISHNA
ERADI AND R. B. MISRA, JJ.

Civil Appeal No. 1003 of 1980, D/- 8-12-1981.

R. S. Makashi and others, Appellants v. I. M. Menon and others, Respondents.

Constitution of India, Arts. 309, 14, 16, 311 — Bombay Rationing Organization (Fixation of Seniority) Rules 1968, R. 4 and R. 7 Proviso — Creation of Bombay Rationing Organization by merging employees of erstwhile Food Grains Distribution Organization and employees of various departments — Seniority lists prepared under Rules of 1968 — Validity — Petition challenging validity of Rules allowed by High Court though filed after long delay — Legality. (1979) 2 Serv LR 583 (Bom), Reversed.

In the State of Bombay a non-statutory scheme of rationing was introduced in 1957 and an organisation was set up under Con-

troller of Food Grains Distribution (C. F. D.). This organisation was manned principally by (1) personnel who had been working in the temporary Civil Supplies Department, (2) persons taken on deputation from other Government departments, (3) retrenched former Civil Supply Department personnel, and (4) persons directly recruited by the Controller of Food-grains Distribution on temporary basis through the Employment Exchange. Since no rules had been framed laying down the qualifications or method of recruitment to the various posts, the guiding factor which seems to have weighed with the authorities in effecting appointments in the CFD was the suitability of the person concerned to carry out the duties attached to a particular post irrespective of qualifications, age, etc. Under a resolution dated 1-4-1963 the seniority of personnel in each category was to be determined with reference to the date of first appointment in the particular cadre in which they were initially appointed in the organization. Subsequently, the State of Maharashtra introduced statutory rationing in some parts and created a Scheme called the Bombay Rationing Organization (BRO). The existing staff of the erstwhile C. F. D. was merged into the new organization. As the experienced staff was also found necessary services of experienced hands from other Departments were obtained on deputation. A provisional gradation list was published on 29-8-1966. Subsequently, on March 22, 1968, the Government of Maharashtra issued the "Bombay Rationing Organisation (Fixation of Seniority) Rules, 1968", laying down the principles to be applied for the fixation of seniority of the persons working in the BRO. These rules were issued under the Proviso to Art. 309 of the Constitution and they were given retrospective effect from Oct. 21, 1965 (the date of the Government Resolution sanctioning the skeleton staff for carrying out the preliminary work for introduction of the scheme of statutory rationing). The personnel released from other departments of the State Government for work in the BRO, including retrenched or replaced Government servants who had not suffered any break in service before joining the BRO were designated under these Rules as "Released Government Servants". By a resolution dated 25-7-1968 various posts that existed in the former CFD were equated with posts in BRO in the manner indicated therein. By another resolution dated 29-7-1968 the State Government promulgated the Recruitment Rules for non-gazetted posts in the establishment. On May 28, 1971, a Gradation List of Rationing Inspectors, Senior Clerks and

Deputy Accountants working in the BRO as on April 1, 1968 was published by the Controller of Rationing. It was expressly recited therein that the said List had been drawn up in accordance with the seniority principles enunciated in the Government Resolution dated March 22, 1968. It was also stated that while preparing the said list, the inter se seniority of the ex-CFD personnel had been kept intact except in the case of those who had been working in the CFD on deputation from other Departments and Offices in respect of whom the seniority had been fixed according to their position inter se in the respective former Departments and Offices from which they had been drawn on deputation. Subsequently there were also Gradation lists published on 31-1-1976. Petitioners who were directly recruited in the former CFD as Supply Inspectors and had been subsequently absorbed in the BRO in the category of Rationing Inspectors/Senior Clerks/Deputy Accountants, filed a Writ Petition under Art. 226 of the Constitution challenging the legality and validity of the aforementioned two Gradation Lists dated No. 18, 1975 and No. 21, 1975. The main contention put forward by them in the writ petition was that the impugned lists were violative of Arts. 14 and 16 of the Constitution. The petitions were allowed overruling the preliminary objection that the petitions were filed after long delay. The High Court held that R. 4, Cls. (a) and (b) and R. 7, Proviso of resolution dated Mar. 22, 1968 offended Arts. 14 and 16 of the Constitution.

Held, that the view expressed by the High Court that Clauses (a) and (c) of R. 4 and the Proviso to R. 7 of the impugned Government Resolution dated March, 22, 1968 are violative of the provisions of Arts. 14 and 16 of the Constitution, is unsustainable in law and that the direction given by the High Court to the State Government to prepare a fresh seniority list without taking into consideration the aforesaid provisions of the impugned Government Resolution and to give to the writ petitioners consequential benefits, including promotions and the emoluments on the basis of such revised seniority gradation list was not called for. The High Court was also wrong in overruling the preliminary objection raised before it that the writ petition in so far it sought to challenge the legality of the Government Resolution was highly belated and was liable to be dismissed on the ground of laches and delay. (1979) 2 Serv LR 583 (Bom), Reversed. (Para 22)

The view expressed by the High Court that a writ petition filed under Art. 226 seeking

redress on the ground of alleged infringement of fundamental rights cannot be dismissed by the Court on the ground of laches, under any circumstances, is inconsistent with the pronouncements of the Supreme Court on the subject and cannot be accepted as correct or sound. The High Court was clearly in error in thinking that the passing of the Government Resolution of 1974 furnished a fresh cause of action for the petitioners for agitating their contentions regarding the invalidity of the Government Resolution of 1968. AIR 1970 SC 898, Foll.

(Paras 27, 30)

On merits also there is no substance in the attack levelled by the petitioners against the legality and validity of the seniority principles laid down in the Govt. resolution dated 22-3-1968. The High Court was wrong in assuming that there is an invariable "normal rule" that seniority should be determined only on the basis of the respective dates of appointment to the post and that any departure from the said rule will be *prima facie* unreasonable and illegal. The assumption is devoid of any legal sanction. It is open to the rule-making authority to take a note of the relevant circumstances obtaining in relation to each department and determine with objectivity and fairness what rules should govern the inter se seniority and ranking of the personnel working in the concerned departments and the Courts will only insist that the rules so formulated should be reasonable, just and equitable. Judged by the said test of reasonableness and fairness, the action taken by the Government in equating the clerical personnel which had rendered two years regular service in other departments with the temporary Supply Inspectors of the CFD and in directing under R. 4 (a) that their inter se seniority shall be determined with reference to the length of service calculated on the basis of the equation cannot be said to be in any way discriminatory or illegal. AIR 1967 SC 1427, Foll. (Para 31)

When personnel drawn from different sources are being absorbed and integrated in a new department, it is primarily for the Government or the executive authority concerned to decide as a matter of policy how the equation of posts should be effected. The Courts will not interfere with such a decision unless it is shown to be arbitrary, unreasonable or unfair, and if no manifest unfairness or unreasonableness is made out, the Court will not sit in appeal and examine the propriety or wisdom of the principle of equation of posts adopted by the Government. In the instant case, in equating the post of Supply Inspector in the CFD with that of

Clerk with two years regular service in the other Government departments, no arbitrary or unreasonable treatment was involved.

(Para 34)

The direction contained in Proviso to R. 7 for preservation of the inter se seniority of deputationists who have been drawn from one and the same Government department to serve the CFD cannot be said to be arbitrary or unreasonable. It is a just and wholesome principle commonly applied in such situations where persons from other departments are drafted to serve on deputation, their inter se seniority in the parent department should be respected and preserved during the period of such deputation to the new department.

(Para 36)

However, the inter se seniority of the CFD personnel has to be strictly maintained intact, and no person who was junior in the CFD in the category of Supply Inspector can go above his senior in that Organisation after being absorbed in the Bombay Rationing Organisation, and also no person who has been taken as a clerk in the Bombay Rationing Organisation can go above persons absorbed therein in the category of Rationing Inspectors.

(Para 38)

Cases Referred : Chronological Paras

AIR 1981 SC 1495 : (1981) 3 SCC 271	: 1981
Lab IC 861	28
AIR 1975 SC 1269 : (1976) 1 SCC 599	: 1975
Lab IC 816	28
AIR 1974 SC 1618 : (1975) 1 SCR 104	: 1974
Lab IC 1090	32
AIR 1970 SC 470 : (1970) 2 SCR 697	: 1970
Lab IC 402	28
AIR 1970 SC 898 : (1969) 2 SCR 824	: (1969)
1 SCC 110	28
AIR 1967 SC 1427 : (1967) 2 SCR 703	31
AIR 1964 SC 1006 : (1964) 6 SCR 261	28

BALAKRISHNA ERADI, J.:— The second world war left in its wake conditions of scarcity of foodgrains and other essential commodities in different parts of the country. To tide over that situation and with intent to ensure a fair and equitable distribution of the available supply of foodgrains etc., schemes of rationing of foodgrains were periodically introduced in the different States in the country.

2. In the State of Bombay, an informal (non-statutory) scheme of rationing was introduced in November, 1957 and for administering the said scheme, an ad hoc Organisation was set up under the Controller of Foodgrains Distribution. Since this Organisation (hereinafter referred to as CFD) was intended to be only a temporary and short-term set up, no recruitment rules were framed for appoint-

ment to the various categories of posts created therein. The CFD was manned principally by (1) personnel who had been working in the temporary Civil Supplies Department created during the second world war period and who were attending to certain residual duties concerned with the winding up of that department, (2) persons taken on deputation from other Government departments, (3) retrenched former Civil Supply Department personnel, and (4) persons directly recruited to the CFD by the Controller of Foodgrains Distribution on temporary basis through the Employment Exchange. Since no rules had been framed laying down the qualifications or method of recruitment to the various posts, the guiding factor which seems to have weighed with the authorities in effecting appointments in the CFD was the suitability of the person concerned to carry out the duties attached to a particular post irrespective of qualifications, age, etc. Admittedly, amongst the persons appointed to the CFD, there were several non-matriculates who were ineligible under the prevailing rules applicable to other Government Departments for regular appointment into the Government service in the clerical category and also quite a few persons who were over-aged for being entertained in the Government service as on the dates of their ad hoc appointments into the CFD.

3. The principles to be observed for fixing the seniority of the personnel appointed to the CFD were laid down by the State Government by a Resolution dated April 1, 1963. Under the said Resolution, the seniority of personnel in each category was to be determined with reference to the date of first appointment in the particular cadre in which they were initially appointed in the CFD.

4. In July 1965, the Government of India issued instructions to all the State Governments advising them to start statutory rationing schemes in metropolitan areas and big towns. With a view to implement those instructions of the Central Government, the State Government of Maharashtra sanctioned on October 21, 1965 a skeleton staff for working out details and carrying out other preliminary work for the introduction of a scheme of statutory rationing in Greater Bombay.

5. Subsequently, by a Resolution dated February 11, 1966, the Government of Maharashtra announced its decision to introduce a statutory rationing scheme in Bombay and the Industrial Complex around it including some areas of Thana District and to set up an organisation under the Controller of Rationing, Bombay, for efficiently administer-

ing the said statutory scheme. The strength and pattern of the staff for the Bombay Rationing Organisation (for short, the BRO) which was newly created under the said Resolution was to be as shown in Annexure 'A' appended to the Resolution. The skeleton staff which had been already sanctioned for carrying out the preliminary work as per the prior Government Resolution dated Oct. 21, 1965 was to be treated as belonging to the BRO. The existing staff of the CFD consisting of 884 posts as shown in Annexure 'B' to the aforesaid Resolution was to be merged into the new BRO with effect from Mar. 1, 1966, excepting 9 posts of part-time Mehtars, which were to be abolished with effect from the said date. In addition, 2818 posts in 23 different categories were also created in the BRO as per the particulars shown in Annexure 'C' to the aforesaid Resolution. Out of these, 1220 newly created posts were in the category of Rationing Inspectors and 165 posts were of Senior Clerks.

6. Since it was considered necessary to have experienced staff for manning the higher posts in the new Organisation, it was decided to obtain the services of experienced hands from other departments on deputation. Accordingly, the Chief Secretary to the Government of Maharashtra addressed a letter dated Feb. 22, 1968 to all Heads of Departments stating that huge staff was required for manning the posts in the newly created BRO, that for the higher posts of Assistant Rationing Officers/Inspecting Officers/ Head Clerks and Rationing Officers/Senior Clerks, it was absolutely necessary to draw upon senior and experienced persons already working in other Government offices in Greater Bombay and hence the Government had decided that each department should immediately on receipt of the letter release the requisite number of persons under intimation to the Controller of Rationing, Bombay and instruct the persons concerned to report for duty to him. It was further mentioned in the letter that for the posts of Assistant Rationing Officers, persons who had put in at least two years' service in a scale comparable to the scale of Rs. 200-10-300 would be considered and that for the posts of Rationing Inspectors/Senior Clerks, Clerks who had put in at least two years' service would be considered. In compliance with the directions contained in the said letter, a large number of personnel from different departments of the State Government of Maharashtra in the Greater Bombay area were sent over to the BRO on deputation and they were appointed to posts in different categories in the new Organisation (B. R. O.). Apparently for the reason that the number

of persons so obtained on deputation was not adequate to fill up all the new posts in the BRO, some persons were also directly recruited into the said Organisation subsequent to March 1, 1966.

7. As an essential preliminary step for the integration of the former CFD personnel with the staff appointed in the BRO from other sources, the Controller of Rationing, Bombay published on 29-8-1966 a provisional Gradation List of the CFD personnel as on March 1, 1966. Subsequently, on March 22, 1968, the Government of Maharashtra issued the "Bombay Rationing Organisation (Fixation of Seniority) Rules, 1968", laying down the principles to be applied for the fixation of seniority of the persons working in the BRO. These rules were issued under the proviso to Art. 309 of the Constitution and they were given retrospective effect from Oct. 21, 1965 (the date of the Government Resolution sanctioning the skeleton staff for carrying out the preliminary work for introduction of the scheme of statutory rationing). The personnel released from other departments of the State Government for work in the BRO, including retrenched or replaced Government servants who had not suffered any break in service before joining the BRO were designated under these Rules as "Released Government Servants". Rule 4 which lays down the principles for fixation of seniority of persons in the cadre of Senior Clerks/Rationing Inspectors/Deputy Accountants is in the following terms:

"Senior Clerks/Rationing Inspectors/Deputy Accountants.

(a) Seniority of a released Government Servant and a Merged Government Servant in the Cadre of senior clerk, Rationing Inspector and Deputy Accountants, as also a person who was initially appointed as a clerk, or Typist or Clerk-cum-Typist in the Bombay Rationing Organisation and subsequently promoted in the said cadre shall be determined with reference to dates which shall be fixed after deducting two years from the length of continuous service, whether officiating or permanent rendered by him in the cadre of clerks, Typists, and clerk-cum-typist. Illustration:—

Suppose there are three persons in the cadre of Senior Clerks/Rationing Inspectors and Deputy Accountants. 'A' a released Government servant was holding the post of clerk continuously from 1st October, 1960 prior to his release, 'B' a merged Government Servant was holding the post of typist continuously from 1st May, 1958. 'C' was appointed as a direct recruit to the post of clerk in the Bombay Rationing Organisation.

on 1st May, 1966 and was subsequently promoted as Senior Clerk on 22nd May, 1968. The seniority amongst them will be fixed as under :—

(See Seniority table below)

Provided that in the case of merged Government servant who was recruited to the post of Supply Inspector or Senior Clerk, by nomination, he shall take rank above a clerk in the former Foodgrains Distribution Scheme who was promoted to the cadre of Supply Inspector or Senior Clerk, in the former Foodgrains Distribution Scheme immediately, after him and if this be not the position, above the first person in the cadre of clerks belonging to that organisation who is posted in the cadre of Senior Clerks, Rationing Inspectors and Deputy Accountants on and after 1st March, 1966.

Illustration :—

Suppose there are four persons in the cadre of Senior Clerks, Rationing Inspectors and Deputy Accountants. All of them were in the Bombay Foodgrains Distribution Scheme. 'A' was a clerk in the Scheme and he was promoted to the post of Supply Inspector with effect from 1st May, 1960 and since then was continuously officiating in the post. 'B' and 'C' were recruited as Supply Inspectors by nomination and were officiating continuously in that post from 15th April, 1960 and 15th April, 1965. None of the Clerks in that scheme was promoted after 'C' till the merger of the staff in the Bombay Rationing Organisation. 'D' was a Clerk and he was promoted as Senior Clerk with effect from 15th April, 1966 i.e. after merger of the staff in the Bombay Rationing Organisation. Their seniority amongst them will be as under :—

Seniority rank	Name
1	B
2	A
3	C
4	D

(b) Seniority of a Government servant appointed in the Bombay Rationing Organisation by direct recruitment to the cadre of Senior Clerks, Rationing Inspectors and Deputy Accountants shall be fixed as under :—

Seniority rank.	Name	Date of commencement of continuous service as Clerk.	Deemed date of appointment for fixation of seniority.
1	2	3	4
1.	B	1.5.1958	1.5.1960
2.	A	1.10.1960	1.10.1962
3.	C	1.5.1963	1.5.1968

puty Accountants shall be fixed with reference to the dates of appointments to the posts in the said cadres :

Illustration :—

Suppose there are three persons in the cadre of Senior Clerks, Rationing Inspectors and Deputy Accountants who were recruited to the cadre by nomination. 'A' was recruited as Rationing Inspector from 24th Feb., 1966. 'B' was recruited as Senior Clerk from 15th Mar., 1966. 'C' was recruited as Deputy Accountant from 28th Feb., 1966. The seniority amongst them will be fixed as under :—

Seniority rank.	Name	Date of commencement of continuous service.
1	2	3
1.	A	24.2.1966
2.	C	28.2.1966
3.	B	15.3.1966

(c) Seniority of Government servant in the cadre of Senior Clerks, Rationing Inspectors and Deputy Accountants fixed on the basis of the rules in (a) and (b) above, shall be merged and refixed with reference to the dates from which their seniority is determined according to the principles in Rr. 4 (a) and 4 (b) above.

Illustration :—

Suppose there are 7 persons in the cadre of Senior Clerks, Rationing Inspectors, Deputy Accountants. 'A' and 'B' were Supply Inspectors directly recruited in the Bombay Foodgrains Distribution Scheme and were continuously officiating in those posts from 4th May, 1963 and 1st May, 1963 respectively. 'C' was a Clerk in the former Bombay Foodgrains Distribution Scheme from 1st Sept., 1960. He was promoted as Supply Inspector on 5th May, 1963. 'D' was a Rationing Inspector directly recruited to it from 2nd Feb., 1966. 'E' was a released Government servant holding the post of Clerk in the former office from 1st August, 1960. He was taken up as Senior Clerk from 2nd August, 1967, in the Bombay Rationing Organisation. 'F' was a released Government servant holding the post of a clerk in his former office from 1st Feb., 1964. He was taken up as Rationing Inspector on 1st Aug., 1967. 'G' was a re-

leased Government servant holding the post of a clerk in his former office from 1st Dec., 1964. He was taken up as a clerk in Bom-
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bay Rationing Organisation subsequently he was promoted as Rationing Inspector from 1st April, 1967. The seniority amongst them will be as under :—

Seniority rank.	Name	Mode	Actual date		DEEMED
			As Clerk	As Sr. Cl./ B.I./Dy. Acctt.	
1	2	3	4(a)	4(b)	5
1.	E	Promoted Clerk (released)	1.3.1960	2.8.1967	1.3.1962
2.	B	Direct S. I.	—	1-5.1963	31.8.1962
3.	A	— do —	—	4.5.1963	31.8.1962
4.	C	Promoted Ex. CFD Clerk	1.9.1960	5-5.1963	1-9.1962
5.	F	Promoted Clerk (released)	1.2.1964	1.8.1967	1.2.1966
6.	D	Direct Rationing Inspector	—	2-2.1966	2-2.1966
7.	G	Released Clerk absorbed in Bombay Rationing Area Organisation as Clerk and subsequently promoted as Rationing Inspector."	1.12.1964	1.4.1967	1.12.1966

8. However, it was further provided under R. 7 that "notwithstanding anything containing in the foregoing Rules :

(a) In case of Government servants released from one and the same office to join the Bombay Rationing Organisation the seniority inter se in their former office shall not be disturbed;

(b) in case of the merged Government servants, they shall be governed by the principles contained in the Government Resolution, Agriculture and Co-operation Department No. EST-1060/40002/SIV, dated the 1st April 1963; and

(c) in case of—

(i) those who were recruited directly in the former Bombay Foodgrains Distribution Scheme shall be governed by the principles contained in the Government Resolution No. Agriculture and Cooperation Department No. EST 1060/40002/SIV dated the 1st Apr., 1963;

(ii) those who were drawn in the Bombay Foodgrains Distribution Scheme from one and the same Government Office/Department shall take their rank according to seniority inter se in the office/department from which they were drawn.

Provided further where there is a clash of principles contained in the Government Resolution Agriculture and Co-operation Department No. EST 1060/40002/SIV, dated the 1st April, 1963 with the seniority inter se in the former Department the seniority inter se in the former Department shall prevail.

Illustration :—

'A' who started his career as Assistant in

Revenue and Forests Department from 1st May, 1962 was drawn in Bombay Foodgrains Distribution Scheme on 18th Oct., 1964 and was taken up as Inspecting Officer. 'E' an Assistant in Revenue and Forest Department working in that cadre continuously from 1st May, 1961 was released to join Bombay Rationing Organisation on 22nd August, 1966 as Inspecting Officer. 'C' who started his career as Assistant in General Administration Department from 1st Apr, 1960 was drawn in Bombay Foodgrains Distribution Scheme on 18th May, 1965 as Inspecting Officer. 'D' as Assistant in General Administration Department working in that cadre continuously from 1st May, 1960 was released to join Bombay Rationing Organisation on 1st July, 1967 as Inspecting Officer. The seniority of these persons will be fixed as under :—

(See Seniority table on next page)

9. By State Government's Resolution dated July 25, 1968, various posts that existed in the former CFD were equated with posts in the BRO in the manner indicated therein. Items 9 to 11 in the Table appended to the said Resolution dealt with the posts of Deputy Chief Supply Inspectors, Supply Inspectors and Senior Clerks, respectively in the CFD. All those three categories of posts were equated with the posts of Rationing Inspectors/Senior Clerks in the BRO on Rupees 160-10-220-EB-10-270 despite the fact that in the CFD the pay scale of the post of Deputy Chief Inspector was a higher post than that of Supply Inspectors and Senior Clerks and it carried a higher pay scale.

Seniority rank.	Name	Department	Date of recruitment as Asstt. in the present Deptt.	Date of joining in Bombay Food grains Distribution Scheme.	Date of joining in Bombay Rationing Organisation.
1	2	3	4	5	6
1.	O	General Admn. Department.	1.4.1960	18-5.1965	1.3.1966
2.	D	General Admn. Department.	1.5.1960	—	1.7.1967
3.	B	Revenue & Forests Department.	1.5.1961	—	22.8.1968
4.	A	Revenue & Forests Department.	1.5.1962	18-10.1964	1.3.1966 (Date of merger)"

10. By a Resolution dated July 29, 1968, the State Government of Maharashtra promulgated the Recruitment Rules for non-gazetted posts in the establishment of the BRO specifying also the method of appointment to the various posts in the said Organisation. Under these Rules, appointments to the category of Senior Clerks/Rationing Inspectors in the BRO were to be made either by promotion from among Clerks, Clerks-typists, Typists etc., who had worked as such for not less than two years, or by transfer of General Duty Clerks from the Secretariat Departments and the Offices of Heads of Departments with not less than two years of service in the cadre. Obviously, the first of the two alternative methods aforementioned would get attracted only when persons already working in the BRO as Clerks were to be appointed as Senior Clerks/Rationing Inspectors. The other alternative provided was to fill up the vacancy by transfer of Clerks working in the Secretariat Departments or in the Offices of the Heads of Departments who possessed not less than two years of service.

11. On May 28, 1971, a Gradation List of Rationing Inspectors, Senior Clerks and Deputy Accountants working in the BRO as on April 1, 1968 was published by the Controller of Rationing. It was expressly recited therein that the said List had been drawn up in accordance with the seniority principles enunciated in the Government Resolution dated March 22, 1968. It was also stated that while preparing the said list, the inter se seniority of the ex-CFD personnel had been kept in tact except in the case of those who had been working in the CFD on deputation from other Departments and Offices in respect of whom the seniority had been fixed according to their position inter se in the respective former Departments and Offices from which they had been drawn on deputation. A specific direction was contained in para 3 of the Order that copies of the said order should

be exhibited on the Notice Boards in the Head Office of the BRO, all the Regional Offices as well as in the Rationing Offices, and the signatures of all the employees working in the respective offices should be taken in a separate copy of the order which should be kept on the record of the respective offices. It was further ordered that a report to the effect that the Gradation List had been brought to the notice of all the persons concerned should be forwarded to the Assistant Controller of Rationing (EST), Head Office in his personal name on or before June 10, 1971.

12. Subsequently, a final Gradation List as on April 1, 1968 was also published with a similar direction for bringing it to the notice of all the persons borne on the establishment of the BRO. Still later, on April 9, 1973, another provisional Gradation List of Rationing Inspectors, Senior Clerks and Deputy Accountants as on April 1, 1972 was published with a like direction that it should be brought to the notice of all the persons borne on their establishment.

13. By Resolution dated March 1, 1974, the Government of Maharashtra took note of the fact that during the course of the previous few years a number of candidates who had not been selected by the Public Service Commission had come to be recruited temporarily to the posts of Clerks, Typists, Stenographers, Assistants, etc. pending allotment of candidates selected by the Public Service Commission, and it was directed that since many of such temporary employees had put in several years of service, they may be retained in Government service without being replaced by candidates selected by the Public Service Commission, provided they fulfilled the following two conditions:

"(1) The non-P. S. C. persons concerned should have the minimum educational qualifications prescribed for the posts to which they were appointed.

(2) They were within the age-limits prescribed for appointment to the respective posts held by them at the time of their initial appointment to such posts."

It was also specified in the Resolution that the benefit of such retention in service would be applicable only to the non-P. S. C. persons, who were recruited in various Government Offices prior to January 1, 1971 and were in service on the date of issue of the said order. Further, the Resolution contained a clear stipulation that the seniority of such non-P. S. C. persons on whom the benefit of continuance of service was thereby conferred was to be fixed only with reference to the date of issuance of the said Resolution, with the consequence that P. S. C. selected candidates who were already working in the various Departments or Offices prior to the said date were all to be treated as seniors in relation to the non-P. S. C. persons covered by the said Resolution.

14. On November 18, 1975, a provisional Gradation List of Rationing Inspectors, Senior Clerks and Deputy Accountants of the BRO as on April 1, 1974 was published on a combined application of the seniority principles laid down by the BRO in the Rules dated March 22, 1968 and those laid down in the Resolution dated March 1, 1974 concerning the non-P. S. C. candidates who were granted the benefit of retention in service under the said Resolution. A similar Gradation List of Assistant Rationing Officers/Junior Accountants of the BRO as on April 1, 1974 was also published by the Controller of Rationing on November 27, 1975.

15. On Jan. 31, 1976, respondents Nos. 1 to 22 herein who were directly recruited in the former CFD as Supply Inspectors and had been subsequently absorbed in the BRO in the category of Rationing Inspectors/Senior Clerks/Deputy Accountants, filed a Writ Petition under Art. 226 of the Constitution in the High Court of Bombay — Misc. Petition No. 166/76 — challenging the legality and validity of the aforementioned two Gradation Lists dated Nov. 18, 1975 and Nov. 21, 1975. The main contention put forward by them in the writ petition was that the impugned lists were violative of Arts. 14 and 16 of the Constitution, inasmuch as, firstly, the State Government and the Controller had given a go-by to the normal rule of fixation of seniority according to the date of appointment to the post, and secondly, unequals had been treated as equals while fixing the seniority inasmuch as the period of service rendered by the employees in the clerical cadre had been reckoned and equated

with the service rendered in the Rationing Inspector's cadre. Another plea taken in the writ petition was that the seniority of the writ petitioners has been made to depend upon an uncertain factor, namely, the seniority of persons who get promoted to the cadre of Rationing Inspectors/Senior Clerks etc., from time to time and this rule which kept the question of seniority of employees in a state of flux for all time to come was grossly arbitrary and unreasonable.

16. Respondents 1 to 3 in the writ petition were the State of Maharashtra, the Controller of Rationing and the Under Secretary to the Government of Maharashtra, Food and Supply Department, respectively. One hundred and sixty-two employees working in the BRO in different categories of posts were impleaded as respondents Nos. 4 to 165 on the ground that they were likely to be affected in case the relief claimed by the writ petitioners were granted by the High Court. The respondents raised a preliminary objection before the High Court that the main attack levelled in the petition being against the validity of the Government Resolution dated March 22, 1968, the writ petition filed after the lapse of more than seven years since the passing of the impugned Resolution was liable to be dismissed on the ground of delay and laches. It was pointed out that on the basis of the impugned Resolution, the provisional Gradation List had been published on May 28, 1971 showing the seniority of personnel in the BRO as on April 1, 1968 and it had been specifically stated in the said gradation list that it had been drawn up on the basis of the principles laid down in the impugned Government Resolution dated March 22, 1968. The said list had been circulated to all the Offices attached to the BRO and signatures of all the personnel working in the different Offices had been taken in token of their having seen the list. The respondents stressed before the High Court the fact that even though objections had been invited against the provisional Gradation List, none of the petitioners had filed any objections. Subsequently, a final Gradation List was published on Nov. 23, 1972, which was also brought to the notice of the personnel working in the BRO. Reliance was also placed by the respondents on the fact that the second provisional Gradation List based on the impugned Resolution of 1968 was published on April 9, 1973 showing the seniority of personnel working in the BRO as on April 1, 1972 and though writ petitioners 1 to 3 filed certain objections against the said list long after the date fixed for the receipt of such objections, no contention has been

taken therein objecting to the seniority principles laid down in the Government Resolution of 1968. The objections raised by writ petitioners 1 to 3 were rejected by the Controller of Rationing as per his communications dated Dec. 6, 1973 and Dec. 19, 1973. Even thereafter, no steps were taken by the petitioners to challenge the validity of the principles laid down in the Government Resolution. It was urged by the respondents before the High Court that in view of the aforesaid conduct of the petitioners, it was not legally open to them to raise a challenge against the said Resolution in the writ petition filed after eight years and thereby upset the seniority position of personnel which had become settled during the course of the period of eight years and disrupt rights which have become vested in others by virtue of the various postings and promotions that have taken place in the meantime.

17. On the merits, the respondents contended before the High Court that the BRO being a newly constituted Organisation with its personnel drawn from different sources, it was perfectly open to the State Government to lay down the principles to be applied for the determination of inter se seniority of the members of the staff belonging to the different categories. Since the new Department was to consist of "merged Government servants" who were absorbed from the CFD, "released Government servants" drawn on deputation from other departments and also direct recruits, it was necessary to evolve some fair and reasonable principle for the fixation of the inter se seniority of the integrated personnel in the different categories. The respondents submitted before the High Court that, viewed in the context of the relevant facts and circumstances, the principles laid down in the impugned Resolution were perfectly reasonable and that the challenge levelled by the petitioners against the said Resolution and the Gradation Lists dated Nov. 18, 1975 and Nov. 27, 1975 on the ground of alleged violation of Arts. 14 and 16 of the Constitution was wholly devoid of merit.

18. The writ petition was heard by a learned single Judge of the High Court and by judgment dated Sept. 11, 1979, the petition was allowed and Cls. (a) and (c) of R. 4 and the proviso to R. 7 of the impugned Government Resolution dated March 22, 1968 were struck down on the ground that they were violative of Arts. 14 and 16 of the Constitution. The Gradation Lists dated Nov. 18, 1975 and Nov. 27, 1975 were also quashed by the learned Judge, and the first respondent — State of Maharashtra — was

directed to prepare a fresh seniority list without taking into consideration the aforesaid provisions of the impugned Government Resolution dated March 22, 1968 which had been struck down and to give consequential benefits to the writ petitioners, including increments, promotions etc.

19. The preliminary objection on the ground of laches and delay, raised by the respondents before the High Court, was overruled by the learned single Judge by stating, firstly, that the law with respect to laches did not lay down any obligation on the Court to refuse to grant reliefs merely because there was a lapse of time since the cause of action arose and since the challenge against the Government Resolution was based on the contention that the fundamental rights of the petitioners under Arts. 14 and 16 of the Constitution were violated, it was not open to the Court to shut out the petitioners from putting forward their challenge against the rules on the ground of delay or laches since such course would tantamount to "condoning the continuance of invalid rules or statutes". The second reason stated by the learned Judge for overruling the preliminary objection was that beyond making a vague statement that the seniority list of Nov. 23, 1972 showing the placement of the officers as on April 1, 1968 had been since followed and promotions made on that basis, no factual data had been placed before the High Court by the respondents "to show the extent of such promotions and the manner in which the promotees would be affected if the relief was granted to the petitioners". A further ground mentioned by the learned Judge for rejecting the preliminary objection put forward on the ground of delay is that by reason of the Resolution dated March 1, 1974 passed by the State Government directing that all temporary employees in the clerical cadre, who had been recruited prior to Jan. 1, 1971 without insistence on the passing of the Public Service Commission examination, may be regularly absorbed in service with effect from March 1, 1974 subject to the conditions mentioned therein, the final Gradation List of personnel in the BRO published on Nov. 23, 1972 has inevitably been upset and hence it cannot be said that any rights have accrued to such of the employees in the BRO who were assigned ranks above the writ petitioners in the impugned seniority list, so as to entitle them to put forward the objection based on laches and delay.

20. We may also briefly set out the reasons mentioned by the learned Judge in support of his conclusion that Cls. (a) and (c) of R. 4 and proviso to R. 7 of the Gov-

ernment Resolution dated March 22, 1968 offend Arts. 14 and 16 of the Constitution. Firstly, it is stated by the learned Judge that since the petitioners had been directly recruited as Supply Inspectors in the former CFD, they were in the position of direct recruits to the cadre of Rationing Inspectors in the BRO and the provision contained in the impugned rules for assignment of deemed dates to the promotees coming from other departments on the basis of their continuous service in the clerical cadre minus two years is against "the normal rule which determines the seniority on the basis of the dates of appointment to the post". According to the learned Judge, any departure from the "normal rule" mentioned by him must be justified by rational, relevant and cogent reasons and since there was no material "to justify the enactment of the said abnormal rule for determining seniority" either in the impugned Resolution itself or in the return filed on behalf of the State, the provisions contained in the impugned rules had to be struck down on the ground of infringement of Arts. 14 and 16 of the Constitution. The second reason stated by the learned Judge is that there is an inherent fallacy in the attempt made by the impugned rules to equate the post of Supply Inspector in the CFD to the posts in clerical cadres in other departments and the impugned rules in so far as they provide for the fixation of inter se seniority of Rationing Inspectors/Senior Clerks/Deputy Accountants in the BRO by giving credit to the service rendered by the "released Government servants" in the clerical cadre in their parent departments subject to a deduction of two years therefrom is violative of Arts. 14 and 16. In the opinion of the learned Judge, it was not legally open to the Government, while laying down rules for fixation of seniority in the category of Rationing Inspectors/Senior Clerks, to make a provision for taking into consideration any service rendered by the deputationists in the lower post of Clerk and that by itself spells out discrimination. The learned Judge has expressed the view that in treating a clerk with two years' service on a par with the Supply Inspector of the CFD, the impugned Resolution has treated unequals as equals and thereby committed a clear breach of provisions of Arts. 14 and 16 of the Constitution. Lastly, it was held by the learned Judge that, since under the provisions of the impugned Resolution the deemed date of appointment of a promotee depends upon two factors, namely, his inter se seniority amongst the persons who have been promoted from his department and his continuous service in the clerical cadre minus two years,

it is inevitable that whenever a person from some other department is taken on promotion to the BRO, the deemed date of appointment of persons drawn earlier from the same department is likely to get altered and since in consequence thereof the deemed dates of the direct recruits will also undergo a change, the seniority of the direct recruits is made dependent on uncertain events which has no reasonable nexus with the object and purpose of the rules and the rule has therefore to be struck down as arbitrary and violative of the principles of equality of opportunity enshrined in Arts. 14 and 16 of the Constitution.

21. Twenty nine persons belonging to the category of "released Government servants" who are amongst the respondents in the writ petition and whose seniority etc., were adversely affected by the decision rendered by the learned single Judge, preferred a Letters Patent Appeal before a Division Bench of the High Court, but that appeal was dismissed in limine by the Division Bench, and hence they have filed this appeal in this Court after obtaining special leave.

22. After giving our anxious consideration to the arguments addressed by counsel appearing on both sides, we have unhesitatingly come to the conclusion that the view expressed by the High Court that Cls. (a) and (c) of R. 4 and the proviso to R. 7 of the impugned Government Resolution dated March 22, 1968 are violative of the provisions of Arts. 14 and 16 of the Constitution, is unsustainable in law and that the direction given by the High Court to the State Government to prepare a fresh seniority list without taking into consideration the aforesaid provisions of the impugned Government Resolution and to give to the writ petitioners consequential benefits, including promotions and the emoluments on the basis of such revised seniority gradation list was not called for. We are also of opinion that the High Court was wrong in overruling the preliminary objection raised before it by the present appellants that the writ petition in so far as it sought to challenge the legality of the Government Resolution dated March 22, 1968, was highly belated and was liable to be dismissed on the ground of laches and delay.

23. The challenge in the writ petition was directed mainly against the Government Resolution dated March 22, 1968, which laid down the principles for determining the inter se seniority of personnel appointed in the different categories of posts in the newly constituted BRO. It may be assumed that the

principles enunciated in the said Resolution did not come to the knowledge of the petitioners and other employees of the BRO immediately after the Resolution was passed by the State Government. But in implementation of those principles a provisional gradation list of Rationing Inspectors/Senior clerks/Deputy Accountants of the BRO as on April 1, 1968 was drawn up and issued by the Controller of Rationing on May 28, 1971. Para 3 of the Order dated May 28, 1971 whereunder the said gradation list was issued contained a specific direction to all the Deputy Controllers of Rationing in the Head Office and also in the regions and to the Rationing Offices, to exhibit one copy of the gradation list together with a copy of the said Order whereunder the list was issued on their respective Office Boards, use another copy for obtaining signatures of all the persons who were still borne on the establishment of the BRO and keep the third copy for the office record. It was directed in the same para that "it should be seen that all the persons working in this Organisation, including those on leave or under suspension or retired, are informed of their seniority and rank and their signatures obtained in token thereof". In the absence of any acceptable evidence to the contrary, it is legitimate to presume that the said direction had been duly carried and that the provisional gradation list and the order dated May 28, 1971 had been duly brought to the notice of all the personnel belonging to the concerned categories then working in the BRO. It is important to notice that in the first part of the aforesaid Order dt. May 28, 1971, it had been expressly mentioned that the provisional gradation list had been drawn up in accordance with the seniority principles enunciated in the Government Resolution dated March 22, 1968. Para 2 of the said Order also contained a brief summary of the principles on which the gradation list had been drawn up. In para 5 of the Order, it was stated that it was open to the persons whose names were included in the gradation list to make representations about the fixation of their seniority on or before June 21, 1971, and that representations received thereafter will not be entertained on any account. It is to be remembered in this context that the BRO is a small Organisation functioning only in the city of Bombay. Since copies of the Order dated May 28, 1971 and the provisional gradation list had been circulated in the Head Office, the Regional Offices and all the Rationing Offices of the BRO and also shown individually to all the members of the staff working in the different offices, the writ peti-

tioners must be taken to have become fully aware of the principles laid down in the Government Resolution dated March 22, 1968 at least when the provisional gradation list dated May 28, 1968 was so published and circulated. None of the writ petitioners, however, preferred any objection against their ranking in the said provisional gradation list. On Nov. 23, 1972, a final gradation list of Rationing Inspectors/Senior Clerks/Dy. Accountants of the BRO as on April 1, 1968 was published with directions for bringing the said list also to the notice of all the persons borne on the concerned categories of the Organisation. Even after the circulation of the said list, the writ petitioners did not file any objections against the ranking given to them in the said list, which was based on the principles enunciated in the Government Resolution dated March 22, 1968, nor did they take any steps whatever to challenge any constitutional validity of those principles.

24. Subsequently, another provisional gradation list of Rationing Inspectors/Senior Clerks/Dy. Accountants as on April 1, 1972 was published by the Controller of Rationing on April 9, 1973. In that list also, it was expressly mentioned that it had been drawn up in accordance with the seniority principles enunciated in the Government Resolution dated March 22, 1968. This list was admittedly brought to the knowledge of the petitioners and the other personnel working in the concerned categories in the BRO. In the Order dated April 9, 1973, whereunder the said list was issued, it had been specified that representations against the seniority and ranking should be submitted to the Controller of Rationing on or before May 1, 1973 and that thereafter no representations would be entertained on any account. The writ petitioners did not file any objections within the said period. However, writ petitioners 1 to 3 submitted certain written representations to the Controller of Rationing in Nov., 1973, contending that the "deemed dates" assigned to them in the gradation list were incorrect. Even in those representations, no objection was raised against the principles for determination of seniority enunciated in the Government Resolution of 1968, and there was no protest whatever against the provision made in the said Resolution for fixation of the seniority of "released Government servants" by giving them credit for the length of regular service put in by them as Clerks in other departments minus two years. The representations filed by petitioners 1 to 3 were rejected by the Controller of Rationing by orders passed in Dec., 1973, wherein it

was stated that the seniority and ranking assigned to them in the provisional gradation list could not be altered in view of the provisions contained in R. 4 (a) and the proviso to R. 7 of the Rules laid down in the Government Resolution of 1968. If the petitioners desired to challenge the constitutionality of Rules contained in the Government Resolution dated Nov. 22, 1968, they should have woken up at least when they received the aforesaid replies from the Controller of Rationing and approached the Court for appropriate relief within a reasonable time thereafter. No such action was taken by them and all that they did was merely to address some further representations to the Secretary, Food & Civil Supply Department reiterating the request made by them before the Controller of Rationing for alteration of their "deemed dates". Writ petitioners 11 and 12 are also seen to have submitted some belated representations against the provisional gradation list complaining that the "deemed dates" assigned to them were incorrect. In those representations also there was no protest or objection raised against the principles laid down in the Government Resolution dated Nov. 22, 1968.

25. On March 1, 1974, the Government of Maharashtra passed a resolution directing that non-PSC persons who were employed in the Ministerial posts, namely, Clerks, Typists, Clerks-typists, Steno-typists and Stenographers in the Secretariat Departments and various Government Offices in Greater Bombay, prior to Jan. 1, 1971, and who were in the service of Government on the date of the issue of the said order, should continue in Government service without being replaced by the candidates selected by the Maharashtra Public Service Commission, provided they possessed the minimum educational qualifications prescribed for the post to which they were appointed and they were also within the age limits prescribed for appointment to the respective posts held by them at the time of their initial appointment to such posts. It was made very clear in para 4 of the said order that the seniority of the non-PSC persons on whom the benefit of permanent absorption in service was conferred thereunder was to be fixed only with reference to the date of the said order and that all the Public Service Commission selected candidates who were working in the various departments/offices prior to the date of the said resolution would be treated as seniors in relation to the non-PSC persons covered by the said order. It is manifest that this order did not in any way affect the inter se seniority between the

writ petitioners and the released government servants drafted to the BRO from other Government departments wherein they had been holding posts on a regular basis after having passed the Public Service Commission Examination. It is also worthy of note that the Government Resolution of 1974 was a general order applicable to all the non-PSC personnel functioning on a temporary or ad hoc basis in the Secretariat as well as the various departments of the State Government and except as indicated above it did not have any special applicability to the BRO.

26. On Nov. 18, 1975, another provisional gradation list of Rationing Inspectors/Senior Clerks/Deputy Accountants of the BRO as on April 1, 1974 was published by the Controller of Rationing. Representations were filed by writ petitioners 1 to 3 objecting to the ranking assigned to them in the said provisional gradation list and it was only in those representations that an objection was specifically taken by them for the first time that the "released" personnel from other departments who had been appointed in the cadre of Rationing Inspectors in the BRO should not be assigned seniority over them since those persons had been working in their parent departments only in the capacity of Clerks. The representation of writ petitioner 1 was filed on Dec. 3, 1975 while those of writ petitioners 2 and 3 on Nov. 27, 1975 and Dec. 9, 1975. Shortly thereafter, the petitioners approached the High Court by filing the writ petition on Jan. 31, 1976.

27. The view expressed by the learned single Judge of the High Court that a writ petition filed under Art. 226 of the Constitution, seeking redress on the ground of alleged infringement of fundamental rights cannot be dismissed by the Court on the ground of laches, under any circumstances, is inconsistent with the pronouncement of this Court on the subject and cannot be accepted as correct or sound.

28. In *Trilokchand Motichand v. H. B. Munshi*, (1969) 2 SCR 824 at pp. 835, 836, 853-855: (AIR 1970 SC 898 at pp. 914, 915, 916), this Court had occasion to deal with a contention that the right to move the Supreme Court under Art. 32 of the Constitution, being a fundamental right, a writ petition filed in the Supreme Court under the said provision cannot be dismissed on the ground of delay or laches, since such a course would amount to a denial of a fundamental right. Repelling the said argument, Mitter, J. observed thus:

"I cannot however find any merit in the contention that because there is an invasion of a fundamental right of a citizen he can be allowed to come to this Court, no matter how long after the infraction of his right he applies for relief. The Constitution is silent on this point; nor is there any statute of limitation expressly applicable, but nevertheless, on grounds of public policy I would hold that this Court should not lend its aid to a litigant even under Article 32 of the Constitution in case of an inordinate delay in asking for relief and the question of delay ought normally to be measured by the periods fixed for the institution of suits under the Limitation Acts.

The Limitation Acts do not in terms apply to claims against the State in respect of violation of fundamental rights. A person complaining of infraction of any such rights has one of three courses open to him. He can either make an application under Article 226 of the Constitution to a High Court or he can make an application to this Court under Art. 32 of the Constitution, or he can file a suit asking for appropriate reliefs. The decisions of various High Courts in India have firmly laid down that in the matter of the issue of a writ under Art. 226 the Courts have a discretion and may in suitable cases refuse to give relief to the person approaching it even though on the merits the applicant has a substantial complaint as regards violation of fundamental rights. Although the Limitation Act does not apply, the Courts have refused to give relief in cases of long or unreasonable delay. As noted above in Bhailal Bhai's case, (1964) 6 SCR 261 : (AIR 1964 SC 1006), it was observed that the "maximum period fixed by the legislature as the time within which the relief by a suit in a Civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured". On the question of delay, we see no reason to hold that a different test ought to be applied when a party comes to this Court under Art. 32 from one applicable to applications under Art. 226.

In my view, a claim based on the infraction of fundamental rights ought not to be entertained if made beyond the period fixed by the Limitation Act for the enforcement of the right by way of suit. While not holding that the Limitation Act applies in terms, I am of the view that ordinarily the period fixed by the Limitation Act should be taken to be a true measure of the time within which a person can be allowed to

raise a plea successfully under Art. 32 of the Constitution."

To the same effect are the following observations of Sikri, J. in his separate judgment in the same case (at p. 904 of AIR):

"A delay of 12 years or 6 would make a strange bed-fellow with a direction or order or writ in the nature of mandamus, certiorari and prohibition. Bearing in mind the history of these writs I cannot believe that the Constituent Assembly had the intention that five Judges of this Court should sit together to enforce a fundamental right at the instance of a person, who had without any reasonable explanation slept over his rights for 6 or 12 years. The history of these writs both in England and the U.S.A. convinces me that the underlying idea of the Constitution was to provide an expeditious and authoritative remedy against the inroads of the State. If a claim is barred under the Limitation Act, unless there are exceptional circumstances, prima facie it is a stale claim and should not be entertained by this Court. But even if it is not barred under the Indian Limitation Act, it may not be entertained by this Court if on the facts of the case there is unreasonable delay.

It is said that if this was the practice the guarantee of Art. 32 would be destroyed. But the article nowhere says that a petition, howsoever late, should be entertained and a writ or order or direction granted, howsoever remote the date of infringement of the fundamental right. In practice this Court has not been entertaining stale claims by persons who have slept over their rights." In *Rabindra Nath Bose v. Union of India*, (1970) 2 SCR 697 at pp. 711-712 : (AIR 1970 SC 410 at pp. 477, 478), the identical question again came up to be considered by this Court, and Sikri, J. speaking on behalf of the Constitution Bench, said this:—

"But in so far as the attack is based on the 1952 Seniority Rules, it must fail on another ground. The ground being that this petition under Art. 32 of the Constitution has been brought about 15 years, after the 1952 Rules were promulgated and effect given to them in the Seniority List prepared on August 1, 1953. Learned counsel for the petitioners says that this Court has no discretion and cannot dismiss the petition under Article 32 on the ground that it has been brought after inordinate delay. We are unable to accept this contention.

The learned counsel for the petitioners strongly urges that the decision of this Court in *M/s. Tilokchand Motichand's case*, (1969)

1 SCC 110 : (AIR 1970 SC 898) needs review. But after carefully considering the matter, we are of the view that no relief should be given to petitioners who, without any reasonable explanation, approach this Court under Article 32 of the Constitution after inordinate delay. The highest Court in this land has been given Original Jurisdiction to entertain petitions under Art. 32 of the Constitution. It could not have been the intention that this Court would go into stale demands after a lapse of years.

It is said that Art. 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay.

We are not anxious to throw out petitions on this ground, but we must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years."

The same position was reiterated by this Court in *Malcom Lawrence Cecil D'Souza v. Union of India*, (1976) 1 SCC 599 at p. 602 : (AIR 1975 SC 1269 at p. 1272), and again in a very recent pronouncement of this Court in *S. S. Moghe v. Union of India* (1981) 3 SCC 271 at p. 292 : (AIR 1981 SC 1495 at p. 1508). We may usefully extract the following observations contained in paragraph 23 of the judgment of this Court in the last mentioned case :

"At this stage, it will be convenient to first dispose of the contentions urged by the petitioners, against the validity of the promotions given to respondents 8 to 67 during the period between 1968 and 1975. In our opinion, the challenge raised by the petitioners against those promotions is liable to be rejected on the preliminary ground that it is most highly belated. No valid explanation is forthcoming from the petitioners as to why they did not approach this Court within a reasonable time after those promotions were made, in case they really did feel aggrieved by the said action of the Department. This writ petition has been filed only in the year 1979, and after such a long lapse of time the petitioners cannot be permitted to assail before this Court the promotions that were effected during the years 1968 to 1975. A party

seeking the intervention and aid of this Court under Art. 32 of the Constitution for enforcement of his fundamental rights, should exercise due diligence and approach this Court within a reasonable time after the cause of action arises and if there has been undue delay or laches on his part, this Court has the undoubted discretion to deny him relief (see *Rabindra Nath Bose v. Union of India*, (1970) 2 SCR 697 : (AIR 1970 SC 470))."

29. The Government Resolution of March 22, 1968 must have come to the knowledge of the writ petitioners at least when the provisional seniority list dated May 28, 1971 was circulated amongst the staff of the BRO. Thereafter, in Nov. 1972, a final Gradation List of Rationing Inspectors/Senior Clerks/Deputy Accountants of the BRO as on April 1, 1968 had been published and the said list was circulated to all the members borne on the concerned categories of the organisation. It was expressly stated in both the aforesaid lists that the ranking of personnel had been effected in accordance with the principles laid down in the Government Resolution dated March 22, 1968. The writ petitioners did not file any objections against the provisional list despite representations having been invited, nor did they take any steps to question the validity of the final gradation list or the seniority principles laid down in the Government Resolution of 1968, on the basis of which the said list had been prepared.

30. Still later, in April 1973, another provisional Gradation List of personnel working in the aforesaid categories was published by the Controller of Rationing and the said list, which was also drawn up in accordance with the seniority principles enunciated in the Government Resolution of March 22, 1968, had been admittedly brought to the knowledge of the writ petitioners. They did not file any objections against the said list within the time prescribed. And what is more significant is that even in the earlier representations filed by writ petitioners 1 to 3, which they filed in Nov. 1973, no objection or protest was raised by them against the principles for determination of seniority laid down in the Government Resolution of 1968. The Controller of Rationing informed writ petitioners 1 to 3 in Dec. 1973 itself that the representations stood rejected since the seniority and rank assigned to them in the provisional Gradation List were in strict conformity with the principles laid down in the Government Resolution of 1968. Even

thereafter, the petitioners did not wake up and it was only on Jan. 31, 1976 that they approached the High Court by filing the present writ petition out of which this appeal has arisen seeking to quash the Government Resolution of 1968 and the Gradation Lists of Nov. 18, 1975 and Nov. 27, 1975. The petitioners have not furnished any valid explanation whatever for the inordinate delay on their part in approaching the Court with the challenge against the seniority principles laid down in the Government Resolution of 1968. As already indicated by us, the fact that the Government had subsequently passed a Resolution dated March 1, 1974 directing the regularisation of the temporary appointments of non-PSCs clerical personnel working in Ministerial posts in the different Government Departments in Greater Bombay, has no relevancy at all in this context of dealing with the question of delay and laches on the part of the petitioners in taking steps to challenge against the Government Resolution of 1968. The inter se seniority between the petitioners and the other personnel regularly absorbed in the BRO who have come over to the BRO as "released Government servants" is not in any way affected by the said Government Resolution of April 1, 1974, inasmuch as it has been expressly made clear therein that the temporary personnel who are entitled to the benefit of regularisation thereunder were to be assigned seniority only on the basis that regular appointments were effected on the date of issue of the said order. The learned single Judge of the High Court was, therefore, clearly in error in thinking that the passing of the Government Resolution of 1974 furnished a fresh cause of action for the petitioners for agitating their contentions regarding the invalidity of the Government Resolution of 1968. We are unable to appreciate the further reason stated by the learned single Judge, that the respondents had not placed on record any factual data to show the extent of promotions made on the basis of the seniority list of 1972 and the manner in which the promotees would be affected if the relief was granted to the writ petitioners, and the same we find to be based on a totally incorrect approach. It is to be noticed that there was no dispute before the High Court that from the date of publication of the provisional list of May 28, 1971, which was expressly based on the principles laid down in the Government Resolution of 1968, the seniority and rank of all the personnel in concerned categories had been fixed in accordance with the prin-

ciples laid down in the impugned Resolution. In the counter-affidavits filed in the High Court on behalf of the State Government and the Controller of Rationing as well as in the affidavits filed by the other respondents, it had been specifically averred that innumerable promotions had been made during the period of six years on the basis of seniority as fixed in accordance with the impugned rules and many officers had gone up by two or three stages as a result of such promotions. Further, there is the clinching fact that the writ petitioners themselves had impleaded as many as 162 officers as respondents on the ground that they were all likely to be affected in case the reliefs claimed in the writ petition were granted. In these circumstances, we consider that the High Court was wrong in overruling the preliminary objection raised by the respondents before it, that the writ petition should be dismissed on the preliminary ground of delay and laches, inasmuch as it seeks to disrupt the vested rights regarding the seniority, rank and promotions which had accrued to a large number of respondents during the period of eight years that had intervened between the passing of the impugned Resolution and the institution of the writ petition. We would accordingly hold that the challenge raised by the petitioners against the seniority principles laid down in the Government Resolution of March 22, 1968 ought to have been rejected by the High Court on the ground of delay and laches and the writ petition in so far as it related to the prayer for quashing the said Government Resolution should have been dismissed.

31. On the merits also, we do not find any substance in the attack levelled by the petitioners against the legality and validity of the seniority principles laid down in the impugned Government Resolution of March 22, 1968. We shall briefly indicate our reasons for reaching this conclusion. The BRO was a totally new Department which was constituted on March 1, 1966 pursuant to the Government Resolution dated Feb. 11, 1966. Under the said Resolution, it was directed that the staff for manning the new organisation should consist of:

(a) the skeleton staff already sanctioned under an earlier Government Resolution dated Oct. 21, 1965 for carrying out the preliminary work in connection with the establishment of the new organisation (BRO);

(b) the existing staff under the Controller of Foodgrains Distribution, Bombay, consisting of 384 posts which were to be merg-

ed with a new Bombay Rationing Office (BRO) with effect from March 1, 1966;

(c) personnel drawn on deputation from other departments of the State Governments; and

(d) persons directly recruited to the BRO. Here is, therefore, a case where the staff for manning a new department has been drawn from four different sources. In such a situation, it was inevitable that some reasonable principles had to be formulated for the determination of the inter se seniority of the personnel appointed to work in the different categories of posts in the new organisation. The entire argument of the petitioners is based on an erroneous assumption that from the very inception they belonged to the BRO and had some vested rights with respect to seniority and rank in the said organisation. The petitioners who were members of the staff of the CFD were taken into the BRO along with the skeleton staff appointed under the Government Resolution dated Oct. 21, 1965 and the "released Government servants" etc., as part of the single scheme formulated by the Government for the constitution of a new department (BRO). There is, therefore, no substance in the contention advanced by the writ petitioners that they stood on a separate and superior footing for the purpose of seniority etc., in the new organisation. In this connection, it is relevant to note that the writ petitioners were holding the posts of Supply Inspectors in the C. F. D. only on the basis of appointments which were purely temporary. They had not been recruited through the Public Service Commission but were given temporary appointments on the basis of recommendations made by the Employment Exchange and their services were terminable at any time without notice. Thus the position that existed at the time of the formation of the B. R. O. was that the writ petitioners were not holding any substantive or regular appointments in the CFD which itself was only a temporary department. In contrast, the deputationists who came over to the BRO as "released Government servants" were persons who had been holding for many years Ministerial posts in other Government departments on regular basis pursuant to their recruitment by the Public Service Commission. Under the impugned seniority rules laid down by the Government Resolution dated March 22, 1968, a deputationist (released Government servant) with two years' regular service as Clerk in other Government departments has been equated with a Supply Inspector of the

CFD and it is on this basis that the inter se seniority as between the erstwhile CFD personnel and the "released Government Servants" appointed to posts of Rationing Inspectors, Senior Clerks, Deputy Accountants in the ERO is to be reckoned. In our opinion, the said equation cannot be regarded as arbitrary or unreasonable, especially when it is viewed in the context of the factual background that the Supply Inspectors in the CFD were merely temporary hands whose appointments were of a precarious nature and the functions and duties performed by them are not shown to have been substantially different from those discharged by the clerks in other Govt. depts. The principle laid down in R. 4 (a) that the seniority of "released Government servants" and merged Government servants in the cadres of Senior Clerks, Rationing Inspectors and Deputy Accountants shall be determined with reference to dates which shall be fixed after deducting two years from the date of continuous service whether officiating or permanent rendered by them in the cadre of clerks, typists etc., appears to our minds to be perfectly just and unexceptionable in the circumstances of the case. The reasons stated by the learned Single Judge of the High Court for declaring the aforesaid rule to be arbitrary and violative of Art. 16 of the Constitution do not appeal to us as correct or sound. Almost the entire reasoning of the learned single Judge is based on an assumption that there is an invariable "normal rule" that seniority should be determined only on the basis of the respective dates of appointment to the post and that any departure from the said rule will be prima facie unreasonable and illegal. The said assumption is devoid of any legal sanction. We are unable to recognise the existence of any such rigid or inflexible rule. It is open to the rule-making authority to take a note of the relevant circumstances obtaining in relation to each department and determine with objectivity and fairness what rules should govern the inter se seniority and ranking of the personnel working in the concerned departments and the Courts will only insist that the rules so formulated should be reasonable, just and equitable. Judged by the said test of reasonableness and fairness, the action taken by the Government in equating the clerical personnel which had rendered two years regular service in other departments with the temporary Supply Inspectors of the CFD and in directing as per impugned R. 4 (a) that their inter se seniority shall be determined with reference to the length of service calculated on the basis of the

said equation cannot be said to be in any way discriminatory or illegal. We are unable to accept as correct the view expressed by the learned single Judge of the High Court that "while fixing the seniority in the higher post, it is not open to take into consideration any service rendered in the lower post and that by itself spells out discrimination". Firstly, it is not correct to regard the post of a regular clerk in the other departments as lower in grade in relation to that of a Supply Inspector in the CFD. Further, in *S. G. Jaisinghani v. Union of India*, (1967) 2 SCR 703 : (AIR 1967 SC 1427), this Court has pointed out that in the case of recruitment to a service from two different sources and the adjustment of seniority between them a preferential treatment of one source in relation to the other can legitimately be sustained on the basis of a valid classification, if the differences between the two sources has a reasonable relation to the nature of the posts to which the recruitment is made. In that case, this Court upheld the provision contained in the seniority rules of the Income-tax Service, whereby a weightage was given to the promotees by providing that three years of outstanding work in Class II will be treated as equivalent to two years of probation in Class I (Grade II) Service.

32. We may also extract, with advantage, the following observations of Palekar, J., speaking on behalf of the Constitution Bench, in *Bishan Sarup Gupta v. Union of India*, (1975) 1 SCR 104 at p. 114 : (AIR 1974 SC 1618 at p. 1625) :

"There is no question in this case of any discrimination being made in a service after officers from two sources have been brought in one cadre. It is true that seniority is a vital element in the matter of promotion but that does not mean that allotment of seniority by rule, relative to recruitment, involves any classification for the purposes of promotion. The argument that the promotees and direct recruits became one class immediately on entry and, thereafter, there could be no classification between them does not disclose the correct approach to the problem of fixing inter se seniority between them. When recruits from two sources have come into a service it is essential to fix inter se seniority for a proper integration of the cadre. Therefore, it is really a case of adjustment of seniority between the recruits and does not amount to making a classification after their absorption in one service."

33. A comparison of the pay scales of the Supply Inspectors in CFD with that of

Clerks in the other departments shows that though the clerks started with a lower salary, their pay scale reached a much higher level than that of the Supply Inspectors. It is also relevant to notice that the next promotion post available to the clerks in other Government departments from where they had gone on deputation to the BRO was that of Assistant or Head Clerk in the Grade of Rs. 200-450 or Rs. 200-300, while the next promotion post of Supply Inspector in the former CFD was that of an Assistant Zonal Officer in the Grade of Rs. 200-300/-. Further, the post of 'Assistant' to which the Clerks in other Government departments get a promotion has been declared to be equivalent to the post of Assistant Rationing Officer in the BRO which is the post immediately above that of Rationing Inspector in the BRO. When all these factors are taken into account, it becomes clear that the post of Supply Inspector in the CFD cannot be regarded as a post higher than or superior to that of clerk in the other Government departments. Hence, we do not find it possible to uphold the view expressed by the learned single Judge of the High Court that the seniority principle embodied in R. 4 (a) treats unequals as equals and that it is, therefore, violative of Arts. 14 and 16 of the Constitution.

34. When personnel drawn from different sources are being absorbed and integrated in a new department, it is primarily for the Government or the executive authority concerned to decide as a matter of policy how the equation of posts should be effected. The Courts will not interfere with such a decision unless it is shown to be arbitrary, unreasonable or unfair, and if no manifest unfairness or unreasonableness is made out, the Court will not sit in appeal and examine the propriety or wisdom of the principle of equation of posts adopted by the Government. In the instant case, we have already indicated our opinion that in equating the post of Supply Inspector in the CFD with that of Clerk with two years regular service in the other Government departments, no arbitrary or unreasonable treatment was involved.

35. Clause (c) of R. 4 which is the next provision that has been struck down by the High Court merely states that the seniority of Government servants in the cadre of Senior Clerks/Rationing Inspectors/Deputy Accountants shall be refixed in accordance with the principles laid down in Cls. (a) and (b) of Rule 4. We have repelled the challenge against Cl. (a) of R. 4 and no chal-

ledge has been raised by the petitioners before us against Cl. (b) of the said rule. It must automatically follow that the aforesaid provision contained in Cl. (a) of Rule 4 is perfectly valid and constitutional.

36. That takes us on to the proviso to Rule 7 which is the only other provision struck down by the High Court. Clause (a) of R. 7 lays down that in the case of Government servants taken into the BRO on release from one and the same office, their seniority inter se in their former office shall be maintained in the BRO. Clause (b) is a similar provision relating to the "merged Government servants" (ex-CFD personnel). Clause (c) of R. 7 lays down that the inter se seniority of persons directly recruited in the former CFD Organisation shall be governed by the principles set out in the Government Resolution dated April 1, 1963. It is further stated in the said clause that in regard to persons who were taken to the CFD from one and the same Government office/department, they shall take their rank according to their inter se seniority in the office/department from which they were drawn. Thereafter, follows the impugned proviso which lays down that where there is a clash of principles contained in the Government Resolution dated April 1, 1963 with the seniority inter se in the former department, the seniority inter se in the former department, shall prevail. The principles for fixation of inter se seniority of personnel working in the CFD had been enunciated by the Government in the Resolution dated April 1, 1963. What has been done under the impugned proviso is only to state that with respect to persons who have been drafted into the CFD Organisation from one and the same Government department on deputation basis, their inter se seniority in the former department shall not be disturbed and that to the said extent a deviation should be made from the principles laid down in the Government Resolution dated April 1, 1963. We fail to see how the said direction contained in the impugned proviso for preservation of the inter se seniority of deputationists who have been drawn from one and the same Government department to serve the CFD can be said to be arbitrary or unreasonable. It is a just and wholesome principle commonly applied that in such situations where persons from other departments are drafted to serve on deputation their inter se seniority in the parent department should be respected and preserved during the period of such deputation to the new department. We, therefore, consider that the High Court was in error in strik-

ing down the proviso to R. 7 as being violative of Arts. 14 and 16 of the Constitution.

37. It now only remains for us to examine whether there is substance in the contention put forward by the writ petitioners that even if the impugned seniority principles laid down in the Government Resolution dated March 22, 1968 are to be regarded as valid, the seniority lists dated Nov. 18, 1975 and Nov. 27, 1975 have not been drawn up in accordance with those principles. The first point urged before us is that the effect of Cl. (b) of R. 7 is to make the provisions of Cls. (a) and (b) of Rule 4 inapplicable to merged government servants and to direct that the seniority of the merged Government servants should be determined only in accordance with the principles laid down in the Government Resolution dated April 1, 1963. This argument is based on a total misconception of the scope and effect of R. 7 (b). What that rule provides is only that as between the CFD personnel who have been absorbed in the BRO their inter se seniority reckoned on the basis of the principles contained in the Government Resolution dated April 1, 1963 shall be preserved. In other words, the object and purpose of sub-clause (b) is limited to the preservation and maintenance of the pre-existing inter se seniority as between the CFD personnel even after their absorption in the BRO and the said provision does not in any way hamper the operation of the principles laid down in Rule 4 for the fixation of the seniority of all the personnel including the merged Government servants in the respective categories in the BRO. A careful reading of the provision of Cl. (c) and the illustrations given thereunder makes this position abundantly clear. The aforesaid contention put forward on behalf of the writ petitioners will, therefore, stand rejected.

38. There is, however, some substance in the grievance put forward on behalf of the writ petitioners that in drawing up the impugned seniority lists in purported application of the principles laid down in Cl. (a) Rule 4, many persons who were juniors to the writ petitioners in the category of Supply Inspectors in the CFD have been ranked above the petitioners in the category of Inspectors/Senior Clerks/Deputy Accountants. There are also instances where persons who were working in the CFD as clerks at the time of the merger and were appointed in the BRO as clerks but have been subsequent-

ly promoted in the BRO as Rationing Inspectors/Senior Clerks/Deputy Accountants have been shown in the gradation list as seniors in relation to the writ petitioners despite the fact that the writ petitioners were all along functioning as Supply Inspectors in the CFD by virtue of their having been recruited to the said category in that organisation. We do not find anything in R. 4 (a) which warrants such an unfair treatment being meted out to persons like the petitioners who were directly recruited as Supply Inspector in the CFD. Rule 7 clearly lays down that the operation of Cl. (a) of R. 4 is subject to the limitation specified therein, namely, that in the case of merged Government servants their inter se seniority will be preserved intact. Hence no person who was functioning as a junior in relation to the writ petitioners in the category of Supply Inspectors in the CFD can be assigned seniority or rank above the writ petitioners in the cadre of Rationing Inspectors/Senior Clerks/Deputy Accountants in the BRO. Similarly, no person who has been taken into the BRO as a clerk from the CFD can under any circumstances be placed above the writ petitioners in the gradation list of Rationing Inspectors/Senior Clerks/Deputy Accountants of the BRO. It is clear from the averments contained in the counter-affidavit filed on behalf of the State Government that the aforesaid principle has been violated while preparing the two impugned gradation lists dated Nov. 18, 1975 and Nov. 27, 1975. The explanation given in the counter-affidavit for adopting the said course does not appear to us to be acceptable or sound. It was pointed out by the counsel for the respondent (writ petitioner) that Exhibit 'A' produced along with the counter-affidavit of the first respondent herein shows that as many as 30 persons, who had joined the BRO as Clerks and were subsequently promoted as Rationing Inspectors, have been shown as seniors in relation to the writ petitioners in the gradation list dated Nov. 18, 1975. Similarly, Exhibit 'B' gives the names and particulars of persons who were appointed as Supply Inspectors in the CFD subsequent to the appointment of the petitioners, but who have nevertheless been shown in the impugned gradation list as seniors to the writ petitioners in the corresponding cadre in the BRO. We have already made it clear that on a combined reading of Rr. 4 and 7 of the impugned seniority rules, the inter se seniority of the CFD personnel has to be strictly maintained intact, and that no person who was junior in the CFD in the cate-

gory of Supply Inspector can go above his senior in that organisation after being absorbed in the BRO, and also that no person who has been taken as a clerk in the BRO can go above persons absorbed therein in the category of Rationing Inspectors.

39. In the light of what we have said above, the impugned seniority lists in so far as they have been drawn up in deviation from the legal position explained above call for immediate revision. We would accordingly direct respondents 23 and 24 (State of Maharashtra and the Controller of Rationing, Bombay) to revise the two impugned seniority lists and refix the ranking assigned to the writ petitioners and others in the light of what we have said in this judgment.

40. In the result, this appeal is allowed and the judgments of the High Court are set aside. The writ petition — Misc. Petn. No. 166 of 1976 — is allowed only to the limited extent of the aforesaid direction issued to respondents 23 and 24 for revision of the impugned seniority lists and it is dismissed in other respects. The parties will bear their respective costs.

Order accordingly.

AIR 1982 SUPREME COURT 119

(From : Allahabad)

S. MURTAZA FAZAL ALI AND

A. P. SEN, JJ.

Civil Appeal No. 1750 of 1981 (from Spl. Leave Petn. (c) No. 10760 of 1979), D/-20-7-1981.

The Sahkari Ganna Vikas Samiti Ltd., Appellant v. Mahabir Sugar Mills (P.) Ltd., Respondent.

Limitation Act (36 of 1963), S. 5 — Condonation of delay — Divisional Commissioner acting under U. P. Act 24 of 1953 as appellate authority, acts as a Revenue Court and not as persona designata — Section 5 applies to appeals before him. (U. P. Sugarcane (Regulation of Supply and Purchase) Act (24 of 1953), S. 1). Decision of Allahabad High Court, Reversed.

The fact that the Divisional Commissioner and not the Cane Commissioner has been constituted appellate authority under the U. P. Sugarcane (Regulation of Supply and Purchase) Act, shows that the Divisional Commissioner was made an appellate Court not as persona designata but as a Revenue Court. This being so, it is obvious that S. 5 of Limitation Act applies to appeals before the Divisional Commissioner and he can condone

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the delay in filing appeal. Decision of Allahabad High Court, Reversed.

(Para 2)

JUDGMENT:— Special leave granted.

2. We have heard counsel for the parties. The only ground on which the High Court reversed the judgment of the Commissioner entertaining the appeal was that Section 5 of the Limitation Act was not applicable. The High Court itself found that so far as the Commissioner of the Division is concerned he was undoubtedly a Revenue Court but it held that as the matter arose out of U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953, the Commissioner was exercising appellate jurisdiction as an authority under the said Act and was therefore *persona designata*. There is no doubt that the Cane Commissioner is the highest authority under the Act and if the intention of the legislature was that appeal should lie to a Special Tribunal, then it would have clearly provided that the appeal should lie to the Cane Commissioner and not to the Divisional Commissioner. This fact which does not appear to have been noticed by the High Court clearly shows that the Divisional Commissioner was made an appellate Court not as *persona designata* but was acting as a revenue Court. If this is the position, it is obvious that S. 5 of the Lim. Act applied and hence the Divisional Commissioner had ample power under S. 5 of the Lim. Act to condone the delay. We, therefore, allow this appeal, set aside the judgment of the High Court and remit the case to the Divisional Commissioner for hearing the appeal on merits. The appeal is disposed of accordingly with no order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 120

(From : Allahabad)

O. CHINNAPPA REDDY, A. P. SEN AND
BAHARUL ISLAM, JJ.

Civil Appeal No. 2219 of 1970, D/- 29-7-1981.

The Allahabad Dist. Co-op. Ltd., Appellant v. Hanuman Dutt Tewari, Respondent.

U. P. Co-operative Societies Act (11 of 1966), S. 70 — Bar of jurisdiction of Civil Court — Expression “touching business of Society” — Suit for declaration by employee of Society that retrenchment of his services by Society constituted under Act is illegal — Dispute does not relate to business of co-operative society — Suit is not barred under

S. 70. AIR 1969 SC 1320 and AIR 1970 SC 245, Foll. (Civil P. C. (1908), S. 9).

(Para 3)

Cases Referred : Chronological Paras
AIR 1970 SC 245 : (1970) 1 SCR 205 : 1970
Lab IC 285 2
AIR 1969 SC 1320 : (1969) 1 SCR 887 2

JUDGMENT:— The only question raised in this appeal is whether the suit filed by the respondent for a declaration that the retrenchment of his services by the appellant Allahabad Distt. Co-op. Ltd., Allahabad, a co-operative society constituted under the Uttar Pradesh Co-operative Societies Act is (sic) barred by the provisions of S. 70 of the Act. According to Mr. Pramod Swarup, learned counsel for the appellant, the dispute relates to the business of the co-operative society and, therefore, the suit is barred by the provisions of S. 70.

2. The expression “business of the society” has been construed by several decisions of this Court. In *Deccan Merchants Co-operative Bank Ltd. v. Dalichand Jugraj Jain*, (1969) 1 SCR 887 : (AIR 1969 SC 1320) it was pointed out “the word ‘business’ has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws.” In *Co-operative Central Bank Ltd. v. Additional Industrial Tribunal, Andhra Pradesh*, (1970) 1 SCR 205 : (AIR 1970 SC 245), it is said “but the meaning given to the expression ‘touching the business of the society’, in our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word ‘business’ is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society.”

3. In view of the above pronouncements of this Court, we cannot accept the submission of Shri Pramod Swarup. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 121

(From: Gujarat)

V. BALAKRISHNA ERADI AND**R. B. MISRA, JJ.**

Civil Appeal No. 1867 of 1970, D/- 11-12-1981.

Chhaganlal Keshavlal Mehta, Appellant
v. Patel Narandas Haribhai, Respondent.**(A) Transfer of Property Act (4 of 1882), S. 60 — Suit for redemption — Maintainability — Co-mortgager cannot file suit only in respect of his share in property on payment of proportionate part of amount due.**

A perusal of S. 60 indicates that a co-mortgagor cannot be permitted to redeem his own share of the mortgaged property only on payment of proportionate part of the amount remaining due. In other words the integrity of the mortgage cannot be broken. (Para 17)

(B) Civil P. C. (5 of 1908), O. 34, R. 1 and O. 22, R. 4 — Suit for redemption — Legal representatives of co-mortgagee not brought on record in appeal — Appeal abates only in respect of that mortgagee when mortgagor is prepared to pay entire mortgage amount to surviving mortgagee.

It is a well recognised principle that even if all the mortgagees are not before the court in a suit filed by the mortgagor for redemption of the property, but the mortgagor is prepared to pay the entire amount due at the foot of the mortgage to such mortgagees as are before the court and gives up his right under the mortgage as against those mortgagees who are not before the court, the court can pass a decree for redemption directing that the entire mortgage amount should be paid to the mortgagees who are actually before the court. AIR 1930 Bom 466 (FB), Approved. (Para 18)

Where the party who had purchased mortgagee rights in respect of part of mortgaged property was joined as a defendant along with the co-mortgagee in the suit for redemption and his legal representatives were not brought on record on his death in appeal, the appeal would not abate as a whole but would abate in respect of that defendant-respondent only, especially when the defendant in question did not contest the suit at any stage and the mortgagor was prepared to pay the entire mortgage amount to the surviving defendant-appellant. (Para 19)

If a defendant does not contest the suit at any stage, he will not be a neces-

sary party in an appeal. A person may be a necessary party in a suit but he may not be a necessary party in the appeal.

(Para 19)

(C) Evidence Act (1 of 1872), S. 115 — Estoppel — Applicability — It cannot be invoked by assignee of party to whom representation is made.

Estoppel deals with questions of facts and not of rights. A man is not estopped from asserting a right which he had said that he will not assert. It is also a well-known principle that there can be no estoppel against a statute. To bring the case within the scope of estoppel as defined in S. 115: (1) there must be a representation by a person or his authorised agent to another in any form, a declaration, act or omission; (2) the representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission, must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel; (8) only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee. (Paras 22, 23)

Where the heirs of mortgagor represented to the mortgagee that they had relinquished their rights in the mortgaged property, the transferee of mortgagee could not plead estoppel against the mortgagor on the basis of representation to his predecessor-in-interest. (Para 23)

Cases Referred: Chronological Paras

AIR 1930 Bom 466: ILR 54 Bom 625 (FB) 18

MISRA, J.:— The present appeal by certificate is directed against the judgment of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No.

6 of 1966 dated the 18th of February, 1970 decreeing the suit for redemption.

2. The property in dispute, situated in Baroda City, originally belonged to Motibhai Bapubhai Shibandi Baxi (for short Motibhai). He created a mortgage with possession of the disputed property in favour of one Nanaji Balwant Pilkhañewala (for short Nanaji) in 1871 for a sum of Rs. 800. In 1890 a second mortgage was created in favour of the same mortgagee and the amount secured by this second mortgage was Rs. 375. Somewhere between 1890 and 1912 the original mortgagee Nanaji died leaving behind his two sons Hari and Purshottam as his heirs and legal representatives. The two sons of Nanaji sold the entire mortgage rights and interest to one Ganpatram Mugutram Vyas (for short Ganpatram) on 4th of July, 1912. Ganpatram in his turn sold the mortgagee rights in a part of the mortgaged property, viz., common latrine, to one Vamanrao Laxmanrao Nirkhe (for short Vamanrao).

3. Ganpatram died and his son Chhotalal Ganpatram (for short Chhotalal) sold away his rights as a mortgagee in possession in respect of the rest of the properties which still remained with him, to Chhaganlal Keshavlal Mehta (for short Chhaganlal Mehta).

4. Mortgagor Motibhai also died leaving behind his son Chimanrai Motibhai Baxi (for short Chimanrai). Chimanrai died leaving behind his widow Chhotiba and a daughter Taralaxmibai. On September 12, 1950 Taralaxmibai sold her right, title and interest in the suit property to one Shantilal Purshottamdas Dalia (for short Shantilal). Later on Shantilal conveyed his right, title and interest in the property to the plaintiff, Narandas Haribhai Patel (for short Narandas).

5. It appears that during the lifetime of Chimanrai Ganpatram, the mortgagee had sent a notice, Ext. 77, dated 15th of April, 1913 to Chimanrai informing him that the mortgaged property was in a dilapidated condition and required repairs. He had already spent some amount towards repairs but still substantial repairs were needed and the same should be got done by him or he should pay the mortgage amount and redeem the property. On receipt of this letter Chimanrai made the following endorsement:

'During the lifetime of my father, I had become separated from him without taking any kind of the moveable or im-

moveable property belonging to him and even after his death, I have not taken any kind of his properties nor have I kept my right over the said properties and so I am not in any way responsible for your any transaction whatsoever in connection with his properties. Be it known to you. And while giving you a definite assurance to that effect I have made attestation on the aforesaid document in respect of purchase of the mortgagee's rights, which may also be known to you."

6. Long after the death of Chimanrai, Chhotalal, son of Ganpatram, gave a similar notice, Ext. 68, dated 6th of October, 1933 to Chhotiba, the widow of Chimanrai calling upon her to redeem the mortgage in question. On this notice similar endorsement on behalf of Chhotiba was made on 10th of October, 1933 by Lomeshprasad Hariprasad Desai (for short Lomeshprasad), her daughter's son, as had been made by Chimanrai earlier on the notice given by Ganpatram. Yet another notice, Ext. 78 dated 21st of September, 1933 was sent by Chhotalal to Taralaxmibai, daughter of Chimanrai to the same effect. In her reply, Ext. 73, dated 3rd of October, 1933 to the notice, Taralaxmibai stated inter alia that her father Chimanrai had forgone all rights whatsoever in the property of his father, Motibhai, during his lifetime and hence she had no concern with the property of Motibhai. It was further stated that her own mother Chhotiba was alive (in October, 1933) and, therefore, she had no concern whatsoever with the property of Motibhai or the liabilities arising out of the dealings of Motibhai.

7. Narandas after the purchase of the mortgagor's rights from Shantilal filed a suit for redemption impleading both the assignees of the mortgagee's rights, Chhaganlal Keshavlal Mehta, as the 1st defendant, and Vamanrao Laxmanrao Nirkhe, as the 2nd defendant.

8. The claim was resisted by the 1st defendant on grounds that the plaintiff had no right to redeem inasmuch as his predecessor in interest, Chimanrai, his widow Chhotiba and his daughter Taralaxmibai on their own admission had no subsisting right, title and interest in the mortgaged property. The plaintiff who is only a transferee from Taralaxmibai could not rank higher, than Ganpatram, the predecessor in interest of defendant No. 1 was not in possession of the property as a mortgagee but as an absolute owner thereof. The defendant No. 1, who

claims through Ganpatram's son Chhotalal, was also an absolute owner and continued to remain in possession from 1933-34 as such. As an absolute owner he carried out repairs to the mortgaged property. He also obtained permission from the municipality and built the house afresh after incurring heavy expenditure and in doing so he had spent about Rs. 3374-2-0. He also denied that Shantilal, purchaser of the equity of redemption was the plaintiff's benamidar. Indeed, the plaintiff had falsely created the evidence of benamidar to bring the present suit, and that the suit was barred by limitation and estoppel. In the alternative he pleaded that he should be paid the sum of Rs. 5099-2-0 if the plaintiff's suit for redemption was to be decreed.

9. The trial court came to the conclusion that the plaintiff had no right to redeem the mortgaged property as he had failed to prove that he had purchased the property benami in the name of Shantilal and that afterwards Shantilal had passed deed of conveyance or mutation in his favour. In view of this finding it was not necessary for the trial court to decide other issues but all the same the trial court recorded findings on the remaining issues also in order to complete the judgment. It found that Chimanrai, Chhotiba or Taralaxmibai never relinquished their right, title and interest in the suit property, that the suit was within limitation, and that the suit was not barred by estoppel. As regards the amount spent on repairs the court came to the conclusion that the defendant No. 1 had spent Rupees 3374-2-0 and, therefore, if the plaintiff was to be allowed to redeem the property he would have to pay that amount in addition to the mortgage consideration. The suit was dismissed by the trial court on the ground that the plaintiff had no right to redeem.

10. Feeling aggrieved the plaintiff went up in appeal, and the defendant No. 1 filed a cross-objection against the finding that went against him. The appeal and the cross-objection were allowed by the Assistant Judge by his judgment dated 31st of March, 1956 on the finding that the plaintiff had purchased the equity of redemption benami in the name of Shantilal and that Shantilal has executed a deed of conveyance, Ext. 66, in favour of the plaintiff and, therefore, he was entitled to redeem the property. He further found that the endorsements made by Chimanrai, his widow Chhotiba and his daughter Taralaxmibai did not amount

to relinquishment of their right, title and interest in the property. He set aside the decree of the trial court and remanded the case for deciding the remaining points after allowing the parties to lead fresh evidence on those issues. The defendant No. 1 challenged the remand order by filing an appeal in the High Court. His complaint was against the direction given by the appellate Court while remanding the case. The High Court allowed the appeal in part and modified the direction of the lower appellate Court asking the trial court to decide other issues afresh after allowing further evidence, except issues Nos. 1 and 4.

11. Consequent upon the order of remand the Joint Civil Judge, Jr. Division, decided other issues against the plaintiff. He held that Chimanrai, his widow Chhotiba and his daughter Taralaxmibai had relinquished their right, title and interest in the suit property and, therefore, Taralaxmibai had no subsisting interest or title to transfer to the plaintiff or his predecessor in interest. He further held that the suit was barred by time and estoppel, and that defendant No. 1 had spent a substantial amount on repairs. On these findings he again dismissed the suit by his judgment dated 21st of August, 1958.

12. The plaintiff again took up the matter in appeal.

13. It appears that during the pendency of the appeal Vamanrao, defendant No. 2 died in August, 1958. His heirs were, however, not brought on the record. A question arose whether the appeal abated as a whole or only as against defendant No. 2. The District Judge by his separate order dated 25th of September, 1959 held that the appeal abated only so far as defendant No. 2 was concerned but it could proceed as against the surviving defendant No. 1.

14. The appeal was eventually allowed by the Assistant Judge, Baroda against defendant No. 1 by his judgment dated 12th of November, 1959 holding that the appellant was entitled to redeem the mortgaged property on payment of Rupees 4724-2-0 on account of the mortgage money as well as the expenditure incurred by defendant No. 1 on repairs and that the suit was neither barred by time nor by estoppel. The appeal was, however, dismissed as against defendant No. 2.

15. The defendant No. 1 challenged the judgment and decree of the Assistant

Judge before the High Court and only two contentions were raised before it: (1) that the mortgage cannot be split up and must be treated as one and indivisible security and since the right to redeem against one of the two co-mortgagees had become extinguished because of abatement of the suit against Vamanrao and his heirs, the suit against defendant No. 1, the other co-mortgagee, must be dismissed; and (2) that the suit was barred by estoppel inasmuch as Chimanrai, the heir of the original mortgagor and after him his widow Chhotiba and daughter Taralaxmibai having relinquished their right in the disputed property which she could have conveyed to Shantilal by sale. Consequently, Shantilal in his turn could not pass a better title to the plaintiff. In the result the plaintiff had no right to file the suit for redemption. A learned single Judge who heard the appeal repelled the first contention but accepted the second one. Accordingly, he allowed the appeal and dismissed the plaintiff's suit.

16. The plaintiff undaunted took up the matter in a Letters Patent Appeal and the defendant also filed a cross-objection. A Division Bench of the High Court allowed the appeal and decreed the suit reversing the finding of the learned single Judge that the plaintiff had no right to sue. The Division Bench, however, granted a certificate of fitness for appeal to this Court. The learned counsel for the appellant has raised the same two contentions before us. We take up the first point first.

17. The first contention is based on the principle of indivisibility of the mortgage. Section 60 of the Transfer of Property Act deals with the rights and liabilities of a mortgagor. It confers a right of redemption. There is, however, a rider to the right of redemption in the section itself, which provides:

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

A perusal of this provision indicates that a co-mortgagor cannot be permitted to redeem his own share of the mortgaged property only on payment of proportionate part of the amount remaining due.

In other words the integrity of the mortgage cannot be broken. O. 34, R. 1 of the Civil P. C. deals with the parties to suits for foreclosure, sale and redemption. It provides:

"Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

18. It has already been pointed out that defendant No. 2 was the purchaser of mortgagee rights in respect of the common latrine while defendant No. 1 is the purchaser of the mortgagee rights in respect of the remaining mortgaged property, viz., the houses. When the plaintiff filed the suit he impleaded both the mortgagees as defendants Nos. 1 and 2. Before the Assistant Judge a statement was made on behalf of the original plaintiff that he was prepared to pay the entire mortgage amount for redemption of the mortgaged property to the 1st defendant. A similar statement was made by Mr. Oza, counsel for the plaintiff in the High Court who further stated that in no event hereafter would the plaintiff seek any relief against the property in possession of defendant No. 2, viz., the right to the common latrine in which mortgagee rights had been transferred to defendant No. 2 by Ganpatram. Besides, the severance of the two properties by Ganpatram was recognised by the mortgagor and hence the severance was with the implied consent of the mortgagor. It is a well-recognised principle that even if all the mortgagees are not before the court in a suit filed by the mortgagor for redemption of the property, but the mortgagor is prepared to pay the entire amount due at the foot of the mortgage to such mortgagees as are before the court and gives up his right under the mortgage as against those mortgagees who are not before the court, the court can pass a decree for redemption directing that the entire mortgage amount should be paid to the mortgagees who are actually before the court. This principle was recognised in a Full Bench decision in *Motilal Jadav v. Samal Bechar*, ILR 54 Bom 625: (AIR 1930 Bom 466). If one of the defendants in a suit dies and his heirs are not brought on record the suit certainly would abate as against that party. The suit, however, could not abate as against the other surviving defendants. A question may arise whether the suit is maintainable against the surviving defendants. In the instant case the suit abated

as against defendant No. 2 in respect of the common latrine. But there is no difficulty in the suit proceeding against the surviving defendant No. 1 if the plaintiff is prepared to pay the entire mortgage consideration.

19. It may, however, be pointed out that defendant No. 2 never contested the suit. He was impleaded as a party as it was incumbent on the plaintiff to have impleaded all the mortgagees as a party. But if the defendant did not contest the suit at any stage, will he be a necessary party in an appeal? A person may be a necessary party in a suit but he may not be a necessary party in the appeal. The Division Bench of the High Court was fully justified in holding that the suit against the surviving defendant No. 1 was maintainable despite the abatement of the suit against the 2nd defendant. We fully endorse the view taken by the Division Bench of the High Court.

20. This takes us to the second point. This contention is based on the aforesaid various endorsements made by Chimanrai, his widow Chhotiba and his daughter Taralaxmibai on the notices sent by the mortgagee. The question is whether these endorsements amount to relinquishment of their rights and interest so as to estop them from transferring the property in suit? The notice by Ganpatram to Chimanrai and the notices by his son Chhotalal to Chhotiba and Taralaxmibai and their respective endorsements thereon have been referred to in the earlier part of the judgment. Whether these endorsements amount to relinquishment of their rights and title and if so whether the same amounts to estoppel within the meaning of S. 115 of the Evidence Act? In our opinion the endorsements have to be read not in isolation but with reference to the notices sent. So read, the endorsements only indicate that the heirs of the mortgagor were not prepared to bear the expenses on repairs of the mortgaged property. The property cannot remain in vacuum even for a single moment. It must vest in somebody. Accordingly, after the death of Motibhai his property vested in his son who was the sole heir. The endorsement of Chimanrai, his widow Chhotiba and daughter Taralaxmibai on the notices at the most would amount to an admission. The contention raised on behalf of the defendant-appellant is that he would not have purchased the mortgagee rights from Ganpatram if such a statement had not been made by Chimanrai, his widow

Chhotiba and his daughter Taralaxmibai and, therefore, they would be estopped from taking up a different stand from the one taken by them earlier. In substance, the question is whether the endorsements would amount to estoppel.

21. The difference between an admission and estoppel is a marked one. Admissions being declarations against an interest are good evidence but they are not conclusive and a party is always at liberty to withdraw admissions by proving that they are either mistaken or untrue. But estoppel creates an absolute bar. In this state of the legal position, if the endorsement made by Chimanrai or by his widow, Chhotiba or his daughter Taralaxmibai amounts to an estoppel they or their transferees would be prevented from claiming the property.

22. It may be pointed out that estoppel deals with questions of facts and not of rights. A man is not estopped from asserting a right which he had said that he will not assert. It is also a well-known principle that there can be no estoppel against a statute. After the death of Motibhai his son Chimanrai succeeded in law.

23. To bring the case within the scope of estoppel as defined in S. 115 of the Evidence Act: (1) there must be a representation by a person or his authorised agent to another in any form—a declaration, act or omission; (2) the representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel; (8) Only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own indi-

vidual character and not as a representative of his assignee.

24. None of these conditions have been satisfied in the instant case, for example, no representation was made to defendant No. 1. Therefore, he cannot plead estoppel. Secondly, the representation was not regarding a fact but regarding a right of which defendant No. 1 or his predecessor in interest had full knowledge or could have known if he had cared to know. It is difficult to say that defendant No. 1 has moved his position on account of the representation made by the mortgagor or his heirs or assignees. On the facts and circumstances of this case it is not possible to hold that ingredients of Section 115 of the Evidence Act have been fulfilled. The view taken by the Division Bench of the High Court is fully warranted by law.

25. For the foregoing discussion we find no force in this appeal. It is accordingly dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 126

(From:— Punjab & Haryana)

D. S. DESAI AND R. B. MISRA, JJ.

Criminal Appeal No. 630 of 1981, D/- 7-8-1981.

Kulwant Rai, Appellant v. State of Punjab, Respondent.

Penal Code (1860), S. 300 Cl. Thirdly; Sec. 304 Part II — Applicability — Short quarrel followed by assault — Accused giving the deceased one blow with a dagger that landed in epigastrium area — Victim succumbing to injury — Absence of prior enmity — There being no intention on part of accused to cause injury in question, Cl. Thirdly of Section 300 would not be attracted — Case would fall under S. 304, Part II.

(Para 3)

JUDGMENT:— We have heard Mr. Ashwani Kumar, learned counsel for the State and Mr. Mulla, learned counsel for the appellant.

2. We have gone through the judgment of the learned Sessions Judge who has summed up the circumstances in which the offence came to be committed. The learned Judge found that the accused at the time of the offence was

aged about 20 years. The offence was committed without any premeditation. The learned Judge also found that there was no prior enmity. He also recorded that a short quarrel preceded the assault. All these would not have weighed with us, except the fact that only one blow was given with a dagger and the blow landed in the epigastrium area. The deceased succumbed to the injury. The learned Sessions Judge convicted the appellant for an offence under S. 302 Penal Code and sentenced him to suffer imprisonment for life.

3. When the matter was before the High Court it was strenuously urged that in the circumstances of the case part I of S. 300 would not be attracted because it cannot be said that the accused had the intention to commit the murder of the deceased. In fact, that is conceded. More often, a suggestion is made that the case would be covered by part 3 of S. 300 Penal Code in that not only the accused intended to inflict that particular injury but the injury intended to be inflicted was by objective medical test found to be sufficient in the ordinary course of nature to cause death. The question is in the circumstances in which the offence came to be committed, could it ever be said that the accused intended to inflict that injury which proved to be fatal. To repeat, there was an altercation. There was no premeditation. It was something like hit and run. In such a case, part 3 of S. 300 would not be attracted because it cannot be said that the accused intended to inflict that particular injury which was ultimately found to have been inflicted. In the circumstances herein discussed, it would appear that the accused inflicted an injury which he knew to be likely to cause death and the case would accordingly fall under S. 304 Part II Penal Code.

4. We accordingly alter the conviction of the appellant from one under S. 302 to that under S. 304 Part I (II?) Penal Code and sentence him to suffer rigorous imprisonment for five years.

5. The appeal is disposed of accordingly.

Order accordingly.

AIR 1982 SUPREME COURT 127

(From: Bombay)*

**S. MURTAZA FAZAL ALI AND
R. B. MISRA, JJ.**Civil Appeal No. 2383 of 1977, D/-
20-11-1981.Idandas, Appellant v. Anant Ram-
chandra Phadke (dead) by L. Rs., Respon-
dents.**(A) Transfer of Property Act (4 of
1882), S. 106 — Lease — Whether yearly
or monthly — Determination of — Coun-
terfoil of receipt — Entry therein — If
admissible against tenant, C. A. No. 1741
of 1976, D/- 18-11-1976 (Bom), Reversed.
(Evidence Act (1872), S. 63).**In the instant case the admitted facts
were as under:—1. That to begin with the lease was
given to the tenant in respect of an open
piece of land;2. That on the open piece of land the
tenant installed a flour mill and that the
tenant was not using the land for any
other purpose except running a flour
mill;3. That the receipts filed by the tenant
clearly showed that the lease was a
yearly one.Held, in the circumstances that the lease
was from year to year. On the basis of
the entries in the counter-foils of re-
ceipts, the landlord tried to make out a
case of monthly tenancy but the entry
in the counter-foil being an admission in
his own favour was not admissible
against the tenant. C. A. No. 1741 of 1976,
D/- 18-11-1976 (Bom), Reversed.

(Para 6)

**(B) Transfer of Property Act (4 of
1882), S. 106 — Lease whether granted for
"manufacturing process" — Tests to de-
termine — Lease for running flour mill
— One for manufacturing purpose —
Termination of — Six months notice is
necessary. C. A. No. 1741 of 1976, D/-
18-11-1976 (Bom), Reversed. (Words &
Phrases — Manufacturing process).**The tests for determining whether a
lease is granted for purpose of "manu-
facturing process" are as follows:—(i) That it must be proved that a cer-
tain commodity was produced;(ii) That the process of production must
involve either labour or machinery;*Civil Appln. No. 1741 of 1976, D/- 18-11-
1976 (Bom).

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(iii) That the end product which comes
into existence after the manufacturing
process is complete, should have a dif-
ferent name and should be put to a dif-
ferent use. In other words, the commo-
dity should be so transformed as to lose
its original character. AIR 1973 SC 425;
AIR 1968 SC 922 and AIR 1963 SC 791,
Rel. on. AIR 1946 Cal 317 and AIR 1971
Mys 365, Approved. (Para 10)In the instant case lease was granted
for running a flour mill wherein wheat
was transformed, by manufacturing pro-
cess which involved both labour and
machinery, into flour.Held that all the three tests were fully
satisfied and thus the lease was one for
manufacturing process and could be ter-
minated only by giving six months' no-
tice under S. 106 of the T. P. Act. C. A.
No. 1741 of 1976, D/- 18-11-1976 (Bom),
Reversed. (Paras 11, 12)**(C) Transfer of Property Act (4 of
1882), S. 106 — Lease — Whether for
manufacturing purpose — Burden of
proof lies upon tenant. (Evidence Act
(1872), Ss. 101-104). (Para 7)****Cases Referred: Chronological Paras**

AIR 1973 SC 425: (1973) 2 SCR 257	7
AIR 1971 Mys 365: 1971 Ren CR 779	9
AIR 1968 SC 922: (1968) 3 SCR 21	8
AIR 1963 SC 791: (1963) Supp 1 SCR 586	8
AIR 1946 Cal 317: 50 Cal WN 441	8

M/s. Gobind Ram Bhatia, R. C. Bhatia,
and P. C. Kapoor, Advocates, for Appel-
lant.**JUDGMENT:—** This appeal by special
leave is directed against the judgment of
the High Court of Bombay dated Dec. 24,
1975 (18th Nov., 1976?)2. The short point of law involved in
this case is whether the lease in question
granted by the landlord to the appellant-
tenant was a lease for manufacturing pur-
poses. In case the lease was for a purpose
of manufacture then it is manifest that
under S. 106 of the Transfer of Property
Act the lease could be terminated only
by giving six months' notice.3. The suit was contested by the de-
fendant-tenant. The plaintiff's case was
that the tenancy was from month to
month and, therefore, a month's notice
to terminate the tenancy was sufficient
and the provision under S. 106 of the
T. P. Act was not attracted. The plaintiff
also denied that the lease was for a
manufacturing purpose. The High Court
upheld the judgment of the District
Judge holding that the lease was not for

a manufacturing purpose and held that the tenancy was rightly terminated as the notice was valid.

4. Mr. Gobind Ram Bhatia, learned counsel for the appellant-tenant, has submitted a short point of law before us. He submits that having regard to the process of manufacturing carried on by the defendant, there can be no doubt that the lease was for a manufacturing purpose and could be terminated only by six months' notice under S. 106 of the T. P. Act. Notice was issued to the respondents. That notice was duly served on them. There is a certificate given by the High Court of Bombay itself that the notice on the respondents was served. Nobody has appeared for the respondents to contest this appeal.

5. In the present case, the admitted facts are as under:

1. That to begin with the lease was given to the defendant in respect of an open piece of land;

2. That on the open piece of land the appellant installed a flour mill and that the defendant was not using the land for any other purpose except running a flour mill.

3. That the receipts filed by the tenant clearly show that the lease was doubtless a yearly one.

6. Reliance was placed by the District Judge on the counterfoil where the plaintiff-landlord tried to make out a case of monthly tenancy but the entry in the counter-foil being an admission in his own favour was not admissible against the appellant. On the other hand, the trial court has pointed out at page (?) of its judgment that the receipts produced by the tenant clearly show that the rent used to be paid from year to year. Exhibits 24 to 26 pertained to the rent paid on an yearly basis right from 1959 to May 31, 1961. On point of fact, therefore, we are satisfied that in the instant case the lease was from year to year and, therefore, a month's notice was not legal if the lease was for a manufacturing purpose.

7. The second point which arises for decision is as to the purpose of the lease. This point is no longer *res integra* and is concluded by a clear authority of this Court in *Allenbury Engineers Private Ltd. v. Ramakrishna Dalmia*, (1973) 2 SCR 257: (AIR 1973 SC 425) where this Court has laid down that the expression "manufacturing purposes" in S. 106 of the T. P. Act must be used in its popular

and dictionary meaning as the statute has not defined the word "manufacturing purposes". We might state that in the present set up of our socialistic pattern of society when our country has made strong strides in various spheres of industrial activities an industrial venture must be given the most liberal interpretation so as to subserve the object of the statute. Of course the burden of proof whether the purpose of the lease was a manufacturing purpose would be on the defendant but we are satisfied that the defendant in this case has amply discharged its onus. In the aforesaid case this Court observed as follows (at p. 427 of AIR):

"The word 'manufacture', according to its dictionary meaning, is the making of articles or material (now on large scale) by physical labour or mechanical power. (Shorter Oxford English Dictionary, Vol. I 1203). According to the Permanent Edition of Words and Phrases Vol. 26, 'manufacture' implies a change but every change is not manufacture and yet every change in an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

8. In coming to this conclusion this Court relied on two of its earlier decisions in *South Bihar Sugar Mills v. Union of India*, (1968) 3 SCR 21: (AIR 1968 SC 922) and *Union of India v. Delhi Cloth and General Mills*, (1963) Supp 1 SCR 586: (AIR 1963 SC 791). Even before the decision of this Court, B. K. Mukherjea, J. (as he then was) who was later elevated to the Bench of this Court and retired as Chief Justice of India observed in *Joyanti Hosiery Mills v. Upendra Chandra Das*, AIR 1946 Cal 317 as follows:

"To manufacture, according to its Dictionary meaning means "to work up materials into forms suitable for use". The word 'material' does not necessarily mean the original raw material for a finished article may have to go through several manufacturing processes before it is fit and made ready for the market. What is itself a manufactured commodity may constitute a "material" for working it up into a different product. Thus, for example for the tanner, the material would be the raw hide, but the leather itself a manufactured article would constitute the material for the shoemaker's business, and we cannot say that the shoe-makers are not manufac-

turers because they do not work on raw hides."

9. In the case of John Augustine Peter Mirandé v. N. Datha Naik, AIR 1971 Mys 365, the Mysore High Court following the Calcutta decision held that the lease in that case, which was a case of saw mill, was for manufacturing purposes. We might observe that so far as the present case, where the mill is a flour mill, stands higher than the facts of the case in Mysore case (supra).

10. Coming now to the tests laid down by this Court the position may be summarised as follows:

1. That it must be proved that a certain commodity was produced:

2. That the process of production must involve either labour or machinery;

3. That the end product which comes into existence after the manufacturing process is complete, should have a different name and should be put to a different use. In other words, the commodity should be so transformed so as to lose its original character.

11. In the instant case what happened was that wheat was transformed, by the manufacturing process which involved both labour and machinery, into flour. The commodity before manufacture was wheat which could not be consumed by any human being but would be used only for cattles or medicine or other similar purposes. The end product would be flour which was fit for human consumption and is used by all persons and its complexion has been completely changed. The name of the commodity after the product came into existence is Atta and not Gehun (wheat). Thus in the instant case all the three tests have been fully satisfied. This being the position the irresistible inference and the inescapable conclusion would be that the present lease was one for manufacturing purposes. In this view of the matter, the notice of one month must be held to be invalid and suit for ejectment should have failed on that ground.

12. We, therefore, allow this appeal, set aside the judgment of the High Court and dismiss the plaintiff's suit. Before concluding we would like to add that with due respect that the judgment of the High Court is not very satisfactory as it has not made any real attempt to apply its mind to the substantial question of law that was involved in the case and seems to have rushed to its conclu-

sions even without considering the authorities on the subject particularly the one referred to in the judgment as also the authoritative decision of this Court referred to above which was pronounced five years before the judgment of the High Court was given. From such a prestigious High Court as Bombay we do expect a more careful and cautious approach in a matter like this. As the respondents have not appeared before us, we make no order as to costs in this Court. The appellant will certainly be entitled to costs in the Courts below.

Appeal allowed.

AIR 1982 SUPREME COURT 129

(From: Madhya Pradesh)

S. MURTAZA FAZAL ALI AND
AMARENDRA NATH SEN, JJ.

Criminal Appeal No. 237 of 1981, D/-
6-3-1981.

Amar Singh and others, Appellants v.
State of Madhya Pradesh, Respondent.

Penal Code (45 of 1860), Ss. 412, 395 —
Stolen property — Recovery very soon
after dacoity took place — Theft of property
in course of dacoity proved — Held
that accused could not be convicted
under S. 395 on basis of presumption
under S. 114, Evidence Act — Conviction
altered to that under S. 412, I.P.C. —
Sentence reduced from 4 years to 2 years
R. I. Judgment of Madhya Pradesh
High Court, Reversed. (Evidence Act
(1872), S. 114). (Para 1)

ORDER:— We have heard counsel for the parties and after going through the judgment of the courts below we are satisfied that this was not a fit case in which the appellants could have been convicted on the basis of presumption (under Sec. 114 of Evidence Act) under S. 395 of the Indian Penal Code. As however the articles were recovered very soon after the dacoity had taken place and had been proved to have been stolen in the course of the dacoity, the case of the appellants clearly falls within the ambit of S. 412, I.P.C. We therefore alter the conviction of the appellants from one under S. 395, I.P.C. to that under S. 412, I.P.C. and reduce the sentence from four years to two years rigorous imprison-

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ment. Fine to be maintained. Out of the sum of the fine, the entire amount shall be paid to the complainant.

2. With this modification, the appeal is disposed of.

Order accordingly.

AIR 1982 SUPREME COURT 130

A. P. SEN AND

BAHARUL ISLAM, JJ.

Writ Petns. Nos. 3334-43 of 1981, D/-25-9-1981.

Suraj Mal Kailash Chand and others Petitioners v. Union of India and another, Respondents.

Rajasthan Trade Articles (Licensing and Control) Order (1980), Cl. 18 — Notification dt. 23-5-1981 fixing maximum limit of wheat to be possessed by dealer at any time at 200 quintals — Not violative of Arts. 14 and 19 (1) (g). (Constitution of India, Arts. 14, 19 (1) (g), 39 (b); Essential Commodities Act (1955), S. 3).

To obviate hoarding and blackmarketing in essential commodities, the State Government has promulgated the Rajasthan Trade Articles (Licensing & Control) Order, 1980. The Order introduces a system of checks and balances to achieve the object of the legislation, i.e. to ensure equitable distribution and availability of essential commodities at fair prices. Cl. 18 of the Order enables the Government to fix the stock-limits of essential commodities. The notification dt. 23-5-1981 fixing the stock limit of wheat cannot be assailed on ground that it provides no guidelines as to the manner of disposal of stock of wheat in excess of the limit of 200 quintals with a dealer at any one time. (Paras 5, 6)

Merely because the notification makes no distinction between a wholesale dealer and a retailer, it does not make the fixation of the maximum limit of wheat permitted to be possessed by them to be irrational. It is also not necessary for the State Government to prescribe different maximum limits for different varieties of wheat. Further, the fixation by the notification of the maximum quantity of wheat allowed to be possessed by a dealer at 200 quintals at any time cannot be held to be arbitrary merely because in case of pulses,

the maximum quantity allowed to be possessed by a dealer at any time is substantially higher. (Paras 7, 8, 9)

Thus the notification dt. 23-5-1981 fixing the maximum limit of wheat to be possessed by a dealer at any time at 200 quintals is not violative of Arts. 14 and 19 (1) (g) of the Constitution. AIR 1982 SC 29, Followed. (Paras 2, 4)

Cases Referred : Chronological Paras AIR 1982 SC 29 2, 3

SEN, J.:— In exercise of the powers conferred by Cl. 18 of the Rajasthan Trade Articles (Licensing & Control), Order, 1980 (hereinafter referred to as 'the Order'), the State Government of Rajasthan, on May 23, 1981, with the prior concurrence of the Central Government, by a notification fixed the maximum limit of wheat to be possessed by a dealer at any time at 200 quintals. The petitioners who are dealers in foodgrains challenge the constitutional validity of the impugned notification as violative of their fundamental rights under Arts. 14 and 19 (1) (g) of the Constitution.

2. Clause 18 of the Order reads as follows :

18. No person shall, either by himself or by any person on his behalf, store or have in his possession at any time any trade article mentioned in Schedule I and Schedule II in quantity exceeding the limits fixed —

(i) under an order issued by the Central Government; or

(ii) by the State Government with prior concurrence of the Central Government by issuing a notification in Official Gazette from time to time. This Court, in *M/s. Krishan Lal Praveen Kumar v. State of Rajasthan* (Writ Petitions Nos. 4839 to 4845 of 1981, decided on 4-9-1981): (reported in AIR 1982 SC 29), has held that the impugned notification does not offend against the fundamental right guaranteed under Art. 19 (1) (g) of the Constitution. Learned counsel for the petitioners contends that the judgment in that case does not stand in his way. It is urged that the impugned notification fixing the maximum quantity of wheat permitted to be possessed by a dealer at 200 quintals at any time is not only arbitrary, irrational and irrelevant and thus violative of Art. 14, but it is also an unreasonable restriction on the freedom of trade guaranteed under Art. 19 (1) (g) of the Con-

stitution. We are afraid, none of these contentions can prevail.

3. In support of these contentions, learned counsel for the petitioners challenged the impugned notification on four grounds, namely, (1) No guidelines have been laid down in fixing a limit of 200 quintals for a dealer at any time as to the manner of disposal of the stock of wheat in excess of the limit so fixed; (2) There is no distinction made between a wholesale dealer and a retailer inasmuch as the maximum quantity of wheat permitted to be possessed by them is the same, i.e. 200 quintals at any time; (3) The Governmental action in fixing the maximum limit at 200 quintals displays arbitrariness as there is no differentiation made between different varieties and grades of wheat; and (4) The fixation of the maximum quantity of wheat to be possessed by a dealer at any time at 200 quintals is also arbitrary because in the case of pulses, the maximum quantity of pulses permitted to be possessed by a dealer at any time is much higher.

As already stated, the Court, in *Krishan Lal's case* (AIR 1982 SC 29) (*supra*) upholding the validity of the impugned notification, observed :

The notification providing for the maximum quantity of wheat which may be possessed by any dealer at any one time is clearly designed to prevent hoarding of foodgrains and is certainly a reasonable restriction within the meaning of Art. 19 (6) of the Constitution.

In view of the above observation, it is difficult to conceive as to how the contention based on Art. 19 (1) (g) of the Constitution can at all survive.

5. If the governmental action is arbitrary or there is no rational nexus to the object sought to be achieved, it is liable to be struck down as violative of Art. 14 of the Constitution. Sub-s. (1) of Sec. 3 of the Essential Commodities Act, 1955 provides that if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce there-

in. Sub-s. (2) thereof provides that without prejudice to the generality of the powers conferred by sub-s. (1), the Central Government may make an order in respect of any of the matters enumerated therein and by virtue of delegation of powers under S. 5 of the Essential Commodities Act, 1955, the State Government may, in relation to such matters and subject to such conditions as may be specified, exercise the powers of the Central Government under S. 3 of the Act. The State Government has adopted various measures in the interests of the general public for the control of production, supply and distribution of, and trade and commerce in, essential commodities. To obviate hoarding and blackmarketing in essential commodities, the State Government has promulgated the Rajasthan Trade Articles (Licensing & Control) Order 1980. The Order introduces a system of checks and balances to achieve the object of the legislation, i.e. to ensure equitable distribution and availability of essential commodities at fair prices. Cl. 18 of the Order enables the Government to fix the stock-limits of essential commodities.

6. It is futile to contend that the impugned notification must be struck down as provides no guidelines as to the manner of disposal of stock of wheat in excess of the limit of 200 quintals with a dealer at any one time, i.e. as to when, in what circumstances and in what manner the excess stock can be disposed of. Once the State Government has issued a notification under Cl. 18 of the Order specifying the maximum quantity of wheat to be possessed by a dealer at any time, the machinery provisions of the Order come into play. Clause 25 of the Order provides as follows :

25. The State Government or the Collector or the Licensing Authority may issue directions to any dealer with regard to purchase, sale, disposal, storage or exhibition of the price and stock list of all or any of the trade articles.

7. The contention that there is no distinction made by the impugned notification between a wholesale dealer and a retailer because the maximum quantity of wheat permitted to be possessed by them is the same, i.e. 200 quintals at any time, is equally unsustainable. Merely because the impugned notifica-

tion makes no distinction between a wholesale dealer and a retailer; it does not make the fixation of the maximum limit of wheat permitted to be possessed by them to be irrational. One cannot forget that the State of Rajasthan is a deficit region and is largely dependent on import of wheat from other States to meet its normal requirements. It is a matter of common knowledge that wholesale dealers mainly operate in large cities and towns and have means and capacity to manipulate the market by withholding stocks of wheat. Fixation of the maximum quantity of wheat to be possessed by a dealer at any time is a purely governmental function. The Government is the best judge of the situation in the State. This year witnessed unprecedented floods in some parts of the State of Rajasthan and in some others near drought conditions prevail. The State Government was more concerned with ensuring adequate supply of wheat to the rural areas. There was, therefore, nothing wrong in the State Government's providing that the maximum quantity of wheat to be possessed by a retailer at any time should also be 200 quintals, looking to the requirements of the rural population, so as to ensure the availability of this essential foodgrain at fair prices to the consumer.

8. We are also not impressed with the submission that the maximum quantity of wheat permitted to be possessed by a dealer, at any one time, must have rational relation to the quality of wheat. In large cities and towns, a dealer would naturally cater to the needs of the more sophisticated classes and keep in stock superior qualities of wheat. Looking to the different varieties of wheat one has to take a pragmatic view of things. All that the notification provides is that the maximum limit of all types of wheat to be possessed by a dealer at any one time should not exceed 200 quintals. It is not necessary for the State Government to prescribe different maximum limits for different varieties of wheat. The supply would take note of the demand and in the rural areas a dealer would normally stock the cheaper varieties of wheat which are normally in greater demand. The fixation of maximum limit of wheat to be possessed by a dealer at 200 quin-

tals at any time is, therefore, neither arbitrary nor unreasonable.

9. The fixation by the impugned notification of the maximum quantity of wheat allowed to be possessed by a dealer at 200 quintals at any time cannot be held to be arbitrary merely because in case of pulses, the maximum quantity allowed to be possessed by a dealer at any time is substantially higher. There was greater need for control of stocks of wheat which forms staple food of the people rather than pulses. For all we know, the maximum limit of pulses was to be higher looking to its production and availability in the market. Looking to the spiral rise of prices of foodgrains, the State Government would be well advised to limit the stock of pulses as well to prevent hoarding and blackmarketing in that commodity also. However, it is not necessary for us to dilate on this question because there is no material placed before us challenging the impugned notification on this ground.

10. Learned counsel having failed to persuade us to accept his point of view, submits that by virtue of ad interim prohibitory orders passed by the court earlier, the petitioners are holding in stock larger quantities of wheat than permitted under the impugned notification. If that be so, the petitioners are not without any remedy. Under Cl. 25 of the Order, they are at liberty to move the State Government to issue necessary directions for the disposal of the excess quantity of wheat in their possession. We hope and trust that the State Government would allow a reasonable time within which the petitioners are permitted to dispose of the excess quantity of wheat, if any. The State Government shall be at liberty to take over the excess stocks under Cl. 19 of the Order at the procurement price. However, nothing that we have said should be construed as a fetter on the discretionary power of the State Government under Cl. 25 of the Order to make such directions as it may deem fit.

11. In the result, the writ petitions must fail and are dismissed. There shall be no order as to costs. If there be any order staying the operation of the impugned notification, it stands vacated.

forthwith and no formal order for vacating such stay need be issued.

Petitions dismissed.

AIR 1982 SUPREME COURT 133

(From: Calcutta)*

A. P. SEN AND BAHARUL ISLAM, JJ.

Civil Appeal No. 1872 (N) of 1970, D/- 18-11-1981.

Smt. Indu Bala Bose and others, Appellants v. Manindra Chandra Bose and another, Respondents.

Succession Act (39 of 1925), Ss. 74, 63 — Will — Proof — Modes of — Suspicious circumstances — What is — Onus lies on propounder to explain.

The mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by S. 63 of the Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing

the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. Any and every circumstance is not a 'suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person. AIR 1964 SC 529, AIR 1959 SC 443, AIR 1962 SC 567, AIR 1950 PC 90, AIR 1950 FC 21 and AIR 1946 PC 156, Rel. on. (Paras 7, 8)

In the instant case held that the execution and the attestation of the will have been duly proved and suspicious circumstances did not exist. Decision of Calcutta High Court, D/- 24-12-1969, Affirmed. (Paras 6, 14)

Cases Referred: Chronological Paras
AIR 1964 SC 529 7

AIR 1962 SC 567: (1962) 3 SCR 195

AIR 1959 SC 443: 1959 Suppl (1) SCR 7, 8

426: 1959 SCJ 507 7

AIR 1950 PC 90 9

AIR 1950 FC 21: 51 Bom LR 906 9

AIR 1946 PC 156: 50 Cal WN 895 13

BAHARUL ISLAM, J.:— This appeal by certificate granted by the Calcutta High Court under Art. 133 (1) (b) of the Constitution is from a decree dated December 24, 1969 and arises out of a probate suit.

2. The material facts may be briefly stated as follows. One Manindra Chandra Bose (original respondent No. 1 since deceased) and Jogendra Nath Mitra (respondent No. 2 before us) filed an application before the Subordinate Judge, Alipore, for probate of a will alleged to have been executed by one Ranendra Chandra Bose on November 8, 1952. Jitendra Chandra Bose, a brother of the testator entered caveat and filed a written statement and contested the application for probate. The plaintiffs' case was that Ranendra died unmarried on November 16, 1952, leaving the alleged will (Exhibit 1) executed on November 8, 1952. Ranendra left behind him three brothers — Jitendra, aforesaid, Gopendra and plaintiff No. 1, Manindra. Manindra and Jogendra (plaintiff No. 2) had been appointed executors of the will. By the will Ranendra bequeathed one-half of his properties to his nephew, Bhabesh, who was the son of his younger brother, Phanindra, who had pre-deceased him, and the remaining half to his younger brother Manindra for life, and after his (Manindra's) death to Bhabesh absolute.

*Decree from Probate Suit before Calcutta High Court, D/- 24-12-1969.

ly. During the pendency of the suit, Jitendra died and his heirs who were substituted, contested the suit.

3. The contentions of the defendants were that Ranendra on November 8, 1952, was not in a physical or mental condition to execute a will; he was in a semi-conscious state of mind and had not the testamentary capacity to execute the alleged will. They alleged that the will was brought into existence at the instance, and under the influence of, the propounder Manindra; that the signatures of Ranendra on the will were not genuine and that they must have been obtained on blank papers by Manindra who was looking after the properties of Ranendra as well as all litigations in which Ranendra was involved.

4. The trial court found that the signatures of the testator and the attesting witnesses on the will were genuine, and that the provisions of the will were neither unfair nor unnatural. But he dismissed the suit and refused to grant probate of the will on the ground that there were certain "doubts and suspicions about the condition of the testator's mind on 8-11-1952."

5. The plaintiffs filed an appeal before the High Court. The High Court held that "there was no suspicious circumstance relating to the will and whatever little suspicion there was has been satisfactorily explained by the plaintiff", with the result that the High Court set aside the decree of the trial court and granted probate of the will. The judgment and decree of the High Court has been challenged by the appellants before us.

6. Mr. S. S. Ray, learned counsel appearing for the appellants has not challenged the trial court's findings that the signatures of the testator and the signatures of the attesting witnesses on the will were genuine. In other words, the execution and the attestation of the will have not been challenged before us. The only submission of learned counsel is that the "suspicious circumstances" surrounding the execution of the will have not been satisfactorily explained by the propounders.

7. This Court has held that the mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by S. 63 of the Succession Act. The onus of proving the

will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. (See AIR 1964 SC 529, 1959 Suppl (1) SCR 426: (AIR 1959 SC 443) & (1962) 3 SCR 195: (AIR 1962 SC 567)).

8. Needless to say that any and every circumstance is not a 'suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

Learned counsel relied on the decision of this Court in the case of Rani Purnima Devi v. Kumar Khagendra Narayan Dev reported in (1962) 3 SCR 195: (AIR 1962 SC 567) (supra). In this case the will in question gave the entire property by the testator to a distant relation of his to the exclusion of the testator's widow, sister and his other relations, and even his daughter, who would be his natural heirs, but subject, of course, to the condition that the legatee would maintain the widow and the sister of the testator. The testator's signatures were not his usual

signatures, nor in the same ink as the rest of the will; the testator used to sign blank papers for use in his cases in court and he used to send them to his lawyer through his servants; the testator did not appear before the Sub-Registrar for the purpose of registration of the will but the Sub-Registrar sent only his clerk to the residence of the testator for the purpose of registration; there were 16 attesting witnesses who attested the will, but of them, only 4 interested witnesses were examined to the exclusion of disinterested witnesses. The above are undoubtedly suspicious circumstances, circumstances creating doubt in the mind of the Court. In spite of these circumstances, it was held by the trial Court that the will was duly executed and attested. On appeal, the High Court affirmed the order of the trial Court. On further appeal, this Court held that the circumstances were suspicious and were not satisfactorily explained and hence held that "the due execution and attestation of the will were not proved."

9. As in the instant appeal, the judgment of the High Court is one of reversal of the judgment of the trial Court, we should also examine the law under which order of the appellate Court can be or should be interfered with, inasmuch as learned counsel has cited the two following decisions before us, and urged that the High Court ought not to have interfered with the judgment of the trial Court. The first case cited is *Bank of India Ltd. v. Jamsetji A. H. Chinoy and Messrs. Chinoy and Co.*, reported in AIR 1950 PC 90. In that case the Privy Council has held (at p. 94):

"The appellate Court would be reluctant to differ from the conclusion of the trial Judge if his conclusion is based on the impression made by a person in the witness box. If, however, the trial Judge based his finding and his opinion of the person on a theory derived from documents and a series of inferences and assumptions founded on a variety of facts and circumstances which, in themselves, offer no direct or positive support for the conclusion reached, the right of the appellate Court to review this inferential process cannot be denied."

The other case cited is *Madholal Sindhu of Bombay v. Official Assignee of Bombay* reported in AIR 1950 FC 21, in which the Federal Court held (at p. 30):

"It is true that a Judge of first instance can never be treated as infallible in de-

termining on which side the truth lies and like other tribunals he may go wrong on question of fact, but on such matters if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, the appeal Court should not lightly interfere with the judgment."

10. Keeping the above principles of law in view let us now turn to the facts of the present case.

Learned counsel for the appellant has enumerated the following 11 'suspicious' circumstances:—

(i) Attempt on the part of the propounder to conceal the real nature of testator's illness.

(ii) The propounder failed to tell the date when the testator went to his lawyer (P.W. 3's) house or when the draft was given by the lawyer to the testator.

(iii) The draft has not been produced and no explanation has come forth as to what happened to the draft.

(iv) No date has been mentioned when the testator sent for his lawyer through Banqshidhar for correctness in the draft.

(v) The diary of P.W. 3 has not been produced.

(vi) The senior lawyer (Sudhanshu Babu) has not been examined. The lawyer examined, namely P.W. 3, is a partisan witness.

(vii) Banqshidhar has not been examined as a witness although he was attending court during the trial of the suit.

(viii) The statement of the propounder, Manindra, that he knew about the will only three or four days after its execution cannot be accepted as true when one of the attesting witnesses, namely P.W. 5, had been told of it a month earlier.

(ix) Nobody knows what alterations were made in the draft.

(x) The scribe and one of the attesting witnesses are employees, another witness (P.W. 4) is a friend and the other attesting witness (P.W. 5) is a relation.

(xi) The evidence of the propounder, Manindra, is partly false; he disavows all knowledge of the will.

A careful perusal of the above circumstances shows that they are by no means suspicious circumstances and stand self-explained. Circumstances Nos. (ii) and (iv) are really test of memory. It may be remembered that the witnesses were deposing thirteen years after the execution of the will. It will be difficult for any witness after such a long lapse of time to give the dates when the testator went to the house of his lawyer or when

the draft was given by the lawyer to the testator or when the testator sent for the lawyer through Banqshidhar for correction of the draft. With regard to circumstance No. (iii) there is no evidence to show that there was any invariable practice that the draft of a will had to be preserved. No question was put in cross-examination to the scribe (P.W. 1) who perhaps might have been able to say what he had done with it. Similar is the position with regard to the diary of P.W. 3. P.W. 3 who deposed that his diary would show that he had drafted the will was not asked in cross-examination as to whether he at all preserved in 1965 the diary of 1952 or whether he could produce it. With regard to grievances Nos. (vi) and (vii) we do not see any necessity of calling the testator's employee Banqshidhar as witness in the case. So far as Sudhangshu Babu was concerned, Manindra was not asked as to why he had not been called as a witness; possibly he had died as P.W. 3 spoke of him as "my late senior". With regard to circumstance No. (ix), it may be said that there was no necessity of knowing what alterations had been made in the draft. With regard to the circumstance that the scribe and the attesting witnesses were either employees, or friend or relation of the propounders' group, the answer is simple. Nobody would normally invite a stranger or a foe to be a scribe or a witness of a document executed by or in his favour; normally a known and reliable person, a friend or a relation is called for the purpose. The same argument applies to P.W. 3 who is said to be a partisan witness for the reason that he was the testator's advocate. But there is nothing to show that he was not telling the truth in his deposition. With regard to the circumstances Nos. (viii) and (x) that Narendra was not telling the whole truth, when he said that he had come to know of the will three or four days after its execution the complaint may be correct, although it was not impossible that he had not been taken into confidence in the matter of the will in his favour, although P.W. 5 had been. Another possibility is that Manindra deposed so in order to avoid cross-examination. In any case this does not appear to be a suspicious circumstance surrounding the execution of the will.

With regard to circumstance No. (i), the submission is that the testator, according to the medical evidence, was at

the time of the execution of the will suffering from high blood pressure, diabetes, acidosis, kidney trouble and that he had no food for two days before 8-11-1952. The evidence of P.W. 2 Naresh C. Das Gupta who is a medical practitioner is that "Ranen Babu was not taking his meals and usual food", which means, he was taking sick diet with 'hydro-protein' prescribed by him. But P.W. 2 deposes in cross-examination that "the patient was not in coma..... The patient had talks with me on the last day" which was eight days after the execution of the will when the testator "suddenly" died of coronary thrombosis in the lap of his employee, Banqshidhar. There is no evidence that Ranendra did not have the mental capacity to execute the will. Even D.W. 2 Sailendra Bose who visited Ranendra during his illness, and D.W. 1, Dr. Amal Chakravorty who deposed by perusing the prescriptions, did not depose that Ranendra was in coma or had lost his mental faculty.

12. On the contrary the following circumstances lend strong support to the plaintiffs' case of genuineness and valid execution of the will. (1) Gopendra, one of the brothers, who has not been given anything under the will had filed a written statement stating that he "has no objection to the grant of probate inasmuch as the will is executed and attested according to law." (2) The disposition under the will is quite fair and there are no suspicious circumstances in it at all. (3) As there were litigations between the two groups of the brothers, the will was the natural outcome to avoid further future litigation.

13. We do not find any suspicious circumstance surrounding the execution of the will. The circumstances pointed out by learned counsel are not only not suspicious but normal as pointed out above. The rule, as observed by the Privy Council, is that "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not as obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth." (See (1946) 50 Cal WN 895; (AIR 1946 PC 156)).

14. The trial Court was wrong in holding that the circumstances "in question were suspicious and the High Court was fully justified in setting aside the

judgment of the trial Court. We are in entire agreement with the judgment of the High Court.

In the result this appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 137

(From: Madras)

D. A. DESAI, A. D. KOSHAL AND
R. B. MISRA, JJ.*

Civil Appeals Nos. 2197-2199 of 1969,
D/- 10-12-1981.

Chinnamarkathian alias Muthu Gounder and another (in C. A. No. 2197 of 1969), Chinna Gounder and another (in C. A. No. 2198 of 1969) and Raja Gounder and another (in C. A. No. 2199 of 1969), Appellants v. Ayyavoo alias Periana Gounder and others, Respondents in All the Appeals.

(A) Tamil Nadu Cultivating Tenants Protection Act (25 of 1955), S. 3 (4) (a) and (4) (b) — Tenant in arrears of rent — Revenue Divisional Officer allowing time to deposit dues — Officer simultaneously passing conditional order for eviction on default — Order is illegal. (Civil P. C. (1908), S. 148). Decision of Madras High Court, Reversed.

Per Court:—

When the Revenue Divisional Officer allows time to a cultivating tenant for depositing the arrears of rent in pursuance of the provisions of cl. (b) of sub-sec. (4) of S. 3 of the Act, he cannot simultaneously pass a conditional order of eviction which is to take effect on a default to occur in future. An order of that type can, in terms of the section, only be passed if the cultivating tenant fails to deposit the sum as directed. Consequently, the orders of the Revenue Divisional Officer directing eviction of the tenants in the instant case were passed in contravention of the express provisions of the clause and were without jurisdiction. Decision of Madras H. C., Reversed. (Para 20)

*(Note: In this case, Judges of the Supreme Court differ in their views on point 'D'. The Majority view is taken by A. D. Koshal and R. B. Misra, JJ. and the minority by D. A. Desai, J.

The judgments are printed in the order in which they are given in the Certified Copy.—Ed.)

LY/ZY/F912/81/MVJ

Per Desai, J.:—

It is a well accepted principle statutorily recognised in Section 148 of Civil P. C. — an analogous provision — that where a period is fixed or granted by the court for doing any act prescribed or allowed by the Code, the Court may in its discretion from time to time enlarge such period even though the period originally fixed or granted may expire. If a Court in exercise of the jurisdiction can grant time to do a thing, in the absence of a specific provision to the contrary curtailing, denying or withholding such jurisdiction, the jurisdiction to grant time would inhere in its ambit the jurisdiction to extend time initially fixed by it. Passing a composite order would be acting in disregard of the jurisdiction, in that while granting time simultaneously the court denies to itself the jurisdiction to extend time. The principle of equity is that when some circumstances are to be taken into account for fixing a length of time within which a certain action is to be taken, the Court retains to itself the jurisdiction to re-examine the alteration or modification of circumstances which may necessitate extension of time. If the court by its own act denies itself the jurisdiction to do so, it would be denying to itself the jurisdiction which in the absence of a negative provision, it undoubtedly enjoys. (Para 14)

The danger inherent in passing conditional orders becomes self-evident because that by itself may result in taking away jurisdiction conferred on the court for just decision of the case. The true purport of conditional order is that such orders merely create something like a guarantee or sanction for obedience of the court's order but would not take away the Court's jurisdiction to act according to the mandate of the statute or on relevant equitable considerations if the statute does not deny such consideration. In order to avoid subsequent controversy, sub-section (4) (b) envisages proceedings in two stages and that by itself inhibits passing of a conditional order. (Para 14)

(B) Interpretation of Statutes — Beneficial legislation — Construction which furthers object of Act has to be adopted. (Tamil Nadu Cultivating Tenants Protection Act (25 of 1955), Preamble and S. 3).

Per Desai, J.:— The Tamil Nadu Cultivating Tenants Protection Act is a beneficial legislation for granting security of tenure to cultivating tenants of agri-

cultural lands. It is a well-settled canon of construction that in construing the provisions of such enactments the court should adopt that construction which advances, fulfils and furthers the object of the Act rather than the one which would defeat the same and render the protection illusory. (Para 6)

(C) Tamil Nadu Cultivating Tenants Protection Act (25 of 1955), S. 3 (4) (a) and (4) (b) — Whether the time prescribed by the Revenue Divisional Officer for depositing arrears of rent by the cultivating tenant if challenged in the superior court i.e. the High Court, the High Court would have jurisdiction to prescribe its own time calling upon the tenant to deposit the amount, to repair the default. (Question left open). (Per Desai J.)

(Para 18)

(D) Tamil Nadu Cultivating Tenants Protection Act (25 of 1955), S. 3 (4) (a) and (4) (b) — Deposit of arrears of rent by tenant — Revenue Divisional Officer acting in pursuance of sub-sec. (4) (b) — It is not incumbent on him to grant time.

Per Majority; Desai, J. contra:— While the opportunity of depositing the arrears of rent cannot be denied to a cultivating tenant during the course of proceedings under sub-sec. (3), the same is not available as of right under sub-cl. (b) of sub-sec. (4). The difference in the language used by the legislature is significant and not without purpose. The intention of the legislature appears to be that normally a defaulting tenant must seek the help of the Court all by himself and if he does so he must be protected; but a defaulting tenant who waits for payment of rent till he is sought to be evicted by the landlord is not necessarily entitled to the same protection. Circumstances may exist which may place him at par with a tenant covered by sub-sec. (3) but then it may not necessarily be so. That is why it is left to the discretion of the Revenue Divisional Officer. (Para 23)

There is no reason to hold that the word "may" occurring in cl. (b) cannot be given its ordinary meaning as denoting the conferment of a discretion on the Revenue Divisional Officer and that it should be equated with "shall" so as to make it obligatory on him to grant time to the cultivating tenant. (Para 23)

Cases Referred: Chronological Paras
(1964) 77 Mad LW 553 4
AIR 1961 SC 882: (1961) 3 SCR 763: 4
(1962) 1 SCJ 427 14

DESAI, J.:— Respondents in each of these appeals are the landlords of the

land more particularly described in the three different petitions filed by them in the Court of the Revenue Divisional Officer, Namakkal in Tamil Nadu State seeking to evict tenants of different parcels of land on the allegation that the concerned tenants were in arrears of rent for the years 1958-59, 1959-60 and 1960-61. The tenants who are appellants in these three appeals appeared in the respective petitions and contested the same on diverse grounds but the only one now surviving at this stage is; whether in view of the language employed in Ss. 3, 4 (a) and (b) of the Madras (now Tamil Nadu) Cultivating Tenants Protection Act 1955 ('Act' for short), the Revenue Divisional Officer erred in passing a composite order for payment of rent found to be in arrears within the time prescribed by him and on default, without any further proceeding, directing eviction of the tenants.

2. The respondents purchased the land cultivated by the tenants in each of the petitions under sale deeds Ext. P-6 dated January 22, 1960 and Ext. P-7 dated March 9, 1960, from the erstwhile owner of the land one Nachayammal. Subsequently by the deed of assignment Ext. P-5 dated 5th December, 1960, Nachayammal, the vendor of the respondents assigned the rent in arrears for the period 1958-59 and 1959-60 to the respondents. By the time, action in each case was commenced, according to the respondents-landlords rent for the year 1960-61 had become due and payable. The respondents accordingly filed C.T.P.A. Nos. 1, 2 and 3 of 1961 against the respective tenants on January 2, 1961, for eviction of the tenants on the ground that they were in arrears of rent due and payable for the years 1958-59, 1959-60 and 1960-61.

3. The Revenue Divisional Officer overruled all the contentions of the appellants-tenants in each case and held that the tenants were in arrears of rent for the aforementioned three years and that they were liable to pay the same. It was further held that since by the deed of assignment, previous landlord assigned the arrears of rent for two years 1958-59 and 1959-60 in favour of the respondents, they were not only entitled to commence the action for recovery of arrears of rent due and payable to the previous landlord but they were also entitled to evict the tenants for failure to pay rent in arrears. Having recorded these findings the Revenue Divisional

Officer passed identical order in each case with variation in figures. Only one order may be extracted to focus the attention on the controversy now brought to this Court. In C.T.P.A. No. 1/61 the following final order was made:

"In view of my findings above I hold that the respondents are in arrears of rent to the extent of Rs. 2,850 for the years 1958-59, 1959-60 and 1960-61 to the petitioners. I direct under Sections 3, 4 (a) that this amount be paid to the petitioners within six weeks from the date of this order failing which they shall be evicted from the suit lands".

This order was made on Nov. 6, 1961. The tenants were, therefore, under an obligation to pay the arrears found due by December 18, 1961, to qualify for the protection of the Act. Admittedly the tenants did not deposit the arrears found due by the Revenue Divisional Officer but filed three Civil Revision Petitions on December 11, 1961 in the High Court. While admitting the revision petitions on December 15, 1961, the High Court granted conditional stay directing that the rent found in arrears be deposited within the time set out in the order of the High Court. A dispute appears to have been raised about the deposit made by the tenants whereupon the High Court on May 2, 1962, directed that an additional amount of Rs. 950 be deposited by the tenants within the time prescribed by it and it is conceded that the conditional orders have been fully complied with.

4. The most important contention that engaged the attention of the High Court at the hearing of the Revision Petitions was whether the Revenue Divisional Officer was in error in passing a composite order whereby he determined the amount of rent in arrears and after specifying the time within which the amount in arrears should be paid up, prescribed the consequences of failure to act within the prescribed time, namely, that the tenants would be evicted. The High Court noticed some of its own conflicting decisions bearing on the topic but ultimately held that the view taken by Srinivasan, J. in *Venkitaswami Naicker v. Ramaswami Naicker*, (1964) 77 Mad LW 553, in which it was held as under, was correct.

"Having regard to the object of the enactment it is clear that the law empowers the Revenue Divisional Officer to grant a reasonable time to the tenant to pay the arrears in order to avoid eviction. There may be a variety of circumstances by reason of which the tenant might find

it difficult to comply with the direction to deposit the arrears by the date fixed. If the date so fixed initially is to be an inflexible and unalterable date, it is bound to work considerable hardships upon the tenants. It would be a mechanical application of the provision of the section for the purpose of eviction. The object of the section is to avoid eviction wherever possible and not insist upon eviction for such reasons as obtain in the case."

5. Having noticed the law as indicated in the passage extracted, the High Court observed that the order made by the Revenue Divisional Officer was not one for eviction. A further unqualified order has to be passed by the Revenue Divisional Officer directing the eviction. But at a later stage in the judgment the High Court appears to have taken a somersault when it observed that in the case before it the High Court found nothing wrong in the order which the Revenue Divisional Officer had passed. In other words, the composite order was held to be legal and once the revision petitions filed by the tenants were dismissed by the High Court, the order passed by the Revenue Divisional Officer would immediately come into operation. With respect, our task became none too easy to wade through the irreconcilably contradictory approach of the High Court. Ultimately the High Court dismissed the three revision petitions. Hence these three appeals by certificate.

6. The object behind enacting the Act clearly manifests itself by reference to its long title which reads:

"An Act for the protection from eviction of cultivating tenants in certain areas in the State of Madras."

It was a beneficent legislation for granting security of tenure to cultivating tenants of agricultural lands. It is a well-settled canon of construction that in construing the provisions of such enactments the court should adopt that construction which advances, fulfils and furthers the object of the Act rather than the one which would defeat the same and render the protection illusory.

7. It is not in dispute that the tenants in each of these appeals are cultivating tenants and the lands of which they are tenants are lands covered by the Act. They are sought to be evicted on the only ground that they have committed default in payment of rent payable from year to year for a period of three years.

8. Mr. Natesan learned counsel who appeared for the respondents urged that if the Revenue Divisional Officer has a discretion to grant time to the defaulting tenant to repair the default, there would be nothing illegal in granting time and simultaneously providing for consequence of default. This contention may be examined from three independent angles:

(1) Has Revenue Divisional Officer a discretion to grant time after being satisfied that a default is committed, to repair the default within the time considered reasonable by him and so ordered by him?

(2) Has he a discretion to further extend the time if the defaulting tenant is unable to repair the default within the time fixed by him?

(3) What is the impact of answers of the afore-mentioned two questions on his jurisdiction to pass a composite order?

8-A. Section 3 and the relevant sub-sections read as under:

"3 (1). Subject to the next succeeding sub-sections, no cultivating tenant shall be evicted from his holding or any part thereof, by or at the instance of his landlord, whether in execution of a decree or order of a court or otherwise;

x x x

(4) (a) "Every landlord seeking to evict a cultivating tenant falling under sub-section (2) shall, whether or not there is an order or decree of a court for the eviction of such cultivating tenant, make an application to the Revenue Divisional Officer and such application shall bear a court-fee stamp of one rupee."

(4) (b) On receipt of such application, the Revenue Divisional Officer shall, after giving a reasonable opportunity to the landlord and the cultivating tenant to make their representations, hold a summary enquiry into the matter and pass an order either allowing the application or dismissing it and in a case falling under clause (a) or clause (aa) of sub-section (2) in which the tenant had not availed of the provisions contained in sub-section (3), the Revenue Divisional Officer may allow the cultivating tenant such time as he considers just and reasonable having regard to the relative circumstances of the landlord and the cultivating tenant for depositing the arrears of rent payable under this Act inclusive of such costs as he may direct. If the cultivating tenant deposits the sum as directed, he shall be deemed to have paid the rent under sub-section (3) (b). If the cultivating tenant fails to deposit the sum

as directed, the Revenue Divisional Officer shall pass an order for eviction."

9. Section 3 of the Act places an embargo on the eviction of a cultivating tenant and the protection extends to rendering a decree or order of a court for eviction nugatory. There is an enabling provision in sub-sec. (4) (a) of S. 3 which enables the landlord to seek eviction of a cultivating tenant on the ground which may be available to him under the Act. When such an application is made, cl. (b) of sub-sec. (4) prescribes the procedure to be followed by the Revenue Divisional Officer. The officer concerned has to, (i) give an opportunity both to the landlord and the cultivating tenant to make a representation; (ii) hold a summary enquiry into the matter to determine the rent in arrears. After having determined the rent in arrears the Revenue Divisional Officer has to further enquire into the relative circumstances of the landlord and the cultivating tenant and the circumstances which have a bearing on the issues are the circumstances relatable to the need of the landlord for rent and the present paying capacity of the tenant. After taking into consideration the circumstances of both the landlord and the tenant thus ascertained the Revenue Divisional Officer has to decide what length of time has to be given to the tenant to deposit the rent found in arrears and at that stage the proceeding must stop. It is something like a preliminary issue to be determined because after a finding is recorded that the tenant is in arrears and the amount of arrears is determined, the Revenue Divisional Officer is under a statutory obligation to grant time to deposit the arrears. The section grants locus poenitentiae to a tenant who has committed default in payment of rent. Granting of the time is not a concession dependent upon the sweet will of the Revenue Divisional Officer. Granting time to deposit the arrears is statutory obligation cast on the Revenue Divisional Officer. He has a discretion in determining the length of time and this discretion is to be exercised judicially based upon objective facts ascertained in the inquiry relatable to the circumstances of the landlord and the tenant. In the context in which the expression 'relative circumstances of the landlord and the cultivating tenant' is used clearly manifests the legislative intention that the circumstances of the landlord for recovering arrears of rent which may indicate his urgent need for the money if the rent

is in the crop share, the crop, and the relative circumstance of the tenant would be his present financial position to repair the default. On both sides there can be number of circumstances one can envisage which, if properly brought to the notice of the Revenue Divisional Officer, would influence his judicial decision as to the length of time to be granted by him for the deposit of arrears. Where the landlord is a big landlord to whom payment of rent by one tenant of a small amount would not make any difference and the tenant is a needy tenant who was so involved in such depressing circumstances that he could not pay even the small amount of rent in time and when such circumstances are judicially apprised, the Revenue Divisional Officer may shorten or lengthen the time to be given for depositing the amount so as to repair the default. It is not open to the Revenue Divisional Officer to arbitrarily fix time. His order fixing the time must show on the face of record that he made the necessary inquiry as to the relative circumstances of the landlord and the cultivating tenant, and after evaluating the circumstances placed before him by both the sides he would determine the length of time and the order fixing the time must at least give some indication as to what weighed with him in fixing the certain time which he fixed in a given case. The proceedings before the Revenue Divisional Officer are judicial proceedings. For the purpose of the proceedings under S. 3 of the Act, the Revenue Divisional Officer is a Court as provided in S. 6 (b) of the Act and a revision petition would lie to the High Court against the order of the Revenue Divisional Officer.

10. If the proceedings are judicial and there is a lis between the parties, the rival contentions have to be properly adjudicated upon the evidence placed before the Court. Before the Revenue Divisional Officer can make an order for eviction of a cultivating tenant he has, as a matter of statutory obligation, to determine the issues which arise in the case under sub-sec. (4) (b) of S. 3, record a finding on each of them and make a speaking order. By the very language of sub-section (4) (b) of S. 3, the Revenue Divisional Officer has to grant time to the cultivating tenant to deposit the arrears found due by him and the length of time is to be relatable to the circumstances of the landlord and the cultivating tenant. After determining the arrears and ascer-

taining the circumstances of the landlord and the tenant and fixing the length of time to pay the arrears, the proceeding at that stage must stop. This is implicit in sub-sec. (4) (b) of S. 3.

11. The scheme of the Act is that merely on determination of rent in arrears the Revenue Divisional Officer is not to conclude that there is such default which has become irreparable and that he is under an obligation to evict the tenant. In fact, the statute grants locus poenitentiae to the tenant by making it obligatory upon the Revenue Divisional Officer to grant some time to the tenant to repair the default. If after the time so granted expires and the tenant fails to comply with the order calling upon him to deposit the arrears there would be a default which may become irreparable and eviction may follow. Till then there is no jurisdiction in the Revenue Divisional Officer to direct eviction.

12. In fact the High Court itself has taken this very view when it observed that the view taken by Srinivasan, J. was the correct one having regard to the avowed object of the Act, namely, preventing unreasonable eviction and affording protection to the tenants to retain the holdings so long as interests of the landlord in the matter of the prompt payment of rent are safeguarded. At another stage, the High Court observed that the time that has to be given or allowed to the tenant to deposit the arrears is to be determined by considering what is just and reasonable having regard to the relative circumstances of both the parties and by its very nature this must be elastic and flexible and not fixed or final. In other words, the High Court was of the opinion that the composite order is not contemplated by sub-sec. (4) (b) of Sections 3.

13. If sub-sec. (4) (b) of Sec. 3 does not contemplate passing of a composite order, what is the correct procedure that must be followed in a proceeding under that sub-section? That is self-evident from the language employed in that sub-section. After the application is received and the parties are summoned and representations are heard, the Court must determine whether the cultivating tenant is in arrears of rent. If the answer is in the affirmative, it has to determine the arrears in terms of its money value. Thereafter, the Revenue Divisional Officer must ascertain relative circumstances of the landlord and the tenant and as indicated hereinabove, these

circumstances must be relatable to the need of the landlord for prompt payment and the present prevalent circumstances of the tenant relatable to the paying capacity. Thousand and one circumstances can be envisaged which may have a bearing on this aspect. After these circumstances are properly adjudicated and evaluated the Revenue Divisional Officer must fix time within which the tenant should pay the amount and repair the default.

14. It was seriously contended by Mr. Natesan as to what is there in the scheme of the Act and especially in the language of sub-sec. (4) (b) which would make it impermissible for the Revenue Divisional Officer simultaneously passing an order determining rent in arrears and directing that if the tenant fails to pay the amount within the time prescribed by the Court eviction shall follow as a matter of course. If this construction of sub-sec. (4) (b) as canvassed by Mr. Natesan is adopted the Revenue Divisional Officer would be denying to himself a more beneficial jurisdiction conferred upon him, namely, to extend the time for making the payment if on evaluation of circumstances so placed before him he is satisfied that a further extension is not only just but not to grant it would be harsh and unjust and would be defeating the object for which the Act was enacted. An analogous provision may be noticed. It is a well accepted principle statutorily recognised in Section 148 of Civil P. C. that where a period is fixed or granted by the court for doing any act prescribed or allowed by the Code, the Court may in its discretion from time to time enlarge such period even though the period originally fixed or granted may expire. If a Court in exercise of the jurisdiction can grant time to do a thing, in the absence of a specific provision to the contrary curtailing, denying or withholding such jurisdiction, the jurisdiction to grant time would inhere in its ambit the jurisdiction to extend time initially fixed by it. Passing a composite order would be acting in disregard of the jurisdiction in that while granting time simultaneously the court denies to itself the jurisdiction to extend time. The principle of equity is that when some circumstances are to be taken into account for fixing a length of time within which a certain action is to be taken, the Court retains to itself the jurisdiction to re-examine the alteration or modification of circumstances which may necessitate

extension of time. If the Court by its own act denies itself the jurisdiction to do so, it would be denying to itself the jurisdiction which in the absence of a negative provision, it undoubtedly enjoys. Conditional orders, were held by this Court to be in terrorem, so that dilatory litigants might put themselves in order and avoid delay, but they do not completely estop a court from taking note of events and circumstances which happen within the time fixed. In *Mahant Ram Das v. Ganga Das*, (1961) 3 SCR 763: (AIR 1961 SC 882) in the context of a failure to pay requisite court-fee within the time allowed by the Court subject to the conditional order that failure to pay would result in dismissal of the appeal, this Court observed as under (at p. 883 of AIR):—

"How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely, estop a court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves on the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians."

The danger inherent in passing conditional orders becomes self-evident because that by itself may result in taking away jurisdiction conferred on the court for just decision of the case. The true purport of conditional order is that such orders merely create something like a guarantee or sanction for obedience of the court's order but would not take away the Court's jurisdiction to act according to the mandate of the statute or on relevant equitable considerations if the statute does not deny such consideration. In order to avoid subsequent controversy sub-sec. (4) (b) envisages proceedings in two stages and that by itself inhibits passing of a conditional order. It is, therefore, not possible to accept the

construction canvassed for on behalf of the respondents.

15. As analysed, the scheme of sub-sec. (4) (b) of S. 3 requires the Revenue Divisional Officer to determine, arrears, ascertain the exact amount payable by the tenant, fix the time for payment after taking into consideration the relevant circumstances of the landlord and the cultivating tenant and then stop there. There is no power in the Revenue Divisional Officer at that stage to pass an order for eviction.

16. If the tenant deposits the amount or pays up the rent and repairs the default within the time fixed by the Revenue Divisional Officer, on an application of the tenant pointing out this fact, the original application of the landlord for eviction would have to be dismissed. If on the other hand the landlord points out to the Revenue Divisional Officer that the cultivating tenant has failed to comply with the order made by the Court and if(?) after notice to the tenant and in the absence of a request for extension of time which again may be judicially examined, the default becomes wilful or contumacious. It is at that stage and at that stage alone that the Revenue Divisional Officer enjoys jurisdiction to order eviction. Such jurisdiction improperly exercised at an earlier stage would render the order without jurisdiction. Surprisingly the High Court reached the same conclusion but failed to follow it.

17. In all the three cases the Revenue Divisional Officer determined the arrears of rent and gave six weeks' time to pay the same. Within the period of six weeks the cultivating tenants in each case approached the High Court and obtained conditional stay, the condition being to deposit the rent in arrears within the time prescribed by the High Court and these orders have been complied with. If the Revenue Divisional Officer had not denied to himself the further jurisdiction to examine the situation as it emerged on the date of expiry of the period prescribed by him, it would have been brought to his notice that the eviction was unjustified in view of the orders made by the High Court. But as the order became effective according to the Revenue Divisional Officer on the mere failure to deposit the arrears found due by him, the order of eviction without jurisdiction became effective. The High Court held that there was no order of eviction but

affirmed the order of the Revenue Divisional Officer as one for eviction.

18. The question then is: What should be my approach in these appeals? Frankly speaking, on my finding that the latter part of the Revenue Divisional Officer's order that 'in the event of failure to deposit the amount within the time prescribed eviction would follow,' being without jurisdiction, I would be required to remand the matter to the Revenue Divisional Officer to proceed from that stage. However, I cannot overlook the fact that the initial proceedings before the Revenue Divisional Officer started in 1961. Two decades have rolled by. The ground of eviction was a technical ground of default repaired by the orders of the High Court when the rent found in arrears was deposited. The landlords have been paid, may be not specifically within the time prescribed by the Revenue Divisional Officer but within the time prescribed by the High Court. It is not necessary to decide in this case whether the time prescribed by the Revenue Divisional Officer, if challenged in the superior court i.e. the High Court, the High Court would have jurisdiction to prescribe its own time calling upon the tenant to deposit the amount to repair the default. That question be kept open but in the facts of this case the amount having been deposited way back in 1961-62, it would be merely adding to the agony of the parties for a very technical consideration to remit the case to the Revenue Divisional Officer. In the facts of this case it would be an idle formality to remit the case to the Revenue Divisional Officer for the additional reason that he will have to fix a fresh date for deposit of the amount and the amount has already been deposited 19 to 20 years back. Having regard to all the circumstances of the case and the inevitable consequence flowing from the passage of time, I do not consider it just and proper to remit the case to the Revenue Divisional Officer. In my opinion the tenants have qualified for the protection of the Act and they were not liable to be evicted.

19. Accordingly, all the three appeals are allowed and the order for eviction of the tenants in each case is set aside but in the circumstances of the case with no order as to costs.

KOSHAL, J.:— 20. I have had advantage of going through the judgment prepared by my learned brother, Desai, J., and find myself in agreement with him on the following points:

(a) When the Revenue Divisional Officer (RDO for short) allows time to a cultivating tenant for depositing the arrears of rent in pursuance of the provisions of cl. (b) of sub-sec. (4) of S. 3 of the Act, he cannot simultaneously pass a conditional order of eviction which is to take effect on a default to occur in futuro. An order of that type can, in terms of the section, only be passed if the cultivating tenant fails to deposit the sum as directed. The orders of the RDO directing eviction and covered by these appeals were thus passed in contravention of the express provisions of the clause and are thus without jurisdiction.

(b) The orders of the RDO directing the deposit of rent having been actually complied with about a couple of decades back it is no use remitting the case to him and it would serve the ends of justice if we declare that the tenants are qualified for the protection envisaged by the Act against their eviction.

(c) All the three appeals merit acceptance and are allowed with no order as to costs, the order for eviction of the tenant in each case being set aside.

21. I may, however, observe that it is wholly unnecessary for the decision of the appeals to determine the question as to whether it is incumbent on the RDO, while acting in pursuance of the provisions of cl. (b) above mentioned, to grant time to a tenant who has been found by him to be in arrears of rent. For one thing, that question did not form the subject-matter of argument on either side at the hearing of the appeals, the only point really canvassed before us being that when the RDO grants time to the tenant he cannot simultaneously pass an order of eviction which is to take effect in future and which he can pass only after the default in making the deposit is committed. Secondly, that question does not arise in these appeals as in each of the appeals before us the RDO did grant time to the tenants concerned to deposit arrears of rent. As it is, Desai, J., has arrived at a categorical conclusion that according to cl. (b) aforesaid it is obligatory on the RDO to grant time to the tenant for depositing the arrears in all cases falling under cl. (a) or cl. (aa) of sub-sec. (2) of S. 3 of the Act in which the tenant has not availed of the provisions contained in sub-sec. (3) of that section. Being unable to subscribe to that conclusion I give below my reasons for holding a contrary opinion.

22. The relevant portion of S. 3 is set out hereunder:

"3 (1) Subject to the next succeeding sub-sections, no cultivating tenant shall be evicted from his holding or any part thereof, by or at the instance of his landlord, whether in execution of a decree or order of a Court or otherwise.

"(2) Subject to the next succeeding sub-section, sub-section (1) shall not apply to a cultivating tenant—

(a) who, in the areas where..... if in arrear at the commencement of this Act, with respect to the rent payable to the landlord, does not pay such rent within the six weeks after such commencement or who in respect of rent payable to the landlord after the commencement of this Act, does not pay such rent within a month after such rent becomes due; or

(aa) who, in the other areas of the State of Madras, if in arrear at the commencement of this Act, with respect to the rent payable to the landlord and accrued due subsequent to the 31st March, 1954, does not pay such rent within a month after such commencement, or who in respect of rent payable to the landlord after such commencement, does not pay such rent within a month after such rent becomes due; or

(b) to (d) xx xx
"Explanations I to IV— xx xx

"(3) (a) A cultivating tenant may deposit in Court the rent or, if the rent be payable in kind, its market value on the date of deposit, to the account of the landlord—

(i) in the case of rent accrued due subsequent to the 31st March, 1954, within a month after the commencement of this Act;

(ii) in the case of rent accrued due after the commencement of this Act, within a month after the date on which the rent accrued due.

"(b) The Court shall cause notice of the deposit to be issued to the landlord and determine, after a summary enquiry, whether the amount deposited represents the correct amount of rent due from the cultivating tenant. If the Court finds that any further sum is due, it shall allow the cultivating tenant such time as it may consider just and reasonable having regard to the relative circumstances of the landlord and the cultivating tenant for depositing such further sum inclusive of such costs as the Court may allow. If the Court adjudges that no further sum is due, or if the cultivating tenant deposits

within the time allowed such further sum, as is ordered by the Court, the cultivating tenant shall be deemed to have paid the rent within the period specified in the last foregoing sub-section. If, having to deposit a further sum, the cultivating tenant fails to do so within the time allowed by the Court, the landlord may evict the cultivating tenant as provided in sub-section (4).

"(c) xx xx xx

"Explanation I— xx xx xx

"(4) (a) Every landlord seeking to evict a cultivating tenant falling under sub-section (2) shall, whether or not there is an order or decree of a court for the eviction of such cultivating tenant, make an application to the Revenue Divisional Officer and such application shall bear a court-fee stamp of one rupee.

"(b) On receipt of such application, the Revenue Divisional Officer shall, after giving a reasonable opportunity to the landlord and the cultivating tenant to make their representations, hold a summary enquiry into the matter and pass an order either allowing the application or dismissing it and in a case falling under clause (a) or clause (aa) of sub-section (2) in which the tenant had not availed of the provisions contained in sub-section (3), the Revenue Divisional Officer may allow the cultivating tenant such time as he considers just and reasonable having regard to the relative circumstances of the landlord and the cultivating tenant for depositing the arrears of rent payable under this Act inclusive of such costs as he may direct. If the cultivating tenant deposits the sum as directed, he shall be deemed to have paid the rent under sub-section (3) (b). If the cultivating tenant fails to deposit the sum as directed, the Revenue Divisional Officer shall pass an order for eviction."

An analysis of the section clearly leads to certain indisputable propositions. Sub-sec. (1) creates a bar against the eviction of a cultivating tenant from his holding or any part thereof, by or at the instance of his landlord, even though the latter seeks to do so in execution of a decree or order of a Court. This bar is subject only to the provisions of sub-secs. (2), (3) and (4). Sub-sec. (2) enacts an exception to sub-sec. (1) and lays down inter alia that sub-sec. (1) shall not apply to a cultivating tenant who conforms to the description in cl. (a) or (aa) of sub-sec. (2). Both the clauses last mentioned cover tenants

who are in arrears in regard to the payment of rent at the commencement of the Act or who fail to pay rent falling due after such commencement within a month after its becoming due. Sub-sec. (3) enables a cultivating tenant to deposit arrears of rent in Court and further provides that after notice of such deposit has been given to the landlord, the Court would embark on a summary inquiry and then adjudge whether any further sum is due to the landlord. If the Court finds that a further sum is due, "it shall allow the cultivating tenant such time as it may consider just and reasonable having regard to the relative circumstances of the landlord and the cultivating tenant for depositing such further sum inclusive of such costs as the Court may allow." If the cultivating tenant fails to pay the sum determined by the Court to be due under sub-sec. (3) the landlord "may evict the cultivating tenant as provided in sub-sec. (4)." Sub-sec. (4) then states that a landlord seeking to evict a cultivating tenant falling under sub-sec. (2) shall make an application to the RDO who shall, after giving a reasonable opportunity to the landlord and the cultivating tenant to make their representations, hold a summary inquiry into the matter and pass an order either allowing the application or dismissing it. The sub-section further provides that if the case falls under cl. (a) or (aa) of sub-sec. (2) in which the tenant has not availed of the provisions contained in sub-sec. (3) the RDO may allow the cultivating tenant such time as he considers just and reasonable having regard.....

23. Now as I read sub-sec. (4), it gives the RDO power either to allow the application of the landlord or to dismiss it after he has held a summary enquiry into the matter. If the application is allowed an order of eviction has to be passed. If it is dismissed the proceedings again come to an end. However, if the ground of eviction is non-payment of rent, the RDO is clothed with power to allow the cultivating tenant to deposit the arrears and costs as directed. The power is discretionary and, while exercising the same, it is not incumbent on the RDO to grant time. If the legislature intended to make it obligatory on the part of the RDO to fix a time for deposit of the arrears in all cases covered by cl. (a) or cl. (aa) of sub-s. (2) there is no reason why it should have used the word

"may" in relation to the grant of time. Support for this view is available in cl. (b) of sub-sec. (3) wherein, the legislature has directed:

"If the Court finds that any sum is due it shall allow the cultivating tenant such time as it may consider just and reasonable....."

(emphasis supplied)

In this situation it must be held that while the opportunity of depositing the arrears of rent cannot be denied to a cultivating tenant during the course of proceedings under sub-sec. (3), the same is not available as of right under cl. (b) of sub-sec. (4). The difference in the language used by the legislature is significant and not without purpose. The intention of the legislature appears to be that normally a defaulting tenant must seek the help of the Court all by himself and that if he does so he must be protected; but that a defaulting tenant who waits for payment of rent till he is sought to be evicted by the landlord is not necessarily entitled to the same protection. Circumstances may exist which may place him at par with a tenant covered by sub-sec. (3) but then it may not necessarily be so. That is why it is left to the discretion of the RDO to grant time to the cultivating tenant or to deny him that opportunity. An example of a case in which no time should be allowed would be that of a tenant who, although in affluent circumstances at all relevant points of time, has failed to make payment of rent year after year in spite of repeated demands from an otherwise indigent landlord and whose conduct is, therefore, contumacious calling for no sympathy or concession. The extension to him of the same facility which is afforded to a willing tenant under sub-sec. (3) would be uncalled for and in fact unjust.

Nor do I find why the word "may" occurring in cl. (b) of sub-sec. (4) be not given its ordinary meaning as denoting the conferment of a discretion on the RDO and be equated with "shall" so as to make it obligatory on him to grant time to the cultivating tenant.

24. Subject to the disagreement expressed by me above I concur with the judgment of Desai, J.

R. B. MISRA, J.:— I agree with my learned brother, Koshal, J.

Order accordingly.

AIR 1982 SUPREME COURT 146

A. P. SEN AND BAHARUL ISLAM, JJ.

Writ Petn. (Crl.) No. 7587 of 1981, D/- 1-12-1981.

Fitrat Raza Khan, Petitioner v. State of Uttar Pradesh and others, Respondents.

(A) National Security Act (65 of 1980), S. 3 — Detention — Grounds — Past conduct — Relevancy — Maintenance of public order — Incitement to communal violence — Detention held valid. (Constitution of India, Art. 22 (5)).

The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is usually from prior events showing tendencies or inclinations of a man that an inference can be drawn whether he is likely, in the future, to act in a manner prejudicial to the maintenance of public order. (Para 4)

The order of detention in the instant case cannot be challenged on the ground that the grounds furnished were vague or indefinite or lacking in particulars or were not adequate or sufficient for the satisfaction of the detaining authority. On the contrary, the grounds set out with sufficient degree of particularity all the basic and necessary facts on which the satisfaction of the detaining authority was based, or, for that matter, for the making of an effective representation. It is true that the order of detention is based on two grounds which relate to two incidents, one of Aug. 13, 1980, and the other of July 24, 1981, i.e., the second incident was after a lapse of about a year, but both the incidents show the propensities of the petitioner to instigate the members of the Muslim community to communal violence. The act on the part of the petitioner squarely fell within the realm of public order, as it was calculated to disturb public peace and tranquillity. It is needless to emphasise that the incitement of the members of a particular community to communal violence in a town like Moradabad, where the Muslim population pre-dominates, pertains to public order and not merely to law and order. (Para 4)

(B) National Security Act (65 of 1980), S. 8 — Detention — Representation made by detenu — Consideration — Represent-

tation made on 8-8-1981 considered by State Government at all levels and ultimately rejected on 24-8-1981 — Held, there was no undue delay in its consideration. (Constitution of India, Art. 22 (5)). (Para 5)

SEN, J.:— By this petition under Article 32 of the Constitution, the petitioner Fitrat Raza Khan challenges the validity of his detention by the order of the District Magistrate, Moradabad, under subsec. (2) of S. 3 of the National Security Act, 1980 (for short 'the Act'), on his being satisfied that the detention of the petitioner was necessary with a view to preventing him from acting in any manner prejudicial to the maintenance of public order.

2. The order of detention is based on two grounds, the first of which relates to an incident of August 13, 1980, relating to the communal riots that occurred in Moradabad City, and the second of July 24, 1981, when the petitioner is alleged to have incited Muslims to communal violence. The grounds of detention are as follows:

"(i) That on 13-8-1980 at about 1-30 p.m. you along with your other 700-800 Musalman companion rioters armed with bricks, lathis, iron rods, sabbal, bottles, etc., under the impulse of communal feelings at Bazar Ganj Neem Ki Piyao within the territorial limits of P.S. Kotwali Moradabad from the side of the Kacha Bagh attacked Hindus, resorted to brick-battling and have thrown bottles on them which caused hurt to Hindus. When Shri Jagdish Singh S.H.O. of P. S. Kotwali along with other force challenged you with a view to preventing you from acting in such manner you and your companions resorted to brickbattling on police and under great police pressure you dispersed. In this connection a Criminal Case No. 863/80 under Section 147/148/336/436/395, I.P.C. was registered on the F.I.R. lodged by Shri Jagdish Singh, S.H.O. of Police Station Kotwali and the same is pending in the Court.

(ii) That on 24-7-81 at about 9 P.M. at Sarai Hussaini Begum in Police Station Kotwali City and District Moradabad at Mohalla Thabboo Ka Nala on the road leading to Deputy Ganj crossing you along with other eight Muslims assembled and you were inciting them with communal feelings against Hindus and were

saying that during the last riots Hindus had committed great atrocities against Muslims and the forthcoming Id is reminding of the last Id. Now we would take revenge against Hindus. On our memory being afreshed with the approach of this coming Id our blood boils. Police too had committed atrocities on us during the last riots. Revenge has to be taken against the police also and has to be confronted boldly. I have made arrangements of better arms from outside. Money will be needed to purchase them. You people should assist me for this work. This amount is to be collected from the important Muslims so that it may not come to the knowledge of the police and some young Muslims also be prepared so that bold confrontation may be staged. Your companions supported all of your proposals and promised to collect the money sooner to purchase the arms. When S.I. Shri Vidya Ratan and other policemen of Police Station Kotwali tried to prevent you from acting in a manner prejudicial to maintenance of public order and attempted to arrest, then you, with the intent to kill policemen fired on them with a pistol taken out from under the belt of your pants and they narrowly escaped. You were caught on the spot. On your personal search a 12 bore country made pistol along with an empty cartridge and 2 live 12 bore cartridges were secured from your possession. In this connection a Criminal Case No. 631/80 under Sections 307/153, I. P. C. and u/Ss. 632/81 read with Section 25 Arms Act has been registered against you and the same is pending."

The two grounds set out are nothing but narration of facts bringing out the antecedent history of the petitioner. It is obvious therefrom that the ground for the making of the order for his detention is one and the same, viz., to prevent him from inciting communal violence in Moradabad City.

3. In challenging the impugned order of detention, learned counsel for the petitioner has mainly advanced two contentions. The first is that the grounds of detention besides being vague and lacking in particulars, did not furnish sufficient nexus for forming the subjective satisfaction of the detaining authority; it is further said that ground No. (i) is stale and, therefore, could not be taken into account by the detaining authority while passing the order of detention, particu-

larly when the petitioner is being prosecuted for the alleged offences committed by him in the communal riots. The second is that the undue delay on the part of the State Government in considering the representation made by the petitioner renders his continued detention bad. Neither of the contentions can be accepted.

4. As to the first contention, it seems to us that the order of detention cannot be challenged on the ground that the grounds furnished were vague or indefinite or lacking in particulars or were not adequate or sufficient for the satisfaction of the detaining authority. On the contrary, the grounds set out with sufficient degree of particularity all the basic and necessary facts on which the satisfaction of the detaining authority was based, or, for that matter, for the making of an effective representation. It is true that the order of detention is based on two grounds which relate to two incidents, one of Aug. 13, 1980, and the other of July 24, 1981, i.e., the second incident was after a lapse of about a year, but both the incidents show the propensities of the petitioner to instigate the members of the Muslim community to communal violence. The unfortunate communal riots which took place in Moradabad City led to widespread carnage and bloodshed resulting in the loss of many innocent lives. The memory of the communal riots is all too recent to be a thing of the past. The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is usually from prior events showing tendencies or inclinations of a man that an inference can be drawn whether he is likely, in the future, to act in a manner prejudicial to the maintenance of public order. Although there was a lapse of a year but the incident of July 24, 1981, was just on the eve of the Id festival and the ground alleged is that the petitioner was trying to instigate the Muslims to communal violence by promise of better arms, with a view to an open confrontation between the two communities. It cannot be said that the prejudicial conduct or antecedent history of the petitioner was not proximate in point of time and had no rational connection with the conclusion that his detention was necessary for maintenance of public order. There is no substance in the contention that the incident of July 24, 1981, related to law and order and not to public order. The

act on the part of the petitioner squarely fell within the realm of public order, as it was calculated to disturb public peace and tranquillity. It is needless to emphasise that the incitement of the members of a particular community to communal violence in a town like Moradabad, where the Muslim population predominates pertains to public order and not merely to law and order.

5. As to the second contention, we are satisfied that there was no unexplained delay on the part of the State Government to consider the representation made by the petitioner. The petitioner made a representation dated Aug. 8, 1981, through the Superintendent, Central Jail, Moradabad. It was actually handed over to the Superintendent, Central Jail, on Aug. 10 1981, and he, on the same day, sent it to the District Magistrate. The District Magistrate forwarded the representation together with his comments to the Home Secretary on Aug. 13, 1981. The representation was received in the Home Department the next day. It could not be attended to on Aug. 15, which was the Independence Day, and on the 16th, being a Sunday. The representation was scrutinised in the Secretariat for three days between the 17th and the 19th, and the notings on the file were made. The file was perused by the Joint Secretary, Home Department, on Aug. 19. On August 20 the Law Department was consulted. The file was placed before the Home Secretary on Aug. 21, who placed it before the Chief Minister. The Chief Minister took two days to study the file and ultimately, passed an order rejecting the representation on Aug. 24. It would, therefore, appear that the representation made by the petitioner was considered by the State Government at all levels, and there was no undue delay in its consideration.

6: Accordingly, the writ petition must fail, and is dismissed.

Petition dismissed,

AIR 1982 SUPREME COURT 149

P. N. BHAGWATI; A. C. GUPTA;
S. MURTAZA FAZAL ALI;
V. D. TULZAPURKAR; D. A. DESAI;
R. S. PATHAK AND E. S. VENKATARAMIAH, JJ.

Transferred Cases Nos. 19, 20, 21, 22, 26 and 24 of 1981 and Writ Petn. No. 274 of 1981 and Spl. Leave Petn. (Civil) No. 1509 of 1981*, D/- 30-12-1981.

S. P. Gupta, V. M. Tarkunde, J. L. Kalra and others, Iqbal M. Chagla and others, Rajappa, P. Subramaniam, D. N. Pandey and others, Petitioners v. President of India and others etc., Respondents.

AND

Miss Lily Thomas, Petitioner v. President of India and others, Respondents.

AND

R. Prasad Sinha, Petitioner v. Sh. K. B. N. Singh (Chief Justice) and others, Respondents.

Editorial Note : In this momentous Supreme Court verdict the seven Judge Constitution Bench upheld by majority:

- (1) Validity of the transfer of Hon'ble K. B. N. Singh, Chief Justice of Patna High Court to the Madras High Court;
- (2) Validity of non-extension of the term of Hon'ble Shri S. N. Kumar, Addl. Judge of the Delhi High Court, and
- (3) Validity of the circular of the Union Law Minister to all States dated 18th March, 1981.

Hon'ble Judges who constituted the Bench — Bhagwati, A. C. Gupta, S. M. F. Ali, Tulzapurkar, Desai, Pathak and Venkataramiah, JJ.

The major issues involved in the case, for the sake of convenience may be classified as follows:

- (i) Locus standi of lawyers to file writ petitions by way of public interest litigation. (See Pt. A)
- (ii) Independence of Judiciary (Pt. B)
- (iii) Validity of Union Law Minister's circular dated 18-3-1981 (Pt. C)
- (iv) Nature of power to appoint/transfer High Court Judges and procedure to be followed — consulta-

tion with constitutional functionaries; Consent of concerned Judges etc. (Pts. E to N)

- (v) Validity of transfer of Judges from one High Court to another — Matters to be taken into consideration, viz. public interest, personal inconvenience, regional language, consent of concerned Judge etc. (Pts. O to Y)
- (vi) Other incidental legal aspects like privileged documents, See Pt. D Interpretation of Constitution, Constitutional conventions etc.

The aforesaid classification is followed in the Headnotes. All the seven Judges have delivered separate opinions. All the writ petitions stands dismissed in view of majority opinions.

The decision on the above said major issues at a glance:—

(i) **Locus Standi :** As important issues concerning judiciary were involved in the case and during pendency of the petitions Hon'ble K. B. N. Singh, C. J. and S. N. Kumar, J. joined as petitioners, the Advocate-General conceded that the petitions were maintainable. It being litigation affecting judiciary, it was unanimously held that lawyers had interest and locus standi to file the petitions and they could not be told off at the gates. Hon'ble Venkataramiah, J. however, observed that but for joining of Hon'ble K. B. N. Singh, C. J. and Shri S. N. Kumar, J. as petitioners, the petitions might have been not maintainable.

(ii) **Independence of judiciary :**

The impugned circular of Law Minister dated 18-3-1981, the transfer of Hon'ble Chief Justice of Patna High Court and the non-extension of the term of Addl. Judge were alleged to be encroachments on judiciary. The power to appoint Judges is executive in nature and the President is bound by the advice of the Cabinet by virtue of Art. 74. The concept of independence of judiciary, its scope and limitations are discussed in the context of the procedure followed in India in the matter of appointment of Judges.

(iii) **Circular of Law Minister dated 18-3-1981 :** Validity of the circular is upheld by Bhagwati, S. M. F. Ali, Desai and Venkataramiah, JJ. On the other hand Gupta, Tulzapurkar and Pathak, JJ. took contrary view.

(iv) **Appointment and extension of term of Additional Judges :**

All Judges agree that consultation with constitutional functionaries must be

*From judgment and order of Patna High Court in C. W. J. C. No. 312 of 1981, D/- 2-2-1981.

meaningful and result oriented and that the proposal can emanate from any of the constitutional functionaries. It is also unanimously agreed that none of the constitutional functionaries can exercise veto in this matter.

On question whether the opinion of the Chief Justice of India enjoys primacy over the other constitutional functionaries, Gupta, Tulzapurkar and Pathak, JJ. held that primacy should be given to the opinion of the Chief Justice of India. However, the majority consisting of Bhagwati, Desai, S. M. F. Ali and Venkataramiah, JJ. held against primacy.

Dealing with constitutional convention that has come up for last 25 years that Additional Judge is normally appointed as permanent Judge as and when vacancy occurs, and therefore the normal expectation that Addl. Judge will be appointed as permanent Judge, it is held that such convention does not vest any enforceable right in the incumbent though the Addl. Judge is entitled to weightage for being appointed as permanent Judge as compared to any fresh candidate.

The nature and extent of consultation required at the stages of fresh appointment and extension of term respectively are also discussed.

Non-extension of the term of Shri S. N. Kumar, Addl. Judge was held valid by the majority consisting of Bhagwati, S. M. F. Ali, Desai and Venkataramiah JJ. as against Gupta, Tulzapurkar and Pathak, JJ.

(v) Transfer of Judges :

There is unanimity that transfer of a Judge from one High Court to another must be in public interest and not by way of punishment.

Prior consent of the Judge concerned was held not necessary by all Judges except Bhagwati, J.

It was also observed that personal inconvenience, language problem should also be taken into consideration as far as possible.

The transfer of Shri K. B. N. Singh, the Chief Justice of the Patna High Court was held to be in public interest and not vitiated by mala fides by the majority consisting of Gupta, Tulzapurkar, Venkataramiah and Pathak, JJ.

(vi) Miscellaneous :

(a) Privilege in matter of production of certain documents by Government

It is held by majority that no privilege could be claimed in respect of documents which constituted material for

forming the opinions in the matter of appointment/transfer of Judges.

Only S. M. F. Ali, J. dissented from the above view. He further held that he was in favour of non-disclosure of documents, but once the documents were made available he was entitled to refer them.

(b) Legal points covering aspects like Interpretation of Constitution, Right of concerned Judge to be heard, Scope of writ jurisdiction, Constitutional conventions, question of strength of Judges whether justiciable are also considered by the Judges while discussing the main issues involved in the writ petitions.

(A) Constitution of India, Arts. 32, 226 and 217 — Locus Standi — Traditional rule — History and development — Principles applicable in determining locus standi — Public interest litigation — Petition by practising lawyers raising important questions relating to independence of judiciary — Maintainable (Pt. Conced- ed).

(There is a general agreement with the views expressed by Bhagwati and Tulzapurkar, JJ. on the question of locus standi of the practising lawyers to challenge validity of transfer of a Judge, refusal to re-appoint an Additional Judge and Law Minister's circular letter. —Ed.)

Per Bhagwati: J. (Gupta, Fazal Ali, Desai, Pathak, Venkataramiah JJ. concurring)) :—

The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legally protected interest by the impugned action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born. Under this rule, the Court was concerned with the question whether the applicant was a person aggrieved. According to this rule, it was only a person who suffered a specific legal injury by reason of actual or threatened violation of his legal right or legally protected interest who could bring an ac-

tion for a regular writ petition to be filed by the public spirited individual espousing their cause and seeking relief for them. The Supreme Court will readily respond even to a letter addressed by such individual acting *pro bono publico*.

(Para 17)

But the individual who moves the court for judicial redress in cases of this kind must be acting *bona fide* with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be activated at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in court. As a matter of prudence and not as a rule of law, the court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of judicial redress. This rule in regard to *locus standi* thus postulates a right-duty pattern which is commonly to be found in private law litigation. But, narrow and rigid though this rule may be, there are a few exceptions to it which have been evolved by the courts over the years. (Case law discussed).

(Para 14)

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art. 226 and in case of breach of any fundamental right of such person or determinate class of persons, in the Supreme Court under Art. 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. 1978 AC 482, Distinguished.

(Para 17)

There is a vital distinction between *locus standi* and justiciability and it is not every default on the part of the State or a public authority that is justiciable.

(Para 23)

Another point which requires emphasis is that cases may arise where there is undoubtedly public injury by the act or omission of the State or public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission.

(Para 25)

Applying these principles it must be held that the petitions, challenging the validity of circular letter-dated 18-3-1981, by the Central Law Minister to the Governor of Punjab and the Chief Ministers of the other States and claiming relief of *mandamus* etc., filed by practising advocates are maintainable.

(Paras 25, 141, 430, 609, 973)

There can be no doubt that the practising lawyers have a vital interest in the independence of the judiciary and if any unconstitutional or illegal action is taken by the State or any public authority which has the effect of impairing the independence of the judiciary, they would certainly be interested in challenging the constitutionality or legality of such action. They had clearly a concern deeper than that of a busybody and they cannot be told off at the gates. AIR 1981 SC 344, Relied on.

(Para 25)

Per Tulzapurkar, J. concurring.

The practising lawyers, who are nothing short of partners in the task of administration of justice undertaken by the Judges, are vitally interested in the maintenance of a fearless and an independent judiciary to ensure fair and fearless justice to the litigants. Hence, in challenging the constitutionality of Law Minister's circular and grant of short-term extensions to sitting Additional Judges of High Courts, the practising lawyers, either in their individual capacity or representing Lawyers' Association have not merely sufficient interest but special interest of their own in the subject-matter of the writ petitions and they cannot be told off at the gates and the petitions at their instance are clearly maintainable.

(Para 609)

Per Venkataramiah, J.:— But for the joining of the affected Judges as petitioners,

the writ petitions would have been liable to be dismissed. (Para 974)

(B) Constitution of India, Pre. and Articles 124, 216, 217, 222, 224 and Part III (General) — Independence of judiciary — Basic structure of the Constitution — Scope and limitations of the concept. (Administrative law — Independence of judiciary.)

Per Bhagwati, J.

The principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values. It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned national charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a socio-economic destination and a creative function. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. (Para 26)

Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you" This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution. AIR 1977 SC 2328; Relied on. (Para 26)

Per Gupta, J.

The independence of the judiciary depends to great extent on the security of tenure of the Judges. If the Judge's tenure is uncertain or precarious, it will

be difficult for him to perform the duties of his office without fear or favour. The tenure of an Additional Judge is not uncertain or precarious but it is conditional on the existence of arrears in the High Court which is an objective condition of fact. (Para 122)

Per S. M. F. Ali, J.

Independence of judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution. While this absolute judicial power has been conceded by the Constitution to the judiciary, a certain amount of executive control has already been vested in the higher judiciary in respect of the subordinate judiciary. This executive power is not absolute and has to be exercised in consultation with the CJI in the case of appointment of Supreme Court Judges, as also in consultation with the CJI and the Governor of the States concerned in case of the appointment of Chief Justice of the High Courts — in the case of appointment of High Court Judges, the Chief Justice of the concerned High Court is also to be consulted. The consultation contemplated by the Constitution must be full and effective and by convention the view of the concerned CJ and CJI should always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by these Constitutional authorities. Thus, in fine, the doctrine of separation of power so far as our Constitution is concerned, reveals an artistic blending and an adroit admixture of judicial and executive functions. (Paras 318, 319)

In the American Constitution by virtue of the fact that the entire judicial power is vested in the Supreme Court or other courts, the appointments have to be made by the Supreme Court, unlike the provisions of Indian Constitution where appointments are to be made by the President in consultation both with judicial and executive authorities as indicated above. Therefore, in expounding the concept of separation, the essential distinctive features which differentiate Indian Constitution from the American Constitution must be kept in mind. (Para 326)

So far as framers of Indian Constitution are concerned they had deliberately rejected the theory of complete insulation of the judicial system from the executive control. The Indian Constitution has de-

vised a wholesome and effective mechanism for the appointment of judges which strikes a just balance between the judicial and executive powers so that while the final appointment vests in the highest authority of the executive, the power is subject to a mandatory consultative process which by convention is entitled to great weight by the President. Apart from these safety valves, checks and balances at every stage, where the power of the President is abused or misused or violate any of the constitutional safeguards it is always subject to judicial review. The power of judicial review, which has been conceded by the Constitution to the judiciary, is the safest possible safeguard not only to ensure independence of judiciary but also to prevent it from the vagaries of the executive. (Paras 328, 329, 334)

The Indian Constitution fully safeguards the independence of Judges as also of the judiciary by a three-fold method—

(1) by guaranteeing complete safety of tenure to judges except removal in cases of incapacity or misbehaviour which is not only a very complex and complicated procedure but a difficult and onerous one;

(2) by giving absolute independence to the Judges to decide the cases according to their judicial conscience without being influenced by any other consideration and without any interference from the executive;

(3) so far as the subordinate judiciary is concerned the provisions of Arts. 233-236 vest full and complete control over them in the High Court.

(Paras 333, 343)

Per Desai, J.

Independence of judiciary under the Constitution has to be interpreted within the framework and the parameters of the Constitution. There are various provisions in the Constitution which indicate that the Constitution has not provided something like a 'hands off attitude' to the judiciary. The power of appointment of High Court Judges and the Judges of the Supreme Court vests in the President and the President being a constitutional head he is constitutionally bound to act according to the advice of the Council of Ministers. Arts. 32 (3), 133 (3), 138, 139, 140, 130, 230, 231, 237, 225, 126, 127 (1), 128 confer power on other constitutional institutions such as the executive which when it acts within the limits of power will have a direct impact on the functioning of the judiciary. This conspectus of articles, not meant to be exhaustive, do

indicate that Parliament has power to regulate Court's jurisdiction. Undoubtedly judiciary, the third branch of the Government cannot act in isolation. They are ensured total freedom, of course, after entering the office, from any overt or covert pressure or interference in the process of adjudicating causes brought before them and to this end they are ensured tenure, pay, pension, privileges and certain basic conditions of service. The judiciary like any other constitutional instrumentality has, however, to act towards attainment of constitutional goals. The independence of judiciary is not to be determined in all its ramifications as some a priori concept but it has to be determined within the framework of the Constitution. True, that the thrust is to ensure that adjudications are untrammelled by external pressures or controls and independence of judiciary under the Constitution is confined to the adjudicatory functions of the Courts and tribunals and they are insulated from executive control in that behalf. It is not unlikely that the total insulation may breed ivory tower attitude. It is not as if judicial independence is an absolute thing like a brooding omnipresence. One need not too much idolise the independence of judiciary so as to become counter-productive.

(Paras 703, 704)

While undoubtedly political packing must be abhorred, in putting the independence of judiciary on pedestal one cannot lose sight of the fact that the judiciary must keep pace with the changing mores of the day, its decision must be informed by values enshrined in the Constitution, the goals set forth in the fundamental law of the land, peoples' yearning desire for a chance for the better and the promised millennium. An activist role in furtherance of the same is a sine qua non for the judiciary. If value packing connotes appointment of persons otherwise well qualified as required by the constitution but having the additional qualification of awareness of the high priority task of eradication of poverty, removal of economic disparity, destroying the curse of illiteracy, ignorance, exploitation, feudal overlordship, coupled with conscious commitment to administering socio-economic justice, establishment of a just social order, an egalitarian society, then not only the value packing is not to be frowned upon nor thwarted by entrenched establishment prone people but it must be advocated with crusader's zeal.

And judiciary cannot stand aloof and apart from the mainstream of society. This will ensure its broad accountability to injustice ridden masses and therefore it is not unnatural that the status quoists can enter their caveat to value packing but which does not commend. While appointing each individual the constitutional philosophy of each individual ought to be a vital consideration and if this is labelled as value packing, it is neither unethical nor unconstitutional nor a weapon to strike at independence of judiciary. (Para 705)

Per Venkataramiah, J.

It is important to bear in mind that the independence of the judiciary is one of the central values on which our Constitution is based. No other constitutional agency is shielded as are the superior Courts in our country with so many built-in safeguards. The Judges can, if they choose to, be guided by the doctrine of conscience only while discharging their duties. They are not expected to be under any kind of external pressure. They are circumscribed by 'expectations of neutrality and impartiality' and by the traditions of the legal profession which is always keeping a watchful eye on every action of a Judge. In all countries where the rule of law prevails and the power to adjudicate upon disputes between a man and a man, a man and the State, a State and a State, and a State and the Centre, is entrusted to a judicial body, it is natural that such body should be assigned a status free from capricious or whimsical interference from outside and the judges who constitute it should be granted a security of tenure that lifts them above the fear of acting against their conscience. (Para 1051)

(C) Constitution of India, Arts. 222 and 217 — Law Minister's circular letter dated 18-3-1981 — Letter is valid.

Per Bhagwati, S. M. F. Ali, Desai and Venkataramiah, JJ. (A. C. Gupta, Pathak and Tulzapurkar, JJ. Dissenting.)

The Central Law Minister's circular letter dated 18-3-1981 requiring the additional Judges as also those whose names were recommended or might in future be recommended for initial appointment, to give their consent for being appointed as Judges outside the State is not invalid. (Paras 54, 769)

Per Bhagwati J. (Majority view):

There is no legal infirmity or any abuse or misuse of authority on the part of the Law Minister in issuing the circular letter. The circular letter does not violate the provisions of Cl. (1) of Art. 217 or Cl. (1) of Art. 222 nor does it offend against any other constitutional or legal provision and the challenge against the validity of the circular letter must, therefore, fail. However, it may be made clear that since an additional Judge has a right to be considered for appointment as an additional Judge for a further term on the expiration of his original term, and in case of a vacancy in a permanent post, for appointment as a permanent Judge in his own High Court, he cannot be discontinued as an additional Judge on the ground that he has not given his consent for being appointed as a permanent Judge in any other High Court. Such a ground for discontinuing an additional Judge would be a wholly irrelevant ground and if, on the expiration of his original term, an additional Judge is discontinued on any such ground, the decision of the President discontinuing him would be unconstitutional and void and the Union of India would be liable to be directed to reconsider his case on the basis of relevant considerations after excluding the irrelevant ground. (Para 54)

The circular letter addressed by the Law Minister is not in the nature of a public order made by a public authority. The Law Minister is undoubtedly a member of the Cabinet and it is reasonable to assume that in issuing the circular letter he was acting on behalf of the Central Government but the circular letter does not appear to have been issued by the Law Minister in the exercise of any constitutional or legal power. The circular letter has no constitutional or legal sanction behind it and non-compliance with the request contained in it would not proprio vigore entail any adverse consequence to the additional Judge or to the person recommended for initial appointment, for not complying with such request. It may be that because an additional Judge does not give his consent to be appointed as a permanent Judge in another High Court, he may not be appointed as a permanent Judge in his own High Court and may be discontinued as an additional Judge on the expiration of his term, though this is not, within the intendment of the circular letter and is

clearly impermissible, but in that event it would be his non-appointment as a permanent Judge or discontinuance as an additional Judge which would, if at all, give him a cause of action and not the circular letter asking for such consent.

(Para 44)

Barring perhaps the Association of Bombay Lawyers, all high powered bodies and associations, which have anything to do with judicial system, have consistently over the years taken the view that one third of the number of Judges in each High Court should be from outside the State. The unanimity of view has been so complete and overwhelming that it is impossible to contend that the policy of having one third of the Judges in every High Court from outside the State, which the Law Minister is trying to implement by issuing the circular letter, is ill-conceived or mala fide or subversive of the independence of the judiciary. So long as the policy is evolved by the Government after consultation with the Chief Justice of India and it is not otherwise unconstitutional, the Court cannot pronounce upon the wisdom of the policy or strike it down because it does not appeal to the Court. Here the policy of having one third of the number of Judges in each High Court from outside the State has been adopted after consultation with the Chief Justice of India and, in fact, it has his complete approval and the Law Minister did not therefore act unconstitutionally or illegally in relying upon this policy in the circular letter. (Paras 45, 417, 418)

It is obvious that the President cannot appoint a person to be a Judge of a High Court without first ascertaining his willingness to be appointed as a Judge in that High Court and someone has to make an inquiry in that behalf in order to ascertain his willingness. It is only if the person concerned is willing to be appointed as a Judge in that High Court that the question would arise of processing his name and consulting the three constitutional functionaries in regard to the appointment of such person. This inquiry has to be made before the process of consultation can start and the Law Minister therefore by addressing the circular letter requested the Chief Minister of each State to make this inquiry. It is true that the Law Minister did not state in so many terms in the circular letter that the Chief Minister may make this inquiry through the Chief Justice of the High Court but that was clearly implicit

in the circular letter, because a copy of the circular letter was also sent to the Chief Justice of each High Court with the endorsement "for necessary action" and moreover it must be presumed that the necessary inquiry would be made by the Chief Minister only through the Chief Justice of the High Court.

(Para 47)

To read the word 'obtain' in the circular letter as meaning that the Chief Minister was expected to coerce the additional Judges into giving their consent or as conveying an implied threat to the additional Judges that if they do not give their consent they might be dropped as additional Judges on the expiration of their term, would be nothing short of torturing out of the language used in the circular letter, a meaning which the language does not bear and which could not possibly have been intended by the Law Minister. (Para 48)

Further, in such a process transfer is not involved. The transfer contemplated in Art. 222 cl. (1) is not a mere act of physical locomotion or transfer of residence from one place to another, but it is an act by which a Judge in one High Court is transferred as a Judge of another High Court. Equally there is no transfer involved where an additional Judge is, on the expiration of his term, appointed as an additional Judge in another High Court or is appointed as a permanent Judge in any other High Court. It is no doubt true that by reason of his appointment as an additional Judge or permanent Judge in another High Court, he has physically to go to that High Court, but it is not while being a Judge of one High Court that he goes over as a Judge of the other High Court. His appointment as additional Judge of one High Court comes to an end and he is appointed afresh as an additional or permanent Judge in another High Court. It is by virtue of a fresh appointment that he becomes a Judge, whether additional or permanent, of another High Court and he is not transferred from one High Court to another within the meaning of cl. (1) of Art. 222.

(Para 51)

It is true that the Law Minister used the expressions "transfer" or "transferred" in his speech but it must be remembered that those were happened to be used by the Law Minister in an ex-tempore speech made on the floor of the House and not in a document or letter

prepared after much care and deliberation. No undue reliance can therefore be placed on the use of the expression 'transfer' or 'transferred' in the speech of the Law Minister. (Para 52)

Per S. M. F. Ali, J. (concurring):

The circular of Union Law Minister dated 18-3-1981 does not endanger and erode the independence of judiciary. The circular does not in any way tarnish the image of the Judges or the independence of judiciary. (Paras 415, 429)

The tone and tenor of the Circular does not amount to pressurising the Judges and putting them under coercion to give their consent at the peril of their being dropped at the initial stage. The plea of coercion or undue influence is to be pleaded by the persons on whom undue influence or coercion is used. None of the Judges have either by any statement or affidavit complained that they had given their consent under duress. (Paras 424, 422)

The Circular does not in any way interfere with the supreme authority of the Chief Justice of India in the matter of consultation under Art. 222. (Para 425)

Per Venkataramiah, J. (concurring with Bhagwati, J.)

The letter written by the Law Minister cannot be said to be invalid on the ground that it amounts to a threat to all the additional Judges whose consent for being appointed as permanent Judges in High Courts other than the one in which they were working is sought or on the ground that the recruitment of members of the Bar or of the subordinate judiciary functioning outside the State would be unconstitutional as there would be no possibility of an effective consultation with the Chief Justice of the High Court and the Governor of the concerned State or on the ground that it is an indirect attempt to transfer some additional Judges from one High Court to another or on the further ground that the circular letter having been addressed without the previous consultation of the Chief Justice of India, Art. 217 (1) and Art. 222 of the Constitution had been violated. In this connection, the recommendation in Reports of the Committees of the Law Commission that one-third of the Judges of a High Court should be from outside cannot be excluded from consideration. (Paras 1223, 1224)

The Constitution does not state that the Chief Justice of the High Court and the Governor of the State should personally know the persons recommended under Art. 217 and that they cannot collect information about them by any other source such as the Chief Justice of the High Court having jurisdiction over the area where they are working or the Governor of the other State. In the true nature of things such personal knowledge cannot be insisted upon. If that is insisted upon, the consultation with the Chief Justice of India itself may turn out to be ineffective for the very same reason for he cannot be expected to have personal knowledge about many persons whose names are recommended by the Chief Justices of the various High Courts and Governors. In the context of Art. 217, it must be said that the functionaries who have to express opinion under that Article can ascertain all relevant information about a person proposed for the appointment by any other reasonable means and they need not know them personally. (Para 1223)

Further the letter cannot be treated an indirect attempt to transfer some additional Judges from one High Court to another. It cannot be so for the reason that the transfer of an additional Judge (appointed under Art. 224 (1)) unless the arrears have been cleared off and the transfer of an acting Judge (appointed under Art. 224 (2)) in any event would not be possible at all. An additional Judge is appointed for a term not exceeding two years only with a view to clearing off the arrears in a High Court. If that is the sole object of appointing him, how can he be transferred as an additional Judge in the public interest from that Court to another Court unless the purpose for which he is appointed is achieved namely, clearing off the arrears. Moreover when his stay as an additional Judge is very short it would not subserve the interest of efficiency of public service if he is made to work in more than one High Court during that short period unless there is not sufficient work to be assigned to him in the High Court in which he is initially appointed as an additional Judge. (Para 1224)

Moreover, Art. 217 cannot be said to be violated on the ground that the letter was written without the previous consultation with the Chief Justice of India. The letter as can be seen from its tenor is intended to find out whether any ad-

ditional Judge is willing to be appointed as a Judge in any other High Court. Such appointment has to be made only in accordance with Art. 217 (1) of the Constitution. Before making such appointment, the President has to consult all the functionaries mentioned in Art. 217 (1) including the Chief Justice of India. Art. 222 of the Constitution does not come into picture at all as no transfer is contemplated under the letter. The letter relates to initial appointments only. In the circumstances, there is no error committed by the Law Minister in writing the impugned letter to the Chief Ministers. (Para 1226)

Per R. S. Pathak J. (Minority view)

The circular letter dated Mar. 18, 1981 addressed by the Law Minister to the Chief Ministers of different States and to the Governor of Punjab requesting that the additional Judges working in the High Court of the State should be required to give their consent to be appointed as permanent Judges in another High Court in the country, and they could name three High Courts, in order of preference, where they would prefer such appointment cannot be acted on and any consent given pursuant to the Circular letter is not binding in law on those who have given it.

The circular letter cannot have the effect of binding the additional Judges by their consent and thus by-pass the consultative process which the President is obliged under the Constitution to enter into with the Chief Justice of India. An appointment of a person as a Judge of a High Court must be an appointment to a particular High Court. For the purpose of making such appointment, the constitutional process must be initiated with respect to a particular High Court. The Constitution does not contemplate a single process in relation to several High Courts collecting as many persons as there are vacancies all over India, and then in discretion of the Government appointing such of them where the Government pleases. To adopt this procedure will be to equate the appointment of Judges with the appointment of members of an All India Service, a position which cannot constitutionally be countenanced. There must be a separate and distinct process in regard to appointment to each High Court. The Governor of the particular State and the Chief Justice of the particular High Court have to be involv-

ed in that process, besides the Chief Justice of India. It is in the course of such a process that a proposal for appointment is made to the person intended for appointment. It is only when consent is given to such a proposal, that is to say, consent to appointment in a particular High Court, that it can be said in law to be binding and effective. The Circular letter has invited the consent of the additional Judges in the most general terms to appointment to any High Court other than the High Court in which they are serving as additional Judges. If it is intended to bind the additional Judges, it has failed in its purpose. (Para 925)

Per Tulzapurkar J.—A. C. Gupta J. concurring (Minority View)

The sitting Additional Judge of High Court has an enforceable right to be considered for being continued or made permanent in that very High Court. In substance and reality in extending the term of a sitting Additional Judge of High Court making him permanent in that High Court no 'fresh appointment' is involved, except for the formality of issuing a fresh warrant of appointment and taking a fresh oath. If in the case of such sitting Additional Judge his consent is sought for being 'appointed to' another High Court it is virtually and in substance seeking his consent for his transfer from his own High Court to another High Court falling within the concept of transfer contemplated in Art. 222 (1). (Para 646)

By resorting to transfers of sitting Additional Judge under the garb of making fresh appointments on the expiry of their initial or extended term the circular letter is an attempt to circumvent the safeguard of public interest and the stringent condition of full and effective consultation with the Chief Justice of India which are required to be observed before the power of transfer under Article 222 (1) can be exercised. (Para 646)

The circular letter seeks to effect in substance and reality transfers of sitting Additional Judges from their own High Courts to other High Courts on the expiry of their initial term or extended term and the consent sought from them thereunder is for such transfer and not for their 'fresh appointment' as permanent Judges of other High Courts, and therefore, it violates Article 222 (1). (Para 649)

By procuring the consent of the sitting Additional Judges for their transfers from their own High Court to another before undertaking any consultation with the Chief Justice of India reduces the full and effective consultation contemplated under Art. 222 (1) to a mere formality, for it is obvious that such consultation and the advice which Chief Justice will be tendering following upon such consultation will not be of any use or avail as the consent to such transfer shall have already been procured from the concerned Additional Judges. The consultation and the resultant advice of the Chief Justice will be robbed of its real efficacy in face of such pre-obtained consent. The Circular which has such effect is clearly violative of Art. 222 (1) and in fact it has to be regarded as having been issued mala fide for a collateral purpose namely to by-pass Art. 222 (1) and confront the Chief Justice of India with fait accompli when the proposal to transfer such Additional Judge would be forwarded to him and as such the same is illegal and unconstitutional and deserves to be struck down. (Para 649)

Reading the circular letter as a whole, it clearly exudes an odor of executive dominance and arrogance intended to have coercive effect on the minds of the sitting Additional Judges by implying a threat to them that if they do not furnish their consent to be shifted elsewhere they will not be continued nor made permanent but would be dropped. The Circular letter, therefore, which seeks to obtain the consent of the sitting Additional Judges to their transfers from their own High Court to another High Court induced by threat, coercion or duress clearly amounts to Executive interference with the judiciary and impinges on its independence and as such is illegal, unconstitutional and void and the consent if any either already obtained thereunder or that may be obtained, would be equally void.

(Para 648)

The Circular letter makes invidious discrimination against those sitting Additional Judges who would not be furnishing their consent as they will suffer a disadvantage, while those who would be furnishing their consent will be at an advantage.

Secondly, the Circular letter seems to confer unfettered and unguided power on the Government to indulge in picking

and choosing even within the class of those Additional Judges who shall have furnished their consent in the sense it will be up to the Govt. to select some from that class for being shifted to High Courts other than their own and to retain and appoint others in their own High Courts. It is, therefore, abundantly clear that invidious discrimination is writ large on the face of the Circular letter and the same is clearly violative of Article 14 and as such unconstitutional and liable to be struck down.

(Paras 651, 652, 653)

Article 222 (1) clearly refers to the transfer of a person, who is already a Judge of a High Court. In the case of the proposed appointees who are being initially appointed Judges, either as Additional or Permanent, to some High Court there would be no question of any transfer in their case as contemplated in Art. 222 (1). Therefore it cannot be said that in regard to proposed appointees recommended for their initial appointment the Circular letter seeks to obtain their consent for their transfer. (Para 646)

(D) Evidence Act (1872), Ss. 123 and 162 — Constitution of India, Arts. 19 (1) (a), 74, 217 and 224 — Additional Judge — Appointment for fresh term — Transfer of Judge — Correspondence between Law Minister and Chief Justice of India and High Court Chief Justice — Disclosure — Privilege. AIR 1961 SC 493, Overruled. Per Bhagwati, J. (Majority view — S. M. F. Ali, J. dissenting).

The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Art. 19 (1) (a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.

(Para 66)

There is a heavy burden of proof on any authority which makes the claim for class immunity. The claim for class immunity is an extraordinary claim because it is based not upon the contents of

he document in question but upon its membership of a class whatever be its contents and therefore the Court should be very slow in upholding such a broad claim which is contradictory, if not destructive, of the concept of open Government. Secondly, classes of documents to which the immunity may be accorded are not closed and in the life of a fast changing society rapidly growing and developing under the impact of vast scientific and technological advances new classes or classes of documents may come into existence to which the immunity may have to be granted in public interest, but that should only be as a highly exceptional measure.

In cases where non-appointment of an additional Judge for a further term or transfer of a High Court Judge is challenged the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them, could not be said to be injurious to public interest.

(Para 81)

It is therefore obvious that, in a proceeding where the transfer of a High Court Judge or Chief Justice of a High Court is challenged, no immunity can be claimed in respect of the correspondence exchanged between the Law Minister and the Chief Justice of India and the notings made by them, since, on the balance, the non-disclosure of these documents would cause greater injury to public interest than what may be caused by their disclosure.

(Para 82)

Consequently, the injury which would be caused to the public interest in administration of justice by non-disclosure of the correspondence between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India and the relevant notings made by them in regard to non-appointment of S. N. Kumar and the correspondence between the Law Minister and the Government of India and the relevant notings made by them in regard to transfer of the Chief Justice Patna, far outweighs the injury which may, if at all, be caused to the public interest by their disclosure and hence these documents were liable to be disclosed in response to the demand of the counsel appearing on behalf of petitioners. AIR 1961 SC 493, Overruled.

(Para 85)

There can be no doubt that the advice tendered by the Council of Ministers to the President is protected against judicial scrutiny. But, the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in Cl. (2) of Art. 74. AIR 1961 SC 493, Overruled. AIR 1977 SC 1361, Relied on.

(Para 60)

Per Desai, J.:— (Concurring with Bhagwati, J.). Undoubtedly, S. 123, a century old provision enacted to some extent keeping in view the needs of Empire builders must change in the context of the Republican Government and the open society which we have set up. Undoubtedly there must be such affairs of the State involving security of the nation and foreign affairs where public interest requires that the disclosure should not be ordered. It is, however, equally well recognised that fair administration of justice is itself a matter of vital public interest. Therefore, if the two public interests conflict, the Court will have to decide whether the public interest which formed the foundation for claiming privilege would be jeopardised if disclosure is ordered and on the other hand whether fair administration of justice would suffer by non-disclosure and decide which way the balance tilts. In the ultimate analysis the approach of the Court while deciding the question of privilege would be that it has to balance public interest in just justice and just administration of justice and State affairs at high level in respect of appointment to high constitutional offices and then decide which way the balance tilts. Having formulated this test the answer was that a disclosure in the interest of justice far outweighs the possible embarrassment felt by disclosing certain aspects.

(Para 849)

Per Venkataramiah, J. (concurring with Bhagwati, J.). The expression 'affairs of State' in S. 123 should receive a very narrow meaning. Any claim for interpreting it with a wider connotation may expose S. 123 to be challenged as being unconstitutional.

(Para 1189)

Privilege could be claimed in respect of a document on two alternative grounds viz. (a) that the disclosure of the contents of the document would be injurious to the public interest by endangering national security or diplomatic relations and (b) that the document belonged to a class which should not be disclosed to ensure the proper functioning of public service. (Para 1157)

There is residual power in Court to decide whether the disclosure of a document is in the interest of the public and for that purpose, if necessary, to inspect the document, and that the statement of the head of the department that the disclosure would injure public interest is not final. AIR 1975 SC 865, Rel. on. (Para 1184)

Where the petitioner demanded the production of the records pertaining to the consultations made by the President under Art. 217 for his appointment as High Court Judge and non-disclosure of such documents was likely to result in graver public prejudice than the direction of disclosure and there would be room for many undesirable conjectures and surmises about the entire process of consultation under Art. 217 due to non-disclosure, the Supreme Court ordered the disclosure of such documents as the public interest involved in the administration of justice should prevail over the public interest of the public service in the peculiar circumstances of the case. (Dissenting from Fazal Ali, J.) (Para 1190)

Per S. M. F. Ali, J. (Minority view):— Article 74 (2) of Constitution and Ss. 123 and 124 of Evidence Act are expressed in a negative form which is the clearest possible proof of the fact that the legislature has incorporated a direct prohibition against the use of documents mentioned in the aforesaid provisions. Thus a disclosure can be allowed only in exceptional circumstances where there is no injury to public interest because public interest is always paramount to private interest. In fact, these provisions clearly contain four important attributes of the doctrine of disclosure:— (1) public interest, (2) confidentiality, (3) candour, and (4) expediency. AIR 1961 SC 493; AIR 1964 SC 1658 and AIR 1975 SC 865, Followed. Case law discussed. (Paras 437, 438, 453, 458)

The doctrine of 'candour' or 'confidentiality' propounded by the American

Supreme Court cannot be blindly applied to the provisions of the Indian Constitution which has features of its own substantially different from those of the American Constitution as indicated while dealing with interpretation of Art. 222. The extreme limit to which the U. S. Supreme Court appears to have gone is directly opposed to the scope of Ss. 123 and 124 of the Evidence Act. (Para 479)

On a parity of reasoning it can be safely concluded that the statutory provisions of Ss. 123 and 124 of the Evidence Act as also those of Art. 74 (2) of the Constitution have fully safeguarded high Government and official secrets and disclosure is prohibited in public interest unless the Court is fully satisfied that disclosure will not harm the public interest. Thus the rule of protection against self-incrimination as prevalent in the United Kingdom or U. S. A. has never been accepted in India. (Paras 482, 485)

In fact, the correct legal position seems to be that whereas mere expediency may not be a ground to claim privilege so as to avoid production of a document which, if produced, may defeat the defence, where the documents consist of highly confidential matters in respect of constitutional functionaries like Chief Justices or High Court Judges, the Law Minister, the President of India, C. B. I., I. B. and such other Departments are concerned, the question of public injury, which may be caused, becomes a decisive factor in upholding the plea of privilege. The Court is, however, not powerless to hold its own enquiry in order to test the bona fide of the plea of privilege. One form of such an enquiry may be, as pointed out in the cases referred to above, the inspection of the documents themselves by the Court before disclosure. If after inspection the court finds that the plea of privilege is well grounded and its disclosure will lead to great public injury, it will be justified in upholding the plea of privilege. (Para 488)

(E) Constitution of India, Arts. 224, 222, 217 — Word "consultation" — Meaning of — Must be meaningful, purposeful and result oriented — Non-extension of Shri S. N. Kumar, J. as an Additional Judge of Delhi High Court held valid.

[Note — The majority of Bhagwati, S. M. F. Ali, Desai and Venkataramiah JJ. held that non-extension of the term of

Shri S. N. Kumar, J. as an Additional Judge is valid. Gupta, Tulzapurkar and Pathak JJ. took contrary view—Ed.)

Per Bhagwati, J. (S. M. F. Ali, Desai and Venkataramiah, JJ. concurring.)

Where the name of a person is proposed for appointment as a Judge of the High Court for the first time, he, having no right to be considered for such appointment, is not entitled to insist that the proposal for his appointment, whether initiated by the Chief Justice of the High Court or the State Government or the Chief Justice of India, should be subjected to the process of consultation. But, the position is different in case of an additional Judge, for though an additional Judge has no right, on the expiration of his term, to be appointed an additional Judge for a further term or to be appointed a permanent Judge, he has still a right to be considered for such appointment and the Central Government has to decide whether or not to appoint him after consultation with the three constitutional functionaries mentioned in Art. 217. The consultation contemplated by Art. 217 is full and effective consultation where the relevant facts bearing upon appointment or non-appointment are brought to the notice of the Central Government and the three constitutional functionaries required to be consulted and the opinion of each of the three constitutional functionaries is taken on identical material and then a decision is reached by the Central Government whether or not to appoint the person concerned as a Judge, whether additional or permanent. Now Art. 217 does not require that any particular procedure should be followed for full and effective consultation nor does it insist that the relevant facts on which the final decision of the Central Government is based should be conveyed to the other three constitutional functionaries in any particular manner or by the Central Government itself. What is necessary to ensure full and effective consultation within the meaning of Art. 217 is that the Central Government as well as each of the three constitutional functionaries required to be consulted "must have for its consideration full and identical facts which can at once constitute both the source and foundation of the final decision" and it is immaterial as to how such "full and identical facts" are conveyed by one authority to the other. It is sufficient compliance

with the constitutional requirement of Art. 217 if the self-same facts on which the final decision is taken by the Central Government are placed before each of the three constitutional functionaries required to be consulted and their opinion is taken on the basis of such facts. Whatever be the manner in which these facts are brought to their notice. (Para 86)

It could not be contended that if the additional Judge has the hall-mark of honesty and integrity "he cannot be removed or dropped because unconfirmed reports say that he is lacking in honesty and integrity", for otherwise "the reputation of every Judge would be at the mercy of rumours, gossips and unconfirmed reports". In the first place, it must be remembered that when the Chief Justice of the High Court is called upon to give his opinion in regard to the suitability of an additional Judge for further appointment, he is not required to adjudicate upon various matters bearing upon his suitability and to come to a definitive finding or conclusion in regard to such matters. Where the complaint against an additional Judge is in regard to his integrity, the Chief Justice of the High Court is not expected to hold a judicial or quasi-judicial inquiry for the purpose of adjudicating whether the additional Judge is, in fact, lacking in honesty or integrity. Such an inquiry against a Judge whether additional or permanent would not be permissible except in a proceeding for his removal. What the Chief Justice of the High Court has to do is merely to assess the suitability of the additional Judge for further appointment and where lack of integrity is alleged against him, the assessment can only be on the basis of his reputation for integrity. In the case of a member of the Bar or the senior most District Judge who is for the first time considered for appointment as an additional or permanent Judge, the integrity of the person under consideration would undoubtedly be a relevant factor to be taken into account, but in assessing such factor the Chief Justice of the High Court would not be expected to hold a judicial or quasi-judicial inquiry for the purpose of determining whether the person concerned does, in fact, possess honesty and integrity or is lacking in these qualities.

(Para 89)

It is therefore not enough in order to be able to recommend a person for ap-

imperative duty or obligation cast on the President who initiates the proposal.

(5) The fulfilment by the President of his constitutional obligation and performance of his duty by the Chief Justice of India are parts of the same process and after this process is fully complied with, the consultation becomes full and effective and not formal or unproductive.

(6) That sufficient opportunity should be given to the authorities concerned to express their views so as to tender advice as deliberation is the quintessence of consultation.

(7) After the data, facts or materials are placed before the consultee and the consultant, there should be a full and complete application of minds in respect of the subject to enable them to reach a satisfactory conclusion. In other words, the two minds must be able to confer and produce a mutual impact on the identical facts which would constitute both the source and the foundation of the final decision.

(8) The Chief Justice of India owes a corresponding duty both to the President and to the Judge who is proposed to be transferred to consider every relevant fact before tendering his opinion to the President.

(9) Before giving his opinion the Chief Justice of India must take into consideration all relevant facts and should informally ascertain from the Judge if he has any personal difficulty or any humanitarian ground on which his transfer is proposed to be made and having done so, must forward the same to the President. (These principles were laid down in Sheth's case 'AIR 1977 SC 2328').

(10) Consultation or deliberation is not complete until the parties make their points of view known to the other or others and discuss and examine the relative merit of their views. If one party makes a proposal to the other who has a counter-proposal which is not communicated to the proposer, the direction to give effect to the counter-proposal without anything more will not amount to consultation. (Para 563)

Per Desai, J. (Concurring with Bhagwati, J.):

The word 'consultation' has been used in different contexts and different authorities are required to be consulted for different purposes before exercise of certain power. The scope and content of consultation may vary from situation to

situation. If the consultation is for appointment all those relevant considerations which enter the verdict before an appointment is made would be the subject-matter of consultation. If the consultation is for transfer of a High Court Judge under Art. 222 (2) the word 'consultation' would mean examination of all those relevant aspects including the consequences of transfer. (Para 759)

Under Art. 217 (1), the consultation is for the purpose of appointment of a Judge of High Court. The constitutional functionaries to be consulted are the Chief Justice of the High Court, Governor of the State and Chief Justice of India. The consultation has to be meaningful, purposeful, result oriented and of substance. Wherever the President can exercise power in consultation with the Chief Justice of India or other constitutional functionaries, the consultation has to be on all relevant aspects which would enter the final verdict. All the parties involved in the process of consultation must put all the material at its command relevant to the subject under discussion before all other authorities to be consulted. Nothing can be kept back. Nothing can be withheld. Nothing can be left for the eye of any particular constitutional functionary. In case of transfer, all necessary facts in support of the proposed action of transfer must be communicated to President and all his doubts and queries must be adequately answered by the Government. The President has, however, a right upon consideration of all relevant facts to differ from the other constitutional functionaries for cogent reasons and take a contrary view. (Para 760)

Per A. C. Gupta, J. (Minority view):

The scope of consultation when the appointment of an Additional Judge for another term is contemplated is limited to an enquiry as to the volume of work pending in the High Court and the time likely to be required to dispose of the arrears. As his initial appointment is not on probation, the Judge's capacity and integrity cannot come within the scope of the consultation necessary under Art. 217 (1) for giving him another term on the expiry of his previous term of office. (Para 122)

Per Tulzapurkar J. (Minority view):

Consultation implies a conference of two or more persons or an impact of two or more minds in respect of a topic in

order to enable them to evolve a correct or at least a satisfactory solution and that in order that the two minds may be able to confer and produce a mutual impact it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision. It is equally well settled that consultation or deliberation is not complete or effective before the parties thereto make their respective points of views known to the other or others and discuss and examine the relative merits of their views. (Para 657)

Per Pathak J. (Minority view):

When on the expiry of the term of an additional Judge he is considered for a further term in that office his case attracts the provisions of cl. (1) of Art. 217, and the President must consult the functionaries mentioned in that clause. In the case of the High Court of Delhi, consultation is called for with the Chief Justice of India and the Chief Justice of the High Court only. The consultative process requires that all the material in possession of the Chief Justice of the High Court must be placed before the Chief Justice of India as well as the President. Likewise, all the material in the possession of the Chief Justice of India must be placed before the President and the Chief Justice of the High Court. So also, all the material in the possession of the President must be placed before the Chief Justice of India and the Chief Justice of the High Court. A continuous process of consultation between all three authorities is mandated, resulting ultimately in advice tendered to the President by the Chief Justice of the High Court and the Chief Justice of India.

(Para 890)

Where the extension of tenure to an additional Judge was refused on the ground of his doubtful integrity; but the material which led to doubt on the integrity of the Judge which was within the knowledge of the Chief Justice of the High Court was never communicated to the Chief Justice of India in its true perspective, the process of consultation with the Chief Justice of India could not be said to be full, effective and as per the constitutional requirement mandated by Art. 217 (1). It follows therefore that the question of grant of extension to the additional Judge must be considered and the decision on it taken only

after full and effective consultation as envisaged by the constitutional mandate.

(Paras 894, 895)

(F) Constitution of India, Arts. 217 and 124 — Appointment of Judges — Power vests in Central Government — Appointment must be made after effective consultation as required by Articles — Opinion of Chief Justice of India has no primacy.

(Note — It is unanimously agreed that the opinion of Chief Justice of India is not binding on the President. Bhagwati, S. M. F. Ali, Desai and Venkataramiah JJ. are of the view that the opinion of the Chief Justice of India has no primacy. Gupta, Tulzapurkar and Pathak JJ. held that it deserves primacy though does not operate as veto —Ed.)

Per P. N. Bhagwati J. (S. M. F. Ali J. concurring):

Each of the three constitutional functionaries occupies a high constitutional office and cl. (1) of Art. 217 provides that the appointment of a High Court Judge shall be made after consultation with all the three constitutional functionaries without assigning superiority to the opinion of one over that of another. It is true that the Chief Justice of India is the head of the Indian judiciary and may be figuratively described as paterfamilias of the brotherhood of Judges but the Chief Justice of a High Court is also an equally important constitutional functionary and it is not possible to say that so far as the consultative process is concerned, he is in any way less important than the Chief Justice of India. In fact, under the constitutional scheme, the Chief Justice of a High Court is not subject to the administrative superintendence of the Chief Justice of India nor is under the control or supervision of the Chief Justice of India. (Para 29)

The *raison d'être* of the provision for consultation enacted in cl. (1) of Art. 217 makes it obvious that the opinion given by the Chief Justice of the High Court must have at least equal weight as the opinion of the Chief Justice of India, because ordinarily the Chief Justice of the High Court would be in a better position to know about the competence, character and integrity of the person recommended for appointment as a Judge in the High Court. The opinion of the Governor of the State, which means the State Government would also be entitled to equal weight, not in regard to the technical competence of the person recommended

and his knowledge and perception of law on which the Chief Justice of the High Court would be the proper person to express an opinion, but in regard to the character and integrity of such person, his antecedents and his social philosophy and value-system. So also the opinion of the Chief Justice of India would be valuable because he would not be affected by caste, communal or other parochial considerations and standing outside the turmoil of local passions and prejudices, he would be able to look objectively at the problem of appointment.

(Para 29)

If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But it is only consultation and not concurrence of the Chief Justice of India that is provided in cl. (1) of Art. 217.

(Para 29)

There must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential — it would go a long way towards securing the right kind of Judges, who would be truly independent and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity.

(Para 30)

Per Desai J. (Concurring with Bhagwati, J.):

It cannot be said that the Chief Justice of India when consulted under Art. 217 would have primacy over the view of the Chief Justice of the High Court.

(Paras 719, 720)

Per Venkataramiah J. (Concurring with Bhagwati, J.):

Under Art. 217 (1) the President should while making an appointment of a High Court Judge act on the advice of his Council of Ministers having due regard to the opinions expressed by the functionaries mentioned therein after a full

and effective consultation. There is no scope for holding that either the Council of Ministers cannot advise the President on this matter or that the opinion of the Chief Justice of India is binding on the President although such opinion should be given due respect and regard.

(Para 1015)

From the scheme of the constitutional provisions, it appears that each of the three functionaries mentioned in Art. 217 (1) of the Constitution who have to be consulted before a Judge of a High Court is appointed has a distinct and separate role to play. The position of the Chief Justice of India under Art. 217 (1) is not that of an appellate authority or that of the highest administrative authority having the power to overrule the opinion of any other authority. From the specific roles attributed to each of them which may to some extent be overlapping also, it cannot be said that the Chief Justice of India has been given any position of primacy amongst the three persons who have to be consulted under Art. 217 (1) of the Constitution. There are no express words conveying that meaning. The President has to take into consideration the opinions of all of them only on the sole principle of primacy. He has to take a decision on the question of appointment of Judges of the High Courts on the basis of all relevant materials before him.

(Para 1002)

Further, the thesis that the Constitution prohibits the participation of the Executive in the appointment of Judges of superior courts and that the opinion of the Chief Justice of India alone should be binding on the President in such matters totally fails when the question of appointment of the Chief Justice of India is considered. From cl. (2) of Art. 124, it is obvious that when the appointment is to the post of the Chief Justice of India, it is not obligatory on the part of the President to consult any specified functionary. But he has to consult such of the Judges of the Supreme Court each one of whom may himself be an aspirant to the post and such other Judges of the High Courts he may consider necessary. In this situation, it is quite evident that the opinion of any one of the Judges who may be consulted cannot be treated as binding on the President. The power of appointment rests with the President who has no doubt to take the decision on the advice given by the Council of Ministers

after making the necessary consultation. When the 'primacy of judicial opinion' doctrine thus fails in the case of the appointment of the Chief Justice of India, it would not be appropriate to hold that it prevails in the case of appointments of other Judges of the Supreme Court and the Judges of the High Courts.

(Para 1015)

Per Tulzapurkar, J.

It cannot be said that all the three consulting functionaries under Art. 217 (1) cannot be regarded as of co-ordinate authority for the simple reasons that on aspects like capacity, character, merit, efficiency and fitness which converge on the suitability of the person proposed for appointment the Governor of the State will be least informed and will have nothing to say whereas the Chief Justice of the High Court and Chief Justice of India, being best informed, are well equipped to express their views and tender advice.

(Para 626)

Article 217 (1) does not expressly suggest that any primacy is to be accorded to the views and advice of the Chief Justice of India during the consultative process undertaken in Art. 217 (1) but, the scheme of consultative process contemplated by that Article envisages consideration of identical facts and materials bearing on the suitability of the candidate by both the consulting functionaries, namely, the Chief Justice of the High Court and the Chief Justice of India, as also an exchange of their views on such material, and thereafter placing of the entire material together with one's views thereon and the tendering of the advice or final recommendation by the Chief Justice of India to the President whose decision should be guided by such advice or final recommendation so tendered. Hence clearly by implication primacy is intended to be given to the advice that would be tendered by the Chief Justice of India to the President.

(Para 626)

Giving primacy to the advice of the Chief Justice of India in the matter of appointment of High Court Judges is not to give power to veto any proposal nor would giving such primacy to his advice mean that the Chief Justice of India would be enjoying unfettered arbitrary powers, for, if his advice has proceeded on extraneous or non-germane considera-

tions the same shall be subject to the judicial review.

In construing Art. 217 (1) as envisaging the scheme of the nature indicated above would preserve judicial independence rather than not according primacy to Chief Justice of India's advice and permitting the President to act as an arbiter between the divergent views of the two high constitutional functionaries and leaving him to prefer the views of one to the other.

(Para 626)

Per Pathak, J.

The advice rendered by the Chief Justice of India as to suitability of a person recommended for appointment as a Judge of the High Court does not enjoy mere parity with that of the Chief Justice of the High Court. But this does not mean that the opinion of the Chief Justice of India supersedes that of the Chief Justice of the High Court and can alone be considered. Art. 217 (1) intends that the President should consult both judicial functionaries, besides the Governor. Advice of Chief Justice of India and Chief Justice of High Court is expert advice and as such entitled to greatest weight.

(Paras 880, 882)

(G) Constitution of India, Arts. 224 & 217 — Appointment of Additional Judge — Conditions Precedent — Power of President — When can be exercised.

Fer Bhagwati, J. (S. M. F. Ali, J. concurring):

It must appear to the President that either by reason of temporary increase in the business of the High Court or by reason of accumulation of arrears of work in the High Court, it is necessary to increase the number of the Judges of that Court for the time being. The power to appoint an additional Judge cannot therefore be exercised by the President unless there is either temporary increase in the business of the High Court or there is accumulation of arrears of work in the High Court and even when one of these two conditions exists, it is necessary that the President must be further satisfied that it is necessary to make a temporary increase in the number of Judges of that High Court. The words "for the time being" clearly indicate that the increase in the number of Judges which the President may make by appointing additional Judges would be temporary with a view to dealing with the temporary increase in the business of the High Court or the

arrears of work in the High Court. Article 224 (1) did not contemplate that the increase in the number of Judges should be for an indefinite duration. By reason of the expectation raised in his mind through a practice followed for almost over a quarter of a century, an additional Judge is entitled to be considered for appointment as an additional Judge for a further term on the expiration of his original term and if in the meanwhile, a vacancy in the post of a permanent Judge becomes available to him on the basis of seniority amongst additional Judges, he has a right to be considered for appointment as a permanent Judge in his High Court. (Para 37)

Per Desai, J.

The framers of the Constitution envisaged appointment of an additional Judge in the High Court in contra-distinction to a permanent Judge or acting Judge. A retired Judge of a High Court who is requested to sit and act as a Judge of the High Court is not deemed to be a Judge of the High Court, and can be given no label or nomenclature and is certainly not an additional Judge as contemplated by Art. 224. An additional Judge can only be appointed either by reason of temporary increase in the business of the High Court or by reason of arrears of work therein. If one or the other or both of the pre-requisites of Art. 224 (1) are satisfied the President may proceed to appoint an additional Judge but in the absence of both there is no power in the President to appoint an additional Judge in the High Court. Appointment cannot be made for a period exceeding two years and before or while making the appointment the number of Judges in the High Court may be increased for the time being, that is, not permanently. The expression 'Judge' in Art. 217 includes an additional Judge.

(Paras 722, 723, 737)

Per Tulzapurkar, J.

Unlike a permanent Judge whose tenure is fixed by reference to his age, the tenure of an Additional Judge when appointed under Art. 224 (1) is fixed by the warrant of his appointment and on the expiry of the period mentioned in the warrant he ceases to be a Judge of the High Court. The continuance of sitting Additional Judge for any further term or as a permanent Judge in the vacancy

of a permanent post cannot be thought of unless for continuance as Additional Judge either one or the other or both the pre-conditions mentioned in Art. 224 (1) obtain in that High Court, and for continuance as a permanent Judge the normal business of the High Court justifies the filling up of the vacancy in the permanent post. In other words pendency of work must justify such continuance, temporary increase in the business of the High Court or arrears of work therein or both for extension of his term and normal business (current institutions) for making him permanent. (Para 613)

Per Pathak, J.

Since, the very purpose and *raison d'être* of Art. 224 (1) being the existence of arrears of work and clearance thereof, it stands to reason that sitting Additional Judges who have already been selected and appointed for the very purpose must be considered for continued appointments if the arrears obtain and go on mounting in their High Courts.

(Para 614)

It is only where the disposal of the temporary increase in the business of the High Court or the pending arrears of work is expected to take about two years at the most that a case for appointing Additional Judges arises. These two conditions control the exercise of the power, and if neither is satisfied there can be no case for appointing an Additional Judge. If the increase in the business of High Court or the volume of arrears of work is of a magnitude which cannot ordinarily be disposed of within two years, the business or work is an accretion to the regular business or work of the High Court, calling for an increase in the strength of permanent Judges and not for appointment of Additional Judges. The appointment of Additional Judges for successive periods of two years or more, in such a situation, constitute a violation of the safeguard afforded by the appointment of permanent Judges for the protection of the principle of judicial independence. (Paras 883, 884)

(H) Constitution of India, Art. 224 — Additional Judge — Extension of term — Matters to be considered — Additional Judge cannot be deemed to be permanent Judge.

Per Bhagwati, J.

When the term of an Additional Judge expires he ceases to be a Judge and therefore, if he is to continue as a Judge,

he must be either reappointed as an additional Judge or appointed as a permanent Judge. In either case, Cl. (1) of Article 217 would operate and no reappointment as an Additional Judge or appointment as a permanent Judge can be made without going through the procedure set out in Article 217 (1). Clause (1) of Article 217 provides that "Every Judge" of a High Court shall be appointed after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. The expression "Every Judge" must on a plain natural construction include not only a permanent Judge but also an Additional Judge. Of course, an Additional Judge has a right to be considered for such reappointment or appointment, as the case may be, and the Central Government cannot be heard to say that the Additional Judge need not be considered. The Additional Judge cannot just be dropped without consideration. The name of the Additional Judge would have to go through the procedure of Cl. (1) of Art. 217 and after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, the Central Government would have to decide whether or not to reappoint him as an Additional Judge or to appoint him as a permanent Judge. (Paras 38, 39)

There can be no doubt that an additional Judge is not entitled as a matter of right to be appointed as an Additional Judge for a further term on the expiration of his original term or as a permanent Judge. The only right he has is to be considered for such appointment and this right also belongs to him not because Cl. (1) of Art. 224 confers such right upon him, but because of the peculiar manner in which Cl. (1) of Art. 224 has been operated all these years. (Para 39)

It would not be right to say that merely because the fitness and suitability of the Additional Judge is required to be considered again for the purpose of deciding whether he should be reappointed for a further term or appointed as a permanent Judge, it would amount to treating him as if he were on probation. An Additional Judge is certainly not on probation in the sense that his service cannot be terminated before the expiration of his term, unlike a probationer who can be sent out at any time during the period of probation. It would also not

be open to the Chief Justice of the High Court or the Governor of the State or the Chief Justice of India to sit in judgment over the quality of the work turned out by the Additional Judge during his term, because that would be essentially an appellate function which can be discharged only by the Court entitled to hear appeals from the decisions of the Additional Judge. But every other consideration which bears on the physical, intellectual and moral fitness and suitability of the Additional Judge can and must be considered and if the Central Government finds, after consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India that the Additional Judge is not fit and suitable for being appointed as a Judge, the Central Government may decide not to appoint him as an Additional Judge for a further term or as a Permanent Judge. So long as the case of the Additional Judge is considered by the Central Government for reappointment or appointment as the case may be, the decision of the Central Government cannot be questioned except on the ground that it was reached without full and effective consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India or that it was based on irrelevant considerations. (Para 40)

Further, the term for which an Additional Judge is appointed must not be less than two years, unless the temporary increase in business or the arrears of pending cases are so small that they can reasonably be disposed of within a shorter period, which, of course, today is only an idle dream in most of the High Courts. An Additional Judge cannot be appointed for a period of three months or six months in order to enable the Chief Justice of India or the Central Government to consider whether the Additional Judge should be appointed for a further term or as a permanent Judge. That is a matter on which the Chief Justice of India must come to his opinion well in time and the Government of India must also reach its decision sufficiently in advance so that the Additional Judge would know quite sometime before his term is due to expire whether he is going to be appointed for a further term or is going to be discontinued. There is no power in the Central Government to appoint an Additional Judge for a short term in order to enable either the

Chief Justice of India or the Central Government to make enquiries with a view to satisfying itself whether the Additional Judge is fit and suitable for being appointed as an Additional Judge or as a Permanent Judge. In the instant case the Chief Justice of India acted under a misconception of the true constitutional position when he recommended the appointment of Additional Judges for a period of six months and the Central Government was also in error in appointing them only for a period of three months. (Para 43)

Per S. M. F. Ali, J.

Art. 224 contemplates only a tenure appointment to meet a particular contingency and is not meant to be a permanent feature so as to form a training base for recruiting Judges from the training base to the permanent cadre. On this point, counsel on behalf of Law Minister made statement that it has now been decided as a matter of policy by the Government not to appoint Additional Judges for a period of less than one year in special cases and two years normally. If this is done in future, then the spirit of the Constitution would be amply fulfilled and the controversy would be set at rest.

(Para 526)

The nature of the appointment under Art. 224 is a pure tenure appointment for a fixed period and once the period expires, there is no question of extension of that period or reappointment. In other words, once the time for which a Judge has been appointed expires, the appointment of the Judge ceases to exist. That being so, whenever a Judge is sought to be appointed afresh, the constitutional functionary will have to go back to Article 217 even if a Judge is to be appointed under Art. 224 and the question of suitability would be the first criterion. It is a different matter that if an Additional Judge is considered for a permanent appointment afresh, the fact that he has acquired some experience would undoubtedly be an important factor to be taken into consideration while judging the suitability of the candidate concerned.

(Para 527)

Thus, the position is that even if an Additional Judge is not appointed afresh and somebody else is appointed, there is no question of judicial review nor is there any question of the non-appointment of an Additional Judge afresh cast-

ing any reflection or aspersion on the reputation or character of an Additional Judge because he was appointed only for a particular period and for a particular purpose and is not on probation.

(Para 528)

If the Additional Judge with the knowledge of the specified period of tenure enters upon his office, makes and subscribes to the oath and starts functioning as a Judge of the High Court, undoubtedly when the period expires, if nothing else takes place he ceases to be a Judge of the High Court. Assuming that he has to be appointed again, the whole gamut of consultation as constitutionally ordained in Art. 217 has to be gone through over again. Harsh though this may appear, it is an inescapable situation flowing from the provisions of the Constitution. Now if the process of consultation starts over again undoubtedly the various constitutional functionaries are bound to express their opinion on the relevant merits and demerits of the Judge and the expression of opinion would be more or less on the same lines as when a person is being appointed for the first time as a Judge of the High Court. Whatever canon of construction one may resort to, it is not possible to hold that the consultation in respect of an Additional Judge who has been once appointed and whose tenure has expired and being eligible, is being considered for appointment afresh for a fresh tenure, the relevant consideration which would govern the decision for appointment would be different, save and except saying that the constitutional functionaries will have the additional benefit of the experience of the person concerned as a Judge of the High Court for the period he was appointed and he worked. Once the consultation starts, all possible hazards in the process of consultation cannot be wished away and the appointment has to be afresh.

(Paras 729, 738)

Secondly, since the insertion of Article 224 (1) in the Constitution it has been the invariable practice to appoint every Judge (whether from the Bar or Services) initially as an Additional Judge for two years and then to make him permanent in due course, i. e. as and when a permanent vacancy arises in that High Court. Such a practice, though contrary to the clear intendment of the Arts. 216 and 224 (1), followed by the President or the

Union Government has given rise to a legitimate expectancy on the part of the sitting Additional Judges (whether from the Bar or Services) to be considered for their continuance either for an extended term or for making them permanent on vacancies arising in permanent posts. After following such practice over the years and thus putting all the Additional Judges into the belief that they will be confirmed in normal course it does not behove the appointing authority to say that the sitting Additional Judges have no right to be considered for their continuance either for an extended term or for making them permanent. (Para 615)

Thirdly, so far as the sitting Additional Judges recruited under Art. 224 (1) from the Members of the Bar are concerned, they have such legitimate expectancy and the right to be considered for continuance for two additional reasons, namely, (a) a well established constitutional convention or practice has grown over the years since after the insertion of the provision in the matter of appointment of such Additional Judges and confirming them as permanent Judges and (b) the undertaking taken from them at the time of their initial appointment that "if and when a permanent Judgeship of that Court is offered to them they will accept it and not decline the same". Since, the genesis of the aforesaid convention or practice as well as the undertaking is nothing but public interest in the sense that public interest is served: (a) by not permitting them to revert to the Bar on expiry of their term, and (b) by not losing or frittering away the experience or expertise gained by them in administering justice during their initial term, it is these very aspects of public interest form the compelling reasons to consider their cases for their continuance either by extending their term or making them permanent in preference to outsiders or freshers. These two aspects of public interest giving rise to the convention or practice and the undertaking are not merely factors to be taken into account while deciding upon their continuance, but along with the disability emanating from the undertaking these aspects confer upon them a legitimate expectancy and the enforceable right not to be dropped illegally or at the whim or caprice of the appointment authority but to be considered for such continuance in that High Court.

(Paras 616, 617)

An additional Judge has a right to be considered for appointment as a permanent Judge or to be considered for further appointment as Additional Judge.

(Para 867)

The Additional Judges are persons having the same high order of character integrity and legal ability as is required in the case of permanent Judge. The standards for making appointment as Additional Judge or as permanent Judge are not different. Furthermore Additional Judges accept office as permanent Judges in accordance with that practice. The requirement of an undertaking that he would not refuse an offer of appointment as Permanent Judge further demonstrates how the appointment of Additional Judges is regarded by the President. As such the case of an Additional Judge must be distinguished from the case of a person considered for direct appointment as Permanent Judge.

(Para 887)

Per Venkataramiah, J.

On a fair construction of Art. 224 (1) of the Constitution which enables the President to appoint an Additional Judge for a period not exceeding two years and of Art. 217 (1) which limits the tenure of an additional Judge appointed to the period specified under Art. 224 (1), a declaration cannot be made that an Additional Judge should be deemed to have been appointed as a Permanent Judge on the ground that when his appointment was made under Art. 224 (1) it was necessary for the President to appoint a permanent Judge in view of the quantum of work pending in the High Court concerned and not an Additional Judge. The warrant of appointment has to be construed in accordance with the unequivocal language in which it is couched and nothing more can be read into it.

(Para 1057)

Further, the declaration in question cannot be made on the basis of British Constitutional convention regarding the tenure of Judges adopted since the Act of Settlement (Act of 1700) or on the basis of absorption of almost all additional Judges as permanent Judges. The Courts are not concerned with the 'constitutional practices' which are outside the Constitution. As such no declaration can be made on the basis of any constitutional convention not found in the Constitution that an Additional Judge

who was appointed after following the same procedure prescribed for appointment of a permanent Judge should be deemed to have been appointed as a permanent Judge because the circumstances warranted the appointment of a permanent Judge at the time of his appointment, contrary to the express and unequivocal language of the warrant of his appointment. (Para 1061)

(I) Constitution of India, Arts. 216, 32, 74 and 226 — Constitution of High Courts — Strength of Judges — Fixation of — Executive function — Writ of mandamus cannot be issued against Union of India for fixing strength of Judges in each High Court — Advice under Art. 74 in matter of appointment of Judges is binding on President.

Per Bhagwati, J.

The fixation of the strength of Judges in each High Court is a purely executive function which is entrusted by Art. 216 to the President, that is, the Government of India and it is entirely for the Government of India to decide in the exercise of its judgment as to what shall be the strength of Judges in each High Court. How many Judges are necessary to be appointed in a particular High Court is left to the discretion of the Government of India and there are no judicially manageable standards for the purpose of controlling or guiding the discretion of the Union of India in that respect. It is not possible for the Supreme Court to lay down any standards or norms on the basis of which it can require the Union of India to appoint a certain number of Judges in a particular High Court. The fixation of the number of Judges necessary to be appointed in a particular High Court does not depend upon the application of a mathematical formula dividing the number of pending cases by the average rate of disposal per Judge per year. It is singularly complex problem and merely increasing the number of Judges in a High Court would not necessarily solve the problem of disposal of pending cases. Some times when the number of Judges in a High Court is increased, the law of diminishing returns begins to operate and the disposals of cases do not increase commensurately with the addition to the number of Judges. Some times it is difficult to recruit competent Judges and no useful purpose is served by appointing mediocre Judges who ultimately would not be able to

make any impact so far as the arrears of pending cases are concerned and who would dilute the quality of justice administered in the High Court.

(Para 27)

Therefore, if the Government of India does not appoint sufficient number of Judges, the appeal must be to the legislature and not to the Court. All that the Court can do is to express the hope that the Government of India will periodically review the strength of Judges in each High Court and appoint as many Judges as are found necessary for the purpose of disposing of arrears of pending cases. (Para 27)

Per S. M. F. Ali, J.

Under Indian Constitution for all practical intents and purposes the executive power vests in the Council of Ministers only and the President is bound to accept the advice of the Council of Ministers. Under Indian Constitution the executive power does not vest absolutely in the President as in the case of America where the President has not vast powers and is assisted by his Advisers who are called Secretaries. (Paras 321, 322)

Per Tulzapurkar, J.

Appointment of Judges to a High Court either as permanent Judges or Additional Judges is purely an executive function entrusted by the Constitution to the appointing authority and the Court cannot usurp that function to itself and cannot grant relief by way of declaring a sitting Additional Judge to be deemed to have become permanent or by directing the President to make him permanent.

(Para 631)

When the President has appointed a duly qualified person as an Additional Judge for two years it cannot be said that the President should be deemed to have appointed such person as the permanent Judge under Art. 216. (Para 631)

Article 216 unquestionably casts a mandatory obligation on the President (appointing authority) to provide adequate strength of permanent Judges in every High Court to cope with and dispose of its normal business and further to review periodically such permanent strength. The word "shall" and the further words "such other Judges as the President may from time to time deem it necessary to appoint" occurring in the Article are a clear pointer in that direction, Art. 224 (1)

confers power on the President to appoint Additional Judges only to meet the situation arising from (a) temporary increase in the business of the High Court, or (b) arrears of work therein. Hence if the increase in the work or business of the High Court is not of a temporary character but a permanent increase every year resort will have to be made to Art. 216 and not to Art. 224 (1). Ordinarily, it will not be proper to appoint an Additional Judge in a High Court while keeping a permanent post vacant or unfilled. (Para 631)

Per Desai J.

In the democracies the world over till today there are two known methods of selection, appointment and election. Under the Constitution of India the power to appoint Judges vests in the executive. The methodology adopted by various democratic countries in the matter of appointment of Judges reveals that the power to appoint Judges where election method is eschewed is always vested in the executive and that it has not been found to be subversive of independence of judiciary. In the 80th Report of the Law Commission of India, it has been frankly admitted that most of the High Courts to which a reference was made by the Law Commission about the existing system of appointment of Judges, have in their replies to the questionnaire, expressed the view that the existing system is by and large sound. Therefore, it is not possible to accept a sweeping statement that the vesting of the power of appointment in the executive is subversive of independence of judiciary. (Para 706)

The Constituent Assembly in terms rejected any veto to be vested in the Chief Justice of India in the matter of appointment of a High Court Judge. And it is too late in the day to contend that debates in Constituent Assembly do not provide an aid to construction of articles of Constitution or it is impermissible to refer to them. AIR 1973 SC 2555 and AIR 1972 SC 1061 and (1971) 3 WLR 133, Rel. on. (Paras 708, 716)

The President is a constitutional or formal head and he must exercise his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. The power to appoint Judges conferred on the President is an executive power, and in the absence of a provision in the

Constitution which permits the President to act in his discretion, bereft of the advice of the Council of Ministers, it is not possible to hold that in the matter of appointment of Judges of High Court and Supreme Court, the advice offered under Art. 74 is not binding on the President. Where the President is not expected to act on the advice of the Council of Ministers a clear indication is given in the Constitution. It cannot be said that while exercising the power of appointment of Judges of the Supreme Court and High Courts, the President is either performing a judicial or quasi-judicial function. It is admittedly an executive function and howsoever one may like to wish away the interference of the Council of Ministers in the matter of appointment of Judges of High Courts and Supreme Court, the framers of the Constitution after having examined various aspects of the matter conferred power on the President rejecting simultaneously the veto of Chief Justice of India. Once this function is held to be an executive function, Art. 74 would come into operation with all its rigours and the President will have to act on the advice of Council of Ministers. (Paras 709, 713)

Once someone is appointed as a Judge of the High Court under Art. 217, he is to be suffered even though his continuance may not be conducive to the fair administration of justice. Extreme care was, therefore, focussed on the question of initial appointment, probably in order to see that error of judgment of one or the other constitutional functionary may not go unnoticed. Actuated with a burning desire that the best one is selected for appointment, while vesting the power in the highest executive of the country three high constitutional functionaries were involved in the decision making process. The State executive, therefore, must participate as intended by the Constitution in this process and its role cannot be minimised by the specious plea that it might erode independence of judiciary. (Para 714)

Per Pathak, J.

Where Additional Judges are appointed even though appointment of permanent Judges is justified on ground that work pending in High Court is not disposable in 2 years, no direction to President for appointing such Additional Judges as permanent Judges could be issued as Court could not by judicial verdict decide the number of Judges of

High Court deciding number of Judges is the duty of the President.

(Para 886)

Per Venkataramiah, J.

Lawyers are entitled to approach the Court by writ petition to direct the Government to appoint sufficient number of permanent Judges and to appoint sufficient number of additional Judges for the maximum period of two years having regard to the arrears and the business of the Court. They may also legitimately agitate that additional Judges should not be appointed when permanent vacancies have remained unfilled for no good reason. Such writ petition cannot be said to be not maintainable on the ground that the questions involved in the petition are non-justiciable on the ground they are political in character.

(Paras 973, 975, 974)

The lawyers cannot be said to be having no 'standing' to file the petitions. It is no doubt true that the power to fix the number of permanent Judges to be appointed in each High Court is within the discretion of the President. But that power is coupled with a duty which the President owes to the public in general and to the lawyers and litigants in particular. If at any given point of time it is found that the number of Judges in a High Court is absolutely inadequate to meet its requirements, the members of the Bar who are vitally interested in the administration of justice can file a petition before the High Court to compel the Government to review the strength of the permanent Judges of that Court and to appoint adequate number of Judges. The members of the Bar are not called officers of Courts only to impose obligations on them. They have certain rights too. The power under Art. 216 is an administrative power which can be regulated in an appropriate way by the Courts like any other administrative power. It is not a matter of policy simpliciter. The question of appointment of sufficient number of additional Judges under Art. 224 (1) of the Constitution for the required period having regard to the arrears or the quantum of business in a High Court can also be agitated by lawyers and litigants.

(Para 969)

The power conferred on the President by Art. 216 to appoint sufficient number of Judges is a power coupled with a duty and is not merely a political function. The Government was directed to review

the strength of permanent Judges in every High Court, to fix the number of permanent Judges that should be appointed in that High Court on the basis of the workload and to fill up the vacancies by appointing permanent Judges.

(Paras 1251, 1254)

(J) Constitution of India, Arts. 224, 226 — Additional Judge — Non-extension of his term — No necessity to give him opportunity of hearing.

Per Bhagwati, J.

It is wholly incorrect to say that when an additional Judge whose term has expired and who would therefore have to return to the Bar or to the subordinate judicial service, is not appointed a permanent Judge or an additional Judge for a further term, he is removed by the Central Government. If he is not appointed a permanent Judge or an additional Judge for a further term, he goes out, but that happens because the term for which he was originally appointed has come to an end and not because he is removed. There is therefore no question of giving him an opportunity to be heard before the decision is taken not to appoint him as a permanent Judge or an additional Judge.

(Paras 89, 103)

Per Tulzapurkar, J.

The procedure to be followed at the time of undertaking consultative process must ensure fair play qua the concerned sitting Additional Judge. In other words, though the principle of natural justice in its full vigour is not contemplated, the sitting Additional Judge should not receive a raw deal at the hands of the consulting functionaries and either one or the other or if necessary both should hear him, especially if any adverse material is weighing in their minds against him.

(Para 627)

Per Pathak, J.

The consideration of a person serving as additional Judge for appointment to the office of permanent Judge envisages a fresh application of the process envisaged under Cl. (1) of Art. 217 in respect of all the matters to which consideration has already been given at the time of his appointment as additional Judge. The additional Judges are not Judges on probation for the purpose of appointment as permanent Judges, and as such no account can be taken of the merits of judgments, decrees and orders rendered by him or

administrative orders or directions made in the bona fide exercise of his judicial functions as an additional Judge. While appointing an additional Judge as a permanent Judge of High Court there will be a varied approach in the considerations of matters envisaged in Art. 217 (1). The difference lies in the reduced emphasis with which the considerations are exercised. The presumption will be that a person found suitable for appointment as an additional Judge continues to be suitable for appointment as a permanent Judge. Before it can be said that such a person has forfeited the badge of suitability for appointment as a permanent Judge there must be material which sufficiently convinces the reasonable mind that the person is no longer suitable to fill the high office of a Judge. Additional Judges are persons who have a right to be considered for appointment. It is a right to be considered fairly but that does not entitle the additional Judges as of right to be heard in regard to material discovered against him. For the purpose of discharging responsibilities involved in the process of consultation the Chief Justice of the High Court and the Chief Justice of India may find it desirable in their discretion to ascertain from the additional Judge whether there is any substance in what has been conveyed to them. But by that the two judicial functionaries will not be conceding a right of hearing to such a person.

(Paras 888, 889)

Per Venkataramiah, J.

Having regard to the high office to which appointment has to be made under Art. 217 (1) and to the association of the high dignitaries who have to be consulted before any such appointment is made the application of principles of natural justice as of right is ruled out and non-compliance with such principles would not vitiate the decision. But it may still be shown on the available material that there was no cogent reason for the decision.

(Para 1070)

Per Gupta, J.

Where the tenure of Additional Judge of the High Court was not extended after expiry of his initial term of office on allegation of corruption against him although the volume of work pending in the High Court required the services of another Judge, the decision not to extend his term of office could be said to be in-

valid when the allegation of corruption against him were not disclosed to him and he was not given an opportunity to explain the charge against him. Assuming again that the Additional Judge had no legal right to have his term extended, he had at least a legitimate expectation that his tenure as an Additional Judge would continue following the usual practice, and in view of the arrears of work in the High Court. Consistent with the principles of natural justice the Additional Judge who had undoubtedly suffered an injury by his term of office not being extended should have been given an opportunity to explain the charge of corruption against him. The principles of natural justice apply even to a person who has no legal right. (1967) 2 QB 617, Rel. on.

(Para 133)

(K) Constitution of India, Arts. 224 & 217 — Additional Judge — Right to be considered for fresh appointment — Short-term extensions — Propriety — Denial to grant extension — Justiciability.

Per Bhagwati, J.

By reason of the expectation raised in his mind through a practice followed for almost over a quarter of a century, an additional Judge is entitled to be considered for appointment as an additional Judge for a further term on the expiration of his original term and if in the meanwhile, a vacancy in the post of a permanent Judge becomes available to him on the basis of seniority amongst additional Judges, he has a right to be considered for appointment as a permanent Judge in his High Court.

(Para 37)

When the term of an additional Judge expires he ceases to be a Judge and therefore, if he is to continue as a Judge, he must be either reappointed as an additional Judge or appointed as a permanent Judge. In either case, Cl. (1) of Art. 217 would operate and no reappointment as an Additional Judge or appointment as a permanent Judge can be made without going through the procedure set out in Art. 217-cl. (1). Cl. (1) of Art. 217 provides that "Every Judge" of a High Court shall be appointed after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. The expression "Every Judge" must on a plain natural construction include not only a permanent Judge but also an additional Judge. Of course, an additional Judge has a right

to be considered for such reappointment or appointment, as the case may be, and the Central Government cannot be heard to say that the additional Judge need not be considered. The additional Judge cannot just be dropped without consideration. The name of the additional Judge would have to go through the procedure of cl. (1) of Art. 217 and after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, the Central Government would have to decide whether or not to reappoint him as an additional Judge or to appoint him as a permanent Judge. (Paras 38, 39)

There can be no doubt that an additional Judge is not entitled as a matter of right to be appointed as an additional Judge for a further term on the expiration of his original term or as a permanent Judge. The only right he has is to be considered for such appointment and this right also belongs to him not because cl. (1) of Art. 224 confers such right upon him, but because of the peculiar manner in which cl. (1) of Art. 224 has been operated all these years. (Para 39)

It would not be right to say that merely because the fitness and suitability of the additional Judge is required to be considered again for the purpose of deciding whether he should be reappointed for a further term or appointed as a permanent Judge, it would amount to treating him as if he were on probation. An additional Judge is certainly not on probation in the sense that his service cannot be terminated before the expiration of his term, unlike a probationer who can be sent out at any time during the period of probation. It would also not be open to the Chief Justice of the High Court or the Governor of the State or the Chief Justice of India to sit in judgment over the quality of the work turned out by the Additional Judge during his term, because that would be essentially an appellate function which can be discharged only by the Court entitled to hear appeals from the decisions of the additional Judge. But every other consideration which bears on the physical, intellectual and moral fitness and suitability of the additional Judge can and must be considered and if the Central Government finds, after consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India that the

additional Judge is not fit and suitable for being appointed as a Judge, the Central Government may decide not to appoint him as an additional Judge for a further term or as a permanent Judge. So long as the case of the additional Judge is considered by the Central Government for reappointment or appointment as the case may be, the decision of the Central Government cannot be questioned except on the ground that it was reached without full and effective consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India or that it was based on irrelevant considerations. (Para 40)

Further, the term for which an Additional Judge is appointed must not be less than two years, unless the temporary increase in business or the arrears of pending cases are so small that they can reasonably be disposed of within a shorter period, which, of course, today is only an idle dream in most of the High Courts. An additional Judge cannot be appointed for a period of three months or six months in order to enable the Chief Justice of India or the Central Government to consider whether the Additional Judge should be appointed for a further term or as a permanent Judge. That is a matter on which the Chief Justice of India must come to his opinion well in time and the Government of India must also reach its decision sufficiently in advance so that the Additional Judge would know quite sometime before his term is due to expire whether he is going to be appointed for a further term or is going to be discontinued. There is no power in the Central Government to appoint an additional Judge for a short term in order to enable either the Chief Justice of India or the Central Government to make enquiries with a view to satisfying itself whether the Additional Judge is fit and suitable for being appointed as an additional Judge or as a permanent Judge. In the instant case the Chief Justice of India acted under a misconception of the true constitutional position when he recommended the appointment of additional Judges for a period of six months and the Central Govt. was also in error in appointing them only for a period of three months. (Para 43)

Per A. C. Gupta, J.

When the question before the concerned authorities is whether the term of an

Additional Judge should be extended and the volume of work pending in the High Court requires the services of another Judge, extension cannot be refused on the basis of unconfirmed reports regarding charges of corruption against the Additional Judge. It cannot be said that Article 224 only fixes an outer limit of time, and the President is therefore free to appoint Additional Judges for varying periods of time not exceeding 2 years — for three months or six months — as he pleases without reference to the volume of work pending in the High Court. Such a claim is untenable on the language of Art. 224 and militates against the conception of independence of the judiciary. (Para 132)

Per Tulzapurkar, J.

Since, the sitting Additional Judges have an enforceable right to be considered for their continuance, it follows that the eventual non-continuance, if any, can become a justiciable issue open to judicial review, if such non-continuance is based on extraneous or non-germane considerations or is mala fide in law or in fact, and in that sense it will not be a case of non-appointment as is the case qua the proposed appointees at the stage of their initial recruitment. (Para 621)

While considering the question of continuance of the sitting Additional Judges on the expiry of their initial term either as Additional Judges or as Permanent Judges the test of suitability contemplated within the consultative process under Art. 217 (1) should not be invoked at all. The consultative process should be confined only to see whether the pre-conditions mentioned in Art. 224 (1) exist or not or whether pendency of work justifies their confirmation or not.

(Paras 622, 623)

Assuming that the suitability test is required to be passed by the sitting Additional Judges over again at the time of deciding upon their continuance either as Additional Judges or as Permanent Judges. The consultative process even on this occasion must be full, complete and effective. (Para 627)

The security of tenure ensures judicial independence and tenures for short-terms like three months, six months or nine months bring in insecurity directly impinging on judicial independence and also tend to shake the faith of the community

in the administration of justice and, therefore, grant of short-term extensions to sitting Additional Judges of High Court would be unconstitutional. The practice of granting short-term extensions for periods like three months, six months or nine months 'pending inquiry into the complaints' said to have been received against a sitting Additional Judge, is clearly outside the contemplation of the Constitution for no machinery having legal sanction behind it has been provided for either in the Constitution or any other law authorising such inquiry or investigation into the complaints against sitting Additional Judge and hence, such practice must be deprecated and regarded as unconstitutional. In any case no extension for less than a year should ever be granted to sitting Additional Judges of High Court, irrespective of whether volume of work justifies it or not simply with a view to give the Judge concerned fixity of tenure for that period.

(Para 628)

The phrase "for such period not exceeding two years as he may specify" in Article 224 (1) cannot be construed literally, so as to claim that the phrase only fixes the maximum period of two years at a time. Such a literal construction of the phrase is not possible because no provision of the Constitution can be interpreted in a manner which will be in conflict with any of the basic features of the Constitution and the cardinal principle of independence of Judiciary is one such basic feature. (Para 628)

It is impossible to construe Art. 224 (1) as conferring upon the appointing authority absolute power and complete discretion in the matter of appointment of additional Judges to a High Court.

(Para 618)

It is true that no constitutional convention or practice can affect, alter or control the operation of any Article if its meaning is quite plain and clear but here Article 224 (1) merely provides for situations when Additional Judges from duly qualified persons could be appointed to a High Court and at the highest reading the Article with S. 14 of the General Clauses Act it can be said that the power conferred by the Article may be exercised from time to time as occasion requires but on the question as to whether when the occasion arises to make appointment on ex-

piry of the term of a sitting Additional Judge whether he should be continued or a fresher or outsider could be appointed by ignoring the erstwhile incumbent even when arrears continue to obtain in that High Court the Article is silent and not at all clear and hence it will be proper to invoke in such a situation the other well settled principle that in construing a constitutional provision the implications which arise from the structure of the Constitution itself or from its scheme may legitimately be made and looking at Art. 224 (1) from this angle a wholesome constitutional convention or practice that has grown because of such implications will have to be borne in mind especially when it serves to safeguard one of the basic features which is the cardinal faith underlying our Constitution, namely, independence of the judiciary. In other words a limitation on the otherwise absolute power and discretion contained in Art. 224 (1) is required to be read into because of the clear implication arising from the said cardinal faith which forms a fundamental pillar supporting the basic structure of the Constitution, as otherwise the exercise of the power in the absolute manner as suggested will be destructive of the same. (Para 618)

Per Desai, J.

Denial of extension of tenure of Addl. Judge without completing process of consultation in letter and spirit — Can be challenged in Court. (Para 765)

Article 224 was not meant to provide an entry door for becoming a Judge of a High Court under Art. 217. Art. 224 was for a specific and specified purpose. Art. 224 is meant to confer power on the President to increase for the time being the number of Judges in a High Court and to appoint additional Judges to fill in the increased strength. This power can be exercised if one or the other of two pre-requisites set out in Art. 224 is satisfied. The article was worked as if an entry in the High Court for a permanent judgeship is via Art. 224, namely, by first being appointed as an additional Judge and then when a vacancy occurs in the permanent strength of the High Court, to be appointed as a permanent Judge. Every one was ordinarily first appointed as an additional Judge and in course of time even after once, twice or thrice being ap-

pointed as an additional Judge till the vacancy occurred in the permanent strength that one became a permanent Judge. This is clearly contrary to the intentment of Art. 224. If an additional Judge was appointed to deal with temporary increase in work and his term is renewed twice or thrice and the temporary increase has become a permanent feature of the High Court, what was needed was increase in the permanent strength of the High Court. It is unbecoming for a High Court Judge to be on two years tenure repeatedly. That is clearly contrary to what was intended by Art. 224. Save in rare exceptional cases an additional Judge on the occurring of a vacancy in the permanent strength was always offered a berth. From this invariable practice, a firm belief, therefore, developed that an additional Judge enters upon office with almost an unwritten albeit incontrovertible assurance to be appointed a permanent Judge. Howsoever strong the belief may be, it is not borne out by the constitutional provision. After all, the appointment was as an additional judge within the constraints and limitation of Art. 224 and no canon of construction would permit the Court to treat the appointment as one under Article 217. If, therefore, the tenure was of two years, on the expiry of it the appointment will have to be a fresh appointment and for making such a fresh appointment, consultation as ordained by Art. 217 is inescapable. (Para 738)

It is true that a practice has grown up for over last quarter of a century (1956-81) that whenever an additional judgeship is offered to a person, he accepts it in the reasonable belief that in course of time he would get a berth as a permanent judge. It may generate hope in him and his expectations could be said to be well-founded and reasonable more so it is, save in rarest of rare cases, invariably done so far. At the minimal most he is entitled to be first considered for a fresh tenure of two years or when the permanent vacancy arises for appointment to that permanent vacancy before any rank outsider is considered given the situation that the pre-requisites which necessitated his initial appointment continue to exist. There is no gainsaying the fact that a practice was followed for over 25 years that an Additional Judge was always first considered and he was entitled to be con-

sidered for a fresh tenure if there was no permanent vacancy and if there was a vacancy in the permanent strength, for being appointed as a permanent Judge. It cannot be said that he has no priority, preference, weightage or right to be considered and that he is on par with any other man who can be brought from the market, an additional Judge who has worked for the period of his tenure has a weightage in his favour compared to a fresh appointee and any process of appointment while filling in a vacancy must commence with the additional Judge whose tenure has come to an end and has led to the vacancy. (Paras 751, 752)

Article 224 provides for a tenure not exceeding two years. It may be that the problem of temporary increase in work may not be wholly solved within the period of two years but the reasonable expectation was that a period of two years would provide adequate length of time to the additional Judge to deal with the problem for tackling which he is appointed. In view of this underlying assumption in enacting Art. 224, the appointment of short-term duration of six months or in the two cases before us, of three months, is inconsistent with the intendment of Art. 224 and unbecoming of the dignity of a High Court Judge. (Para 756)

Extension of tenure of Addl. Judge by 3 months or 6 months in order to gain time to make inquiries in respect of complaints against the concerned Addl. Judge is utterly impermissible and wholly inconsistent and contrary to the intendment of Art. 224 and unbecoming of the dignity of High Court Judge. (Para 756)

If on objective consideration it appears that the situation is not likely to improve even within a period of two years, normally the fresh tenure should be of two years unless a contrary legitimate decision verifiable on objective facts is reached that the problem can be resolved within a short period which should in no case be less than one year. One cannot appoint the lowest grade servants on such a short term duration of six months or three months. It violently hurts the dignity of a Judge of a High Court to be appointed for a period of six months or three months and that during this period he is not supposed to clear the arrears to deal with which he was appointed but during the period of three months either the execu-

tive or the Chief Justice of India will be holding their inquiries to consider his future suitability, a decision which these two high constitutional functionaries could not reach within a period of two years for which initially the additional Judge was appointed. The fresh tenure must be for two years subject to the overriding consideration that if an honest and legitimate opinion can be formed by all the constitutional functionaries that the temporary increase in the High Court or the arrears to tackle which the additional Judge was appointed could be resolved to the satisfaction of all within a period of say one year, the duration can be of one year but not less than that in any case. Moreover, even if the additional Judge is appointed, say for a period of one year, and a vacancy occurs within three months of his appointment, there is no bar in law in offering him the permanent appointment and if the workload still justifies, to appoint someone else as an additional Judge. (Para 758)

Per Pathak, J.

Although Art. 224 cl. (1) prescribes 2 years as the maximum period for which an additional Judge can be appointed. That does not mean that in every case the appointment must be for two years. The appointment of an additional Judge may be for a period less than two years. The period for which an additional Judge is to be appointed is to be determined with reference to the time estimated for disposing of the temporary increase in the business or the pending arrears of work which occasioned the appointment. The period of appointment cannot be fixed on the basis of any other factor. (Para 884)

Per Venkataramiah, J.

Since invariably an additional Judge has been appointed as a permanent Judge in due course except in some rare cases, every member who is appointed as an additional Judge and who has not completed the age of retirement expects that he will be made permanent as and when a vacancy arises in the permanent strength and will be continued as an additional Judge by fresh appointments until such vacancy arises provided the arrears in the High Court requiring his continuance as an additional Judge persist. It cannot be said that such expectation on the part of an additional Judge is not well founded,

In addition to such settled expectation on the part of the additional Judge even on the part of the Govt. there has always been reluctance to send back an additional Judge to the Bar after the completion of his term specified under Art. 224 (1) and to lose the services of a Judge with experience. These twin factors namely the expectation on the part of the additional Judge and the reluctance on the part of the Government distinguish the case of an additional Judge from the case of a new member who may be a competitor for the same post at the termination of the tenure of the additional Judge. Ordinarily the additional Judge is continued in service as a Judge or as an additional Judge unless there are any relevant circumstances which would outweigh the above mentioned factors. In the absence of any such cogent reasons for not appointing him again, the appointment of somebody else in his place would be an unreasonable or perverse act which entitles an Additional Judge to move the Court for appropriate relief in the peculiar circumstances in which Art. 224 (1) is being operated till now. (Para 1069)

(L) Constitution of India, Art. 224 (1) — Appointment of Judges to High Court — Is purely an executive function of President — Court cannot declare a sitting Additional Judge to be deemed to have become permanent or direct the President to make him permanent.

Per Tulzapurkar, J.

Appointment of Judges to a High Court either as permanent Judges or Additional Judges is purely an executive function entrusted by the Constitution to the appointing authority and it will not be proper for this Court to usurp that function to itself or, grant relief by way of declaring a sitting Additional Judge to be deemed to have become permanent or by directing the President to make him permanent.

When the President has appointed a duly qualified person as an Additional Judge for two years it cannot be said that he should be deemed to have appointed such person as the permanent Judge under Art. 216 (Para 631)

Per Desai, J.

The constitutional scheme is that ordinarily there should be permanent Judges

of the High Court. Art. 224 is an enabling provision conferring power on the President to appoint additional Judges to meet a specific situation, namely, a temporary increase in the work of the High Court or the arrears in the High Court. Ordinarily, therefore, the constitution envisages appointment of permanent Judges. When a permanent post is vacant an additional Judge cannot be appointed. If the President even by a misconception of a situation, makes an appointment specified in Art. 224 limited for a duration of two years, it is inconceivable that the appointee can ignore the tenure and claim to be appointed as a permanent Judge. Undoubtedly consultation for the purposes of Art. 224 and for appointing a permanent judge under Art. 217 is of the same width and dimension and the constitutional functionaries involved in the process of appointment are all the same, nonetheless power of the President to appoint for a fixed duration in a given situation even if the situation is shown not to exist, cannot be understood to mean that the President had some other power under some other Article and is deemed to have acted under that Article. In such a situation it may possibly appear that the initial appointment was bad. Where the President has specifically set out in the warrant of appointment that the Judge is appointed as 'additional judge' for 'a period of two years'. Even if the pre-requisite for exercise of power was absent and, therefore, it was an impermissible exercise of power under Art. 224, there was no intention to appoint a permanent judge which the Supreme Court by a deeming fiction can enforce. Doctrine of severability is not attracted. The intention not shown to be to appoint permanent, as two years' tenure furnishes contrary indication the submission that Court must enforce it must be negated. (Para 755)

(M) Constitution of India, Arts. 224 and 217 — Additional Judge — Appointment of — Process — Nature of — Extension of tenure — Proposals of recommendation or otherwise must be initiated well in time.

When fresh appointment of Addl. Judge or extension of his period of appointment is to be done what has to start is a process of appointment. The Chief Justice, when there is a clear vacancy, has to initiate the proposal for

appointment. He may think of selecting someone from the Bar or from the subordinate judiciary. But what he initiates is a proposal for appointment. It is unthinkable that the Chief Justice of High Court would start a proposal for non-appointment for the first time. Once he initiates the proposal it must ultimately reach the President. It may be that some of the constitutional functionaries do not agree to the proposal but it cannot be said that once one of the constitutional functionaries does not assent to the proposal the proposal falls through and cannot be further examined is accepted, it would be putting the power of veto on a constitutional functionary only entitled to be consulted. Ultimately the President may not accept the proposal and drop the proposal resulting in non-appointment. The non-appointment is the end product of a process of appointment. There is nothing like an independent process of non-appointment. (Para 761)

In case of extension of the tenure of an Addl. Judge, may be, initiation of the proposal from the Chief Justice of High Court may start with a recommendation that he is not in favour of a fresh term for the concerned additional Judge. He is entitled to express his opinion. Proposal has, however, to be proceeded further and must ultimately reach the President along with the opinion of all the concerned constitutional functionaries. No constitutional functionary merely entitled to be consulted has a right to kill the proposal on his own. If there are differences of opinion qua a person amongst the three constitutional functionaries entitled to be consulted, it is inevitable in the very scheme of things that the President will have to choose keeping in view the fundamental assumption underlying this complex scheme that the best must be appointed and the doubtful must be eliminated. Therefore, there is nothing like a process of non-appointment in respect of which consultation can be eschewed. (Para 762)

When a term of additional Judge is about to expire it must be deemed obligatory on the Chief Justice of the High Court in which the additional Judge is functioning to initiate the proposal very much in time for completing the process of consultation through various stages before the period of initial appointment expires. Maybe, that the Chief Justice is not willing to recommend him for his own reasons. He may say so and forward

his own view through the appropriate channel of communication for consultation. The Chief Justice of the High Court has no veto by sheer inaction to deal with the fate of an additional Judge. That is not the role assigned to him and he cannot arrogate the same to himself by his own inaction. It may be that in case of a fresh appointment the Chief Justice may not initiate the proposal at all because he may not be inclined to fill in the vacancy. But it is equally possible that in such a situation any other constitutional functionary entitled to be consulted in the matter of appointment of a Judge of the High Court can initiate the proposal and the proposal must move along and reach each constitutional functionary entitled to be consulted ultimately culminating in the proposal reaching the President with all the collected material in the process of consultation. It is not open to any of the constitutional functionaries entitled to be consulted to sit tight over the proposal without expressing opinion on the merits of the proposal and by sheer inaction kill the proposal. (Para 765)

(N) Constitution of India, Arts. 224 (1), 217 (1) — Additional Judge — Functions and status.

An Additional Judge discharges functions of the same character as a permanent Judge. There is no difference whatever between the two in status and the other incidents of office, except that an additional Judge can hold office only for the period specified in the warrant of his appointment. Art. 224 (1) nowhere suggests that the temporary increase in the business of the High Court or the pending arrears of work can alone be entrusted to additional Judges. Which work should be assigned to permanent Judges and which to additional Judges is a matter normally falling within the discretion of the Chief Justice of the High Court. AIR 1974 SC 209, Explained. (Para 883)

(O) Constitution of India, Art. 222 — Transfer of Judges — Exercise of power — Public interest, but not consent, is necessary concomitant — Absence of word "Consent" in Art. 222 — It is a case of deliberate omission rather than casus omissus — Transfer should not be by way of punishment — Held in instant case that transfer of Chief Justice of Patna High Court was valid and in public interest.

(Note:— On the issue of transfer of a Judge there is unanimity that it should be in public interest and not by way of punishment. On the issue as to necessity of prior consent of the Judge whose transfer is proposed, S. M. F. Ali, Tulzapurkar, Desai, Pathak and Venkataramiah have held that "consent is not a necessary concomitant of Art. 222 while Bhagwati, J. held to the contrary. The transfer of Shri K. B. N. Singh, C. J. of Patna High Court was held valid by majority of Gupta, Tulzapurkar, Pathak and Venkataramiah, JJ. while Bhagwati, Fazal Ali and Desai, JJ. disagreed.— Ed.)

Per A. C. Gupta, J. (Majority view):— An order of transfer even if made for administrative reasons and in public interest is likely to cause some injury to the Judge transferred, though that could not be valid ground for holding that the transfer is by way of punishment; it is the reason behind the order of transfer that should determine its nature. It would be only fair not to let the Judge who is being transferred face more difficulties than are absolutely necessary. If the Judge is wholly unfamiliar with the language of the State to which he is transferred, it is possible in some cases that it will affect his efficiency. Government should consider if it is possible to transfer the Chief Justice to some High Court, consistent with his position as a Senior Chief Justice, where the language difficulty would not be so acute.

(Para 140)

Per Tulzapurkar, J. (Majority view): The transfer of a High Court Judge in public interest, does not involve "fresh appointment". Consent cannot be read into Article 222 (1). The non-consensual transfers are, therefore, within the purview of Art. 222 (1). AIR 1977 SC 2328, Foll.

(Para 640)

In cases of transfers of High Court Judges in public interest, without involving any punishment, the two safeguards of public interest and effective consultation subject to which the power of transfer is to be exercised cannot be regarded as illusory or unreal and if they afford real protection to the Judge concerned against the abuse of power, there would be no need to read consent into Article 222 (1).

(Para 638)

The transfer of Shri K. B. N. Singh, Chief Justice of Patna High Court, on the

facts of the case must be regarded as a selective transfer and not based on the policy in the contemplation of the Union Government, notwithstanding the reference to 'Government Policy' made by the Chief Justice of India during his telephonic talk with Shri K. B. N. Singh on Jan. 5, 1981. (Para 673)

The transfer of Shri K. B. N. Singh, Chief Justice of Patna High Court, was in public interest, for the reasons that certain persons were exploiting their proximity to Shri K. B. N. Singh which had created considerable misunderstanding and dissatisfaction in the working of the High Court and surely remedying dissatisfactory working conditions in a High Court serves one kind of high public interest; and so far as his posting at Madras High Court is concerned, the Chief Justice of India felt that it would be in fitness of things that an experienced and senior Chief Justice like Shri K. B. N. Singh be posted as the Chief Justice of one of the premier High Courts in the country. It could not be said that either of these considerations which weighed with the Chief Justice of India did not serve public interest. The impugned transfer is, therefore, valid transfer under Art. 222 (1). (Paras 674, 679)

In the absence of any connivance or complicity on the part of Shri K. B. N. Singh in the matter of the exploitation, no reflection is implied on him simply by reason of his transfer, which must be regarded as having been made, with a view to remedying the dissatisfactory working conditions in that High Court and no unfair play was involved in the procedure followed by the Chief Justice of India. In the circumstances it is clear that the impugned transfer has been in public interest and not by way of punishment.

(Para 674)

It will not be correct to draw an inference of the concerned Judge's connivance or complicity in every case where persons close to him exploit their proximity to him while handling their matters in the High Court and in the absence of any connivance or complicity on his part, such exploitation of close proximity would not imply any reflection on the Judge concerned. In such a case if the atmosphere has to be improved and dissatisfactory working conditions have to be remedied it may become inevitable to transfer the concerned Judge without

any blame attaching to him whatsoever; it is obvious that such a transfer will not carry any reflection on him. (Para 674)

In the case of Shri K. B. N. Singh from the material produced on record, it is abundantly clear that there was full and effective consultation between the transferring authority on the one hand and the Chief Justice of India on the other in regard to his transfer as contemplated by Art. 222 (1) before the effective decision thereon was taken, and if the consultation has been full and effective as contemplated by Art. 222 (1), as is shown by the material produced on record, the contention that the normal procedure ought not to have been reversed and the proposal should have emanated from the President and not from the Chief Justice of India as is the case here loses its significance. Moreover, there is no hard and fast rule as to from whom a proposal for transfer should emanate. (Para 675)

The procedure followed by the Chief Justice of India ensured complete fair-play qua Shri K. B. N. Singh. The material on record clearly shows that the Chief Justice of India had discussed all the relevant aspects concerning the impugned transfer with Shri K. B. N. Singh including his personal difficulty pertaining to his mother's advanced age and serious illness. That the Chief Justice of India took a different view about it does not mean that any unfair-play was involved. After all in his view public interest outweighed the considerations of personal difficulty as well as the language difficulty which were put before him. (Para 676)

A transfer by way of punishment for misbehaviour is clearly outside the purview of Art. 222 (1). Similarly, any transfer with an oblique motive or for an oblique purpose, such as for not toeing the line of the Executive or for rendering decisions unpalatable to the Executive or for having for some reason or the other fallen from the grace of the Executive, would also be outside its purview and liable to be struck down, if oblique motive or purpose is established. (Para 637)

The safeguard of public interest read into Art. 222 (1) is not intended for protecting any black-sheep in the judiciary but for protecting the numerous honest, conscientious hard-working Judges.

(Para 637)

There is clear distinction between the punishment involved in making the transfer for misbehaviour or out of oblique motive and the punishment which is inherent in the order of transfer in the sense of infliction of personal injury, loss or damage arising out of his moorings being severed, he being required to have two establishments or his suffering a dislocation in his family affairs, etc. When it is said that the power of transfer under Art. 222 (1) cannot be and should not be exercised by way of punishment what is intended to be conveyed is that the Judge concerned should not be transferred for misbehaviour falling under Art. 124 (4) or with oblique motive or for oblique purpose which alone would be by way of punishment in the correct sense of that expression in the context of the power as contained in Art. 222 (1) and not that he should not be subjected to the kind of punishment which is inherent in the transfer. (Para 638)

Per Pathak, J. (concurring with Tulzapurkar J.):— Clause (1) of Art. 222 was specifically enacted in our Constitution for the purpose of empowering the President to transfer a Judge without necessarily securing his consent. The power was intended to be in the widest terms and subject only to the obligation to consult the Chief Justice of India. If a transfer only with the consent was contemplated, it would have been sufficient to rely on the power of the President under cl. (1) of Art. 217 to appoint the Judge to another High Court, and cl. (c) of the proviso to cl. (1) of Art. 217 would remove any doubt that by such appointment the Judge vacated his office in the original High Court. There is no need to confer power in express terms to do a specific act which can be done with the consent of the parties under the umbrella of a general power. The power to transfer a Judge from one High Court to another is a public power and can only be used only in public interest. As such to say that cl. (1) of Art. 222 was incorporated in the Constitution so that the Chief Justice of India could be brought in for the purpose of ensuring that the transfer was effected in the public interest only and not for the personal benefit of a Judge would not be correct. (Paras 903, 904)

The fact that a fresh oath or affirmation is necessary when a Judge enters upon his office in the other High Court, and whether he will make and subscribe

such oath or affirmation rests necessarily within his volition, does not lead to the conclusion, that element of consent must be imported in Art. 222 (1). Transfer of a Judge under Art. 222 (1) cannot be made for the purpose of punishing him and Cl. (1) of Art. 222 does not mention the grounds on which the Judge may be transferred. But as it is in the nature of a public power vested in a functionary of the State, it can be exercised only in the public interest. This is the necessary limitation implicitly circumscribing the exercise of power under cl. (1) of Art. 222. All grounds which can be said to fall within that may be entertained. But the grounds of misbehaviour or incapacity of a Judge can never be made grounds for transfer in the transfer of a Judge from one High Court to another the principle of judicial independence and the rights of the Judge are protected by two safeguards. The first is, the obligation of the President to consult the Chief Justice of India. The Constitution expects the Chief Justice of India to ensure in the process of consultation that the power to transfer is not used arbitrarily against a Judge of a High Court, that it is not employed as a disguise for punishing him. A Judge is entitled to continue in the High Court to which he has been appointed for the full period of his tenure. As such the consultation with the Chief Justice of India must, extend to the entire gamut of the grounds on which the transfer is proposed. To properly discharge his responsibility, the Chief Justice of India must entertain not only the material furnished by the President to him but he must also make as full an enquiry as he conveniently can for the purpose of determining whether a transfer should be advised. In that process, he must determine not only whether the grounds on which the transfer proposed are made out but he must also consider as relevant the personal circumstances of the Judge concerned. For this the Chief Justice of India should satisfy himself by enquiring from the Judge himself. But by this the Judge does not get a right to be heard. All that is necessary is that the Judge should know why his transfer is proposed and he should be able to acquaint the Chief Justice of India of any reason why he should not be transferred. The second safeguard is that a Judge who is ordered to be transferred can invoke the jurisdiction of the Court and seek judicial relief against the transfer on the ground of violation of cl. (1) of Art. 222. (Paras 906 to 910)

The transfer of the Chief Justice of the Patna High Court on ground that people in his proximity have created an atmosphere injurious to the administration of justice falls within the expression public interest and as such there was no violation of Art. 222 (1). (Paras 916, 917, 923)

When a Judge permits his judgment in a case to be influenced by the irrelevant considerations of caste and creed, of relationship or friendship, of hostility or enmity, he commits a breach of his oath. It is a case where justice is not done and is denied. It is a case of misbehaviour, to which the provisions of Art. 218 read with cls. (4) and (5) of Article 124 are attracted. There is another kind of case where a Judge acts in accordance with his conscience on the basis of the facts and the law as he bona fide understands them, and yet because of surrounding circumstances it may appear that justice has not been done even though in fact it may have been done. Where there is a danger that justice will not appear to be done, and the prevailing environment is linked with the person of the Judge, notwithstanding that he may have done nothing to promote it, the injury to the administration of justice can be as serious as a case where the Judge is consciously deviated from the standards of impartial judgment. Where there is a genuine apprehension that justice may not appear to be done, the ordinary rule is that the case pending before the Judge should be transferred to another Judge. But where the apprehension is rooted in local association, on links with members of the Bar or influences present in close proximity to the Judge and the circumstances are such that, notwithstanding that the conduct of the Judge has done nothing to promote it, there is grave and bona fide fear in the minds of honest citizens that the fount of justice may be polluted, its effect is not confined to a single case but spreads widely, endangering the purity of the entire administration of justice. Inasmuch as the administration of justice relies for its vitality on the strength of public confidence, it must rank supreme and, therefore, if the Judge is transferred in these circumstances it must be regarded as a transfer in the public interest. (Para 921)

Per Venkataramiah, J. (concurring with Tulzapurkar J.):— If Art. 222 is construed as requiring the consent of a High Court Judge to be transferred then the power

of the President can be neutralised by the Judge withholding consent. Such a construction would virtually confer on an unwilling Judge an immunity against the exercise of the power by the President under Art. 222 even though public interest demands the transfer of the Judge. Art. 222 would in that case become almost ineffective. That being so, such a construction has to be avoided. It cannot be said that any transfer or shifting of a Judge without his consent would amount to a punishment and would interfere with the independence of the Judge concerned or of the judiciary. If the requirement of the consent of the Judge in question is read into Art. 222 then the power conferred on the President ceases to be a power in the jurisprudential sense. AIR 1977 SC 2328, Approved. (Para 1080)

Further, since there is no necessity for a fresh oath after the transfer of a High Court Judge as a matter of abundant caution the practice of taking fresh oath is prevailing now a days, it cannot be said that he is appointed afresh as a Judge in the Court to which he is transferred as his consent for transfer is necessary. Such construction runs counter to Art. 222 (2) as the payment of additional compensation under Art. 222 (2) can be justified only by holding that the transfer under Art. 222 (1) does not result in a fresh appointment in another High Court to which a Judge is transferred. If a Judge who is to be treated as having been appointed afresh in the High Court to which he is transferred then he will have to be assigned a rank below all the other Judges who were working in that Court before he was transferred. It is only if it is held that he goes there as a person already appointed as a Judge though in another High Court then he can reasonably be assigned seniority over others who were appointed after he was appointed initially as a High Court Judge. Any other view would be irrational.

(Paras 1110 to 1112)

Moreover, it cannot be said on the basis of payment of compensatory allowance to a Judge who is transferred that it is a punishment in disguise. A transfer under cl. (1) of Art. 222 could not ever have been considered to be a punishment in disguise, the transfer being in the public interest. The transfer may not be on account of any conduct of a Judge which is not relished by the transferring authority. It may be on account of the public

interest such as providing another High Court with a competent Judge who is able to discharge his duties effectively in that Court. Payment of such compensatory allowance does not imply that a transfer involves an element of punishment. It cannot be said that Art. 222 was enacted by the Constituent Assembly as a measure of punishment to an erring Judge. It may be that when a Judge is transferred in the public interest, he suffers some inconvenience but such inconvenience cannot be termed as a punishment. It can be hoped that the Chief Justice of India and the President will duly consider all aspects before ordering such a transfer. (Para 1114)

It cannot be said also that the transfers of Judges would be opposed to the public interest on the ground of various regional languages of India. (Para 1146)

The policy of having the Chief Justice in every High Court from outside the State is not unconstitutional and that it could be achieved by resorting to Article 222. The transfer ordered pursuant to that policy cannot therefore be considered as either discriminatory or not being in the public interest. In fact such transfers are in the public interest. (Para 1234)

Per Bhagwati J. (Minority view; Fazal Ali and Desai, JJ. agreeing with him):—The power of transfer under Art. 222 of cl. (1) cannot be exercised against a Judge without his consent. It is, a highly dangerous power involving great hardship and injury to the Judge transferred including a stigma on his reputation in cases where the transfer is not effected pursuant to any policy but the Judge is picked out for transfer on a selective basis, it makes no difference whether the transfer is made by the Government on its own initiative or it is made at the instance of the Chief Justice of India. Further, the power to transfer a Judge from one High Court to another can be exercised only in public interest and there must be full and effective consultation between the President, that is, the Central Government and the Chief Justice of India before the decision to transfer a Judge is taken.

(Paras 106, 107)

When a Judge is transferred from one High Court to another by way of punishment, it can never be in public interest for no public interest would countenance punishment of a Judge except by way of

impeachment under proviso (b) to cl. (1) of Art. 217 read with cl. (4) of Art. 124. There is a clear antithesis between a transfer by way of punishment and a transfer in public interest and therefore, a transfer by way of punishment must be held to be outside the scope and ambit of Art. 222, cl. (1). (Para 108)

Having regard to the high status and dignity of a Judge of a High Court, it is not fair that when the Government is displacing the right of the Judge to continue in his High Court up to the age of 62 years, he should be told what are the reasons which have weighed with the Government in transferring him. He must be assured that all the constitutional requirements have been complied with. Besides, the facts showing that there was full and effective consultation between the Government and the Chief Justice of India and the reasons for making the transfer would be within the special knowledge of the Government and the onus must therefore be upon the Government to prove them. Thus the burden of sustaining the validity of the order of transfer must rest on the Government and this burden, is a heavy burden, which must satisfactorily be discharged by the Government. This is the same principle which has been applied by the Supreme Court when the legality of detention of a person is challenged by filing an application for a writ of habeas corpus. It is not enough merely to repeat the constitutional formula that every aspect of the question was discussed with the President. It is an affidavit which is made by the Chief Justice and the affidavit must contain not merely the constitutional incantation but facts giving particulars stating with whom the Chief Justice of India had discussion.

(Paras 109, 113)

In the absence of the information as to what where the facts discussed by the Chief Justice of India with the Central Government it would not be possible for the Court to conclude that there was full and effective consultation between the Chief Justice of India and the Central Government. There was also a further infirmity in that Chief Justice K. B. N. Singh had discussed about his difficulties such as his mother's illness and advanced age but there was no information whether this difficulty was conveyed to the Law Minister or the Prime Minister by the Chief Justice

of India. This omission to communicate the difficulty which would be experienced by Chief Justice K. B. N. Singh as a result of transfer is sufficient to vitiate the process of consultation and it must be held that there was no full and effective consultation as required under Art. 222, clause (1). (Para 114)

The Central Government stated in a note handed over to the Court that the reason why the Central Government made the order of transfer was: "(1) It was felt that not agreeing to these transfers may be construed as though the Government is departing from the view of having Chief Justices from outside; (2) the policy aspect could still be pressed into service later." This reason which prevailed with the Central Government was totally different from the reason which induced the Chief Justice of India to make his proposal for transfer and there is nothing to show that this reason which weighed with the Government of India was communicated to the Chief Justice of India for his opinion. There was therefore clearly no full and effective consultation even in regard to this aspect. Moreover this reason given by the Central Government for making the order of transfer clearly shows that the Central Government did not apply its mind to the question whether on the facts, it was necessary or expedient to transfer Chief Justice K. B. N. Singh, but accepted the recommendation of the Chief Justice of India, because it thought that if the recommendation of the Chief Justice of India was accepted and the transfers of Chief Justice M. M. Ismail and Chief Justice K. B. N. Singh were made, it would be easier for the Central Government thereafter to press for acceptance of the Government policy by the Chief Justice of India. There was clearly abdication of its constitutional function by the Central Government. The order of transfer of Chief Justice K. B. N. Singh to the Madras High Court must therefore be held to be unconstitutional and void.

(Para 116)

Per S. M. F. Ali, J. (Concurring with Bhagwati, J.):— A general and unanimous policy of transfer of Judges and Chief Justices of High Courts to promote national integration and suppress fissiparous tendencies, would doubtless be in public interest. Although Art. 222 does not contain the words "Public in-

terest" in so many words but the every exercise of the power, which is not a normal power but an exceptional one, it follows as a logical consequence that public interest is a necessary concomitant of the exercise of this power. But on a parity of reasoning it cannot be said that 'consent' also should be read as a part and parcel of the exercise of the power under Art. 222. If a Judge cannot be transferred without his consent then the power loses its significance and becomes an immunity to a Judge from transfer by withholding his consent. Thus, a power which is to be exercised by the President can be defeated or stalled by a simple act of the Judge in refusing to give his consent to the transfer. This could never have been the intention of the Founding Fathers of the Constitution.

(Paras 173, 174)

A perusal of Art. 222 unmistakably shows that it is expressed in absolutely clear, explicit, intelligible, plain and unambiguous language which admits of no vagueness or ambiguity. It is not the function of the Court to supply words to suit a particular course of action so as to be acceptable to a particular set of persons as a doctrine of implied consent. The word 'consent' has been dropped by the legislature deliberately or it is a case of deliberate omission rather than casus omissus. Whenever the Founding Fathers intended that a particular expression should be used in an Article as a condition precedent to the exercise of a particular power, the same has been mentioned and where no such intention was there the expressions have not been used. To read 'consent' into Art. 222 would be to limit and whittle down the scope, ambit and purpose of Art. 222. To supply the omission by reading the word 'consent' would really be going against the principles laid down by Supreme Court in AIR 1980 SC 485. If the word 'consent' is read into Art. 222 then it will amount to imposing unnecessary restraints and conditions in the Article which are not there at all and which cannot be done under the well-known rules of Interpretation of Statutes.

(Paras 175, 177, 179, 183, 185, 190, 191, 192, 232, 255, 258, 260, 294, 297, 343)

Even at the time when Art. 222 was taking its birth there was some talk of making the transfer with the consent

of the Judge concerned but this idea was given up when it was pointed out that in the national interest it may be necessary to send a competent Judge to another High Court and this policy may be stalled by the Judge by withholding his consent. In other words, the idea of 'consent' having been conceived, discussed and rejected clearly shows that the Founding Fathers deliberately omitted the word 'consent' from Art. 222.

(Para 297)

Per Desai, J. (Concurring with Bhagwati, J.):— Article 222 (1) does not cater to only consensual transfer, and non-consensual transfer is within its purview. Thus the words "with consent of the Judge who is sought to be transferred" cannot be read in Article 222 (1). The Constitution-makers clearly envisaged a power to transfer a High Court Judge and conferred it on the President and this power cannot be denied by the Court by re-writing the Article. There is no power in the Court to rewrite the Article.

(Paras 800, 805, 806)

The power to transfer a High Court Judge is an extra-ordinary power. The first safeguard against arbitrary exercise of power is in the obligation cast on the President to consult the Chief Justice of India and, therefore, the parameters of consultation were drawn very wide so that the power may not be exercised to the detriment of the Judge for a collateral purpose. The second safeguard is found in reading into Article 222 that the power to transfer a High Court Judge can only be exercised in public interest. This power is not for purposes of providing the executive with a weapon to punish a Judge who does not toe its line or who for some reason or the other has fallen from its grace.

(Para 807)

The three safeguards, namely, full and effective consultation with the Chief Justice of India, and that the power to transfer can be exercised in public interest, and judicial review, would certainly insulate independence of judiciary against an attempt by the executive to control it. To punish a High Court Judge by an impermissible method is not in public interest. And if a Judge is uprooted from one place because he has made himself obnoxious, the transfer itself may inflict punishment. If, therefore, a Judge is trans-

erred because he is involved in local actionous atmosphere or has a circle of favourites and disfavoured it would be obviously by way of punishment and would cast a slur and stigmatise the Judge. Selective transfer of individual Judge for something improper in his behaviour or conduct would certainly cast a slur or attach a stigma and would leave such indelible mark on the character of the Judge that even in the High Court to which he is transferred he would be shunned and the consumers of justice would have little or no faith in his judicial integrity. This is an inevitable outcome of selective transfer on the ground of some improper streak in the conduct or behaviour of the Judge. (Para 808)

Therefore, whenever the transfer answers to some objective norms even if it causes personal inconvenience and hardship, it can be said to be in public interest. But the transfer of a Judge not answering to any objective norms but selectively made and founded upon complaints and grievances relating to the conduct or behaviour of the Judge would certainly cast stigma or slur and would be by way of punishment and that cannot be inflicted by exercise of power under Art. 222 (1). If transfer can be effected because there are complaints and grievances against a Judge of a High Court on account of his behaviour or conduct it would permit the executive after going through the process of consultation to rotate inconvenient Judges and this rotation causes such character assassination on one hand and hardship and inconvenience on the other that it will be sufficient to drive out even a strong willed Judge. Therefore, a transfer on account of any complaint or grievance against a Judge referable to his conduct or behaviour is impermissible in exercise of power under Art. 222 (1).

While testing the validity or otherwise of an order of transfer of a High Court judge made by the President in exercise of the power conferred by Art. 222 (1), below mentioned tests will have to be applied:—

(i) power to transfer a Judge of High Court is conferred on the President which as part of the executive function of the President he would, in view of Art. 74, discharge according to the aid and ad-

vice received by him from the Council of Ministers;

(ii) the power to transfer a High Court Judge thus is in the executive which is the litigant in a very large number of cases coming before a Judge of a High Court;

(iii) the power to transfer a High Court Judge is extraordinary power;

(iv) the limitation on the exercise of power is a full, effective and meaningful consultation with the Chief Justice of India;

(v) the power to transfer can be exercised only in public interest and not according to the whim, caprice or fancy of the executive or to remove an inconvenient Judge not toeing its line;

(vi) the consultation to be effective must be focussed upon such very personal factors as the family problems of the Judge, which include the position of his wife and children and parents, the reasons for transfer whether the transfer is actuated on account of anything in the conduct or behaviour of the Judge, whether the injury, inconvenience and difficulties experienced by the Judge consequent upon his transfer are such as to be inconsequential in view of the larger public interest for which the transfer is being ordered;

(vii) would the transfer cast a slur or stigma on the Judge proposed to be transferred;

(viii) the policy universally followed till 1976 of not transferring a Judge of High Court without his consent is being shelved for achieving some larger public interest or the so-called public interest is a cloak or device to strike at an inconvenient Judge;

(ix) is the transfer intended to inflict punishment for misbehaviour not of adequate magnitude to invoke proceedings analogous to impeachment as contemplated by Art. 124 (4) and (5) read with Art. 218 and Judges (Inquiry) Act, 1968. (Para 813)

Held in the instant case that a transfer of Chief Justice of Patna to Madras High Court was invalid and based on extraneous considerations.

(Paras 846, 847)

(P) Constitution of India, Art. 222 — Transfer of a Judge — Proposal for —

Art. 222 must be complied — Fact which authority initiates is not material.

Per S. M. F. Ali, J.

From a plain language of Art. 222 it is manifest that the proposal for transfer can emanate either from the Chief Justice of India or from the President through the Union Minister for Law and Justice. What is important is whichever authority initiates the transfer, the conditions prescribed under Art. 222 must be complied with. (Paras 338, 556, 557)

It would be necessary for the Chief Justice of India on receiving the proposal from the President, to ascertain the views of the judge concerned and his personal circumstances or objections, if any, and then after applying his mind to them, place the same before the President through the Law Minister. (Para 339)

Where, however, the proposal emanates from the Chief Justice of India himself, then he should collect the necessary facts and examine the reasons given by the Minister concerned for the transfer and before giving his opinion or advice to the Minister he would have to consult the judge concerned and ascertain his views and give due consideration to them. Thereafter, he should also communicate the views expressed by the judge concerned — whether against or in favour of the proposal — to the President through the Minister concerned so that even if the Chief Justice of India does not agree with the view of the Judge, the President may be in a position to give his decision finally one way or the other. (Para 340)

In this process, the Chief Minister or the Governor of the two States may express their opinion but the President is not bound under Art. 222 to accept their views. Thus, the information given by the Chief Ministers and the Governors of the States is merely for the limited purpose of ascertaining their views and other matters referred to above and is not, therefore, a part of the consultative process enshrined in Art. 222.

(Para 341)

Accordingly, when the proposal of transfer of Justice K. B. N. Singh and

others emanated from the Chief Justice of India it was perfectly legal and constitutional and did not offend the provisions of the Memo. because the Memo. does not and cannot in any way debar the CJI from initiating the proposal if he wants to do so. (Para 342)

Per Desai, J.

Undoubtedly the power is in the President to transfer and as a pre-condition the Chief Justice is required to be consulted. But on that account alone it cannot be said that the Chief Justice of India cannot initiate the proposal. Where power to do a thing is vested in a certain constitutional functionary it is immaterial who draws the attention of the constitutional functionary, the repository of power, for exercise of the same. If the power is exercised after fulfilling all the pre-conditions, the mere fact that somebody invited the repository of power to exercise power which may tantamount to saying that someone initiated the proposal for exercise of the power, such initiation of proposal would not be unconstitutional or contrary to the constitutional mandate.

It would be constitutional obligation of the Chief Justice of India to place all relevant data and material having an impact on the final verdict before the President and the President in his turn must apprise himself of all the relevant considerations. If there are either grey or blurred areas, it would be the constitutional obligation of the President to call for necessary information from the Chief Justice of India who being the initiator of the proposal must have considered all of them and having brought to bear upon the subject his mature consideration must have initiated the proposal and after all the relevant data thus supplied, including the missing links, if any, as required by the President, the President may either exercise the power or on mature consideration may decline to exercise the power. Collection of relevant material, public interest involved, and the decision recommending transfer must precede the proposal and the same must accompany the proposal. A bald proposal unaccompanied by relevant material and the reasons for proposing transfer and total absence of public interest sought to be served by the proposal would certainly not satisfy the constitu-

tional mandate of Art. 222 (1). The fulfilment of the constitutional obligation in this background would be on the Chief Justice of India and the performance by the President of his duty to elicit all facts which are necessary to arrive at an appropriate conclusion are parts of the same process and are complementary to each other. But with this precaution, who initiates the proposal is irrelevant. (Para 812)

Per Venkataramiah, J.

Even if the proceedings for transfer of a Judge are initiated by the Chief Justice of India the order of transfer would not be bad as under Art. 217 (1) of the Constitution which is couched in almost the same language, an appointment of a Judge would not be bad only because the Chief Justice of a High Court who is one of the authorities to be consulted initiates the proposal when the authority exercising the power of transfer has brought to the knowledge of the authority to be consulted all the relevant material with it and has given sufficient opportunity to tender his opinion. (Para 1228)

(Q) Constitution of India, Art. 222 — General policy of transfers of Judges or Chief Justices from home State to other States — Power to formulate this policy lies within four corners of Article 222.

Per S. M. F. Ali, J.

The idea of the Central Government of a uniform policy of transfer of CJs, so that each State has a CJ from outside, is a very essential, useful, sensible and a wise one which cuts at the roots of so many evils with which not only our country but even the higher judiciary is faced. (Paras 382, 396, 402)

Such a uniform policy will be in the better interest of the concerned Judge himself because however disinterested or independent he may be, he is bound to be influenced either consciously or unconsciously by interested persons who choose to exploit him even without his knowledge. Such a policy would enhance the prestige of the judiciary, ensure its independence and make the working of the head of the judiciary in the State more efficient and generate a

greater confidence in the people of the new State where he is transferred.

(Para 383)

The only objection which has been pointed out against this policy is the language problem but that also does not appear to be an insurmountable obstacle because while laying down the policy the Government can start with transfers of CJs within the Zones as recommended by the Law Commission which will minimise the language difficulty. In making the transfers, there would be no serious objection if the CJ is allowed to indicate his choice regarding the State where he would be prepared to be transferred and the same may be accepted as far as practicable. (Para 384)

The Chief Justice of each High Court should be asked to prepare a panel of suitable persons who are considered for appointment as High Court Judges both from the Bar and from the subordinate judiciary. Before including the names of the persons concerned their previous consent for being appointed outside the State may be obtained by the CJ. It would be better if the persons whose names are included in the panel are appointed outside the State as permanent judges which would provide an attractive offer and give a better impetus to the persons aspiring for judgeship and would tempt them to serve outside the State. (Para 384)

Hence, the power to formulate or evolve this policy clearly lies within the four corners of Art. 222 itself which contains a very wide power conditioned only by consultation with Chief Justice of India who is the highest judicial authority in the country. It is always open to the President, which in practice means the Central Government, to lay down a policy, norms and guidelines according to which the presidential powers are to be exercised and once these norms are followed, the powers of the President would be beyond judicial review. (Para 398)

Per Tulzapurkar, J.

The transfer of High Court Judge based on general policy of Government must satisfy the requirements of Art. 222 (1) and if extraneous considerations are established the same will have to be struck down. (Paras 641, 642)

Ordinarily, policy matters would be decided upon by the Government. But

propriety requires and perhaps smooth working thereof may necessitate consultation with the Chief Justice of India who is the highest administrative head of the country's judiciary. But, even after a general policy in the matter of transfers of High Court Judges is framed and adopted whenever a transfer is to be made in pursuance of such policy the proposal, before it culminates into an order, will have to satisfy the requirements of Art. 222 (1). (Para 642)

It cannot be said that a policy transfer, that is to say, a transfer based on or made in pursuance of a general policy would necessarily be non-punitive in character nor can it be said that every selective transfer is necessarily punitive. (Para 643)

Merely adopting a general policy, which is or may be broadly supportable for reasons of public interest, would not be sufficient to insulate transfers of High Court Judges against Executive interference unless adequate mechanism or modality of procedure in that behalf is also fixed and followed in practice. A selective transfer in an appropriate case for strictly objective reasons and in public interest of general administration could be non-punitive. Each case of transfer, whether based on a policy or a selective transfer, will have to be judged on the facts and circumstances of its own for deciding whether it is punitive in character in the sense of having been effected with some oblique motive or not, (Para 643)

Per Venkataramiah, J.

The policy of having the Chief Justice in every High Court from outside the State is not unconstitutional and that it could be achieved by resorting to Art. 222 of the Constitution. The transfer ordered pursuant to that policy cannot therefore be considered as either discriminatory or not being in the public interest. In fact such transfers are in the public interest. (Para 1234)

(R) Constitution of India, Arts. 222 and 124 (4) (5) — Transfer of a Judge on mere allegations of misbehaviour or incapacity which form subject-matter of action under Art. 124 — Not permissible — Transfer effected on aforesaid

allegations — It is liable to be struck down.

Per Venkataramiah, J.

In the absence of any categorisation of acts of misbehaviour or incapacity into different classes, like those on the basis of which 'Parliamentary' proceedings for the removal of a Judge may be initiated and those on the basis of which an order of transfer under Art. 222 of the Constitution can be passed, it cannot be said that a transfer of a Judge can be made under Art. 222 on mere allegations of misbehaviour or incapacity of a Judge. Art. 218 and Art. 124 (4) and (5) make it clear that Art. 222 cannot be resorted to in any such case, and if it is utilised by the President in that way, the transfer would have to be set aside on the ground of excess of jurisdiction. When once it is declared that a transfer of a Judge cannot be made at all on the ground of allegations of misbehaviour or of incapacity and can only be made in the public interest, the reputation of a transferred Judge would remain unsullied and no evil consequences such as those indicated above would follow. (Para 1124)

If a Judge with a bad reputation is transferred, then it would not subserve any public interest at all since the people in the State to which he is transferred will not have faith in him. More than all, in the absence of any procedure for an enquiry in which a Judge can clear his conduct, is it fair to expose him to public ridicule? Can payment of compensation under Art. 222 (2) of the Constitution be of any avail to an honest Judge? Looking at the problem from another angle, can we say that the Constitution has provided for payment of a reward under Art. 222 (2) to a Judge who is transferred on the allegation of misbehaviour or incapacity which is not established at an inquiry? All these questions may be set at rest by reading down Art. 222 as not conferring on the President the power to transfer a Judge on the basis of untested allegations or rumours about acts of misbehaviour or incapacity of the Judge and it appears that such a construction would not merely be in conformity with Arts. 218 and 124 (4) and (5) but also would be consistent with the independence of the judiciary. As

the law now stands it is not open to any single individual, whether it is the President or the Chief Justice of India or anybody else to take cognizance of any allegations of misbehaviour or of incapacity of a Judge and to take any legal action on their basis under the Judges (Inquiry) Act, 1968. One hundred Members of the Lok Sabha or fifty Members of the Rajya Sabha alone can initiate any action on such allegations. Naturally, all others are excluded from taking cognizance of them and acting on them. (Para 1124)

(S) Constitution of India, Art. 222 (2) — Transfer of High Court Judge — Order fixing compensatory allowance not required to be issued simultaneously along with transfer order.

Per Tulzapurkar, J.

Article 222 (2) does not provide that the order fixing compensatory allowances to the transferee Judge has to be issued simultaneously along with the transfer order. (Para 677)

Per S. M. F. Ali, J.

While Art. 222 (2) does require that on transfer from one High Court to another, compensatory allowance may be paid; it does not state that the Presidential Order should issue *pari passu* the order of transfer. Such an Order could follow the transfer. Moreover, as the C. J. of Patna High Court who was transferred to Madras High Court never cared to join his new assignment and before he could do so the writ petitions were filed and proceedings were stayed, there was no occasion for the President to pass the order directing compensatory allowance to be paid to him until the validity of his transfer was finally adjudged by Court. This is not a case where a judge or a C. J. having been transferred had joined his new assignment and started working and still no order of compensatory allowance was made by the President. (Para 586)

(T) Constitution of India, Art. 222 (1) — Transfer of Judge — Onus of justifying transfer is on State (Evidence Act (1872), Ss. 101 to 104). (Per Pathak, J.) (Para 911)

(U) Constitution of India, Art. 222 (1) — Chief Justice of High Court — Falls

within the expression "a Judge of a High Court" — Transfer of Chief Justice of High Court from one High Court to another High Court — Falls within the purview of Art. 222 (1). (Per Tulzapurkar and Venkataramiah, JJ.)

(Paras 665, 1128, 1129)

(V) Constitution of India, Art. 222 (1) — Transfer of Judge — Advice tendered by Chief Justice of India must ordinarily be accepted by President. AIR 1974 SC 2192, Foll. (Per Pathak, J.)

(Para 910)

(W) Constitution of India, Art. 222 (1) — Power to transfer Judge is extraordinary power — Power must be used sparingly and for very strong reasons only. (Per Pathak, J.) (Para 911)

(X) Constitution of India, Art. 222 (1) — Order of transfer of Judge from one High Court to another — Legal effect of.

Per Pathak, J.

A Judge appointed to a High Court is entitled to continue as a Judge of that High Court until he attains the age of 62 years, unless he resigns his office or is removed from it. His transfer to another High Court involves the vacation of his office in that High Court, that is his appointment as a Judge of that High Court stands terminated. Simultaneously, without anything more the transfer effects his appointment to the other High Court to which he is being sent. An order of transfer under Cl. (1) of Art. 222 therefore, is a transaction in two parts, the termination of the appointment as a Judge of the original High Court and the simultaneous appointment as a Judge of the other High Court. (Para 900)

(Y) Constitution of India, Arts. 222, 217 (1) Proviso (c) — Transfer and appointment — Distinction — Transfer cannot be fresh appointment — Mere fact that transferee Judge has to take fresh oath is immaterial — (Words and Phrases — Words "appointment" and "Transfer").

What S. 220 (2) (c) of the Govt. of India Act, 1935 contemplated is that if a Judge of a High Court was to be transferred he would have to be appointed to that High Court. Indian Constitution, however, makes a clear dis-

inction so far as this aspect of the matter is concerned inasmuch as Art. 222 expressly uses the word 'transfer' rather than the word 'appointment' when a Judge is transferred from one High Court to another. (Paras 280, 343)

While in the case of a Judge who goes to the Supreme Court, the word "appointed" is used to indicate that this is a fresh appointment in a higher court, or rather the highest court in the country, whereas when a Judge is transferred from one High Court to another, the word 'transfer' in contradistinction to the word 'appointed' as mentioned in S. 220 (2) (c) of the 1935 Act, has been deliberately used which clearly shows that the two modes of vacation of office by a sitting Judge are quite different. (Paras 282, 343)

The Proviso (c) to Art. 217 (1) itself makes a difference between vacating the office by a Judge who is appointed to the Supreme Court and a Judge who is transferred. A Judge who is transferred merely vacates the office in a limited sense; namely, that he cannot act as a High Court Judge in the High Court where he was appointed but the fact remains that until he takes oath in the transferee High Court, he continues to be a Judge of the Original High Court. (Paras 284, 285, 343)

Whenever a legislature or constituent assembly uses a particular phrase in contradistinction to another phrase it is not possible to read the two phrases so as to indicate the same purpose. In the instant case, the Constitution has used the word 'appointed' in the case of a Judge of the Supreme Court and 'transfer' in the case of a Judge of a High Court. A perusal of the language of Art. 217 (1) Proviso (c) leads to the irresistible conclusion and logical inference that the Founding Fathers have made a clear distinction between transfer and appointment. (Para 286)

It is true that on being transferred to another High Court a Judge ceases to be a Judge but then he ceases to be a Judge of the transferor court only and does not cease to be a Judge for all times to come so as to make his transfer in the transferee court a fresh appointment. (Para 286)

It is true that in Para 11 (iii) to Sch. 2 of the Constitution joining time is mentioned on transfer from a High Court to Supreme Court or from one High Court to another and the word 'appointment' has not been used as such. That however makes no difference because this schedule only refers to a small matter of joining time which both the judges, viz., a judge appointed to the Supreme Court and the judge transferred, are entitled to avail. Nothing, therefore, turns upon the language of para 11 (iii) of the second schedule. (Para 287)

When a Judge was appointed in the original High Court he had taken the oath of his office which bound him to act as a Judge of that particular High Court. Since by virtue of the transfer, the court is changed, a fresh oath becomes necessary as a clerical formality to indicate that although his appointment as a Judge of a High Court does not cease to exist he discharges his duties as a Judge in another court in respect of which he had not taken the oath of office. In these circumstances, it cannot be said that merely because a transferee Judge has to take a fresh oath the transfer becomes a new or a fresh appointment. (Para 288)

The plain and unambiguous language of Art. 217 (1) Proviso (c) and Art. 222 cannot be stretched to indicate that 'appointment' and 'transfer' are synonymous terms when the constitutional provisions make it very clear that the power of transfer and the power of appointment are two different kinds of powers to be exercised in different ways. AIR 1973 SC 1461, Expld. (Para 290)

(Z) Constitution of India, Arts. 215, 216, 217 (1) Proviso (c) — Judges of High Courts do not constitute a single All India cadre.

Per Pathak J.

The Judges of the High Courts do not constitute a single All India cadre. The constitutional scheme embodied in Chapter-V envisages each High Court as a distinct entity from every other High Court. Every High Court is a complete, self-contained and self-sufficient institution independent of the others and not related to them in any manner. Every High

Court draws its own powers and jurisdiction from the provisions of the Constitution, and in no way does it share them with the other High Courts. When a Judge is appointed to a High Court, he is appointed to that High Court only. He is the holder of a distinct office, that of a Judge of the High Court to which he is appointed. The Presidential Warrant appointing the Judge specifically mentions that the appointment is as a Judge of the High Court named therein. Moreover, the prescribed Form itself of the oath, which the Judge must make and subscribe before entering upon his office shows clearly that the appointment is confined to that High Court. It is for this reason that Art. 217 (1) Proviso (c) enacts that the office of a Judge shall be vacated by his being transferred to any other High Court.

Similarly the consultative process involved in the appointment of a Judge of a High Court requires the President to consult the Chief Justice of the High Court to which his appointment is proposed and the Governor of the State concerned, besides the Chief Justice of India. The Chief Justice of the High Court is consulted because, he is intimately concerned with the appointment of a competent Judge to meet the particular requirements of his Court. The Governor of the State likewise is consulted because he is concerned about the quality of the administration of Justice at its highest level in the State. In the case of both functionaries, they are involved with the appointment in order to ensure that the Judge appointed is most suitable in relation to that High Court. The interest and needs of that High Court alone occupy the mind of these two functionaries. Article 216 speaks of a High Court for each State, and Art. 216 plainly declares that the High Court shall consist of a Chief Justice and other Judges. The Chief Justice is a Chief Justice of that High Court only and so are the other Judges. The Judges of a High Court owe their responsibilities and discharge their functions in relation to that High Court only. They have no constitutional connection and no legal relationship with the body of Judges of any other High Court. As such there is no All India Service of High Court Judges. AIR 1937 All 588 (FB), Disting. (Para 899)

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(ZA) Constitution of India, Arts. 124 (4), 139A (2), 214 (2) & (3) (before deletion in 1956), 222, 366 (14) and 376, Sch. 7 List 1, Entry 78 and Para 11 (b) (i) — High Courts — Status, inter se — They possess same status.

Per Venkataramiah J.

Various provisions in the Constitution bearing on the High Courts and Judges of High Courts indicate that all the High Courts organically form integral parts of a single system although their territorial jurisdictions are defined. No High Court can claim any superiority over the other either on the basis of its situation or on the basis that it is a successor to a High Court which was functioning in any Province immediately before the commencement of the Constitution or on the basis of the extent of its territorial jurisdiction. All the High Courts have the same status under the Constitution.

(Paras 988, 990, 992)

An analysis of the various provisions of the Constitution and other laws having a bearing on the question shows that every High Court in India is an integral part of a single Indian judiciary and Judges who hold the posts of Judges of High Courts belong to a single family even though there may be a slight variation in two of the authorities who are required to be consulted at the time of the appointment.

(Para 988)

(ZB) Constitution of India, Arts. 19 (1) (a), 32 — Procedure — Discussions by Press on the merits and demerits of the grounds on which recommendations were made concerning the Judges or the truth or falsity of disclosed material — Amounts to holding a trial by Press — Such behaviour of the Press — Deprecated.

Per Tulzapurkar J.

A section of the Press while reporting the proceedings of the Court in this case seems to have, without fully realising the scope and purpose of the disclosure ordered by the Court, exceeded its limits of fair reporting and fair comment by discussing the merits and demerits of the grounds on which recommendations were made concerning the Judges or the truth or falsity of the disclosed material; assuring that this Court was intending to adjudicate on the merits or demerits of the grounds

of the recommendations made or on truth or falsity of the materials even then how could the press before this Court has finally adjudicated upon the issues involved, pronounce its verdict — which it almost did — on the high constitutional functionaries involved by holding a trial by press? The disclosure which became necessary in the highest public interest of administration of justice — for seeing that injustice was not perpetrated and justice was meted out to high judicial functionaries under the Constitution, was not intended for being used for such purpose. Such behaviour of a section of the Press has been most distressing and has unnecessarily affected the image of Judiciary and the high Constitutional functionaries involved. (Para 681)

(ZC) Constitution of India, Arts. 217 (1), 226 — Appointment of High Court Judge — Initial recruitment — Non-appointment of a person — Writ of mandamus at the instance of aggrieved person (non-appointee) to reconsider his case would not lie. Per Tulzapurkar J.

The special machinery for making appointments of High Court Judges indicated in Art. 217 (1), is obviously designed to recruit persons of great ability, high character and unquestioned integrity to the Bench. All these factors go to show that at the stage of initial recruitment under Art. 217 (1), no one has a right to be appointed a Judge of the High Court nor the right to be considered for such appointment and, therefore, it does appear that a writ of mandamus at the instance of an aggrieved person to reconsider his case would not lie. (Para 612)

Per Venkataramiah J.

It cannot be said that an advocate or a member of the Subordinate Judiciary whose name is approved by the Chief Justice of a High Court and the Chief Justice of India gets a vested right to be appointed as a Judge of a High Court. In fact he has no justiciable right at all. If for any reason he is not appointed he cannot move the Court to appoint him as a Judge of the High Court. (Para 1026)

(ZD) Constitution of India, Art. 226 — Writ proceedings — Affidavits, counter-affidavits and rejoinder-affidavits filed by the parties constitute not merely their pleadings but also partake of

the character of evidence in the case. (Per Tulzapurkar J.) (Para 675)

(ZE) Constitution of India, Arts. 32, 226, 139A — Jurisdiction — Scope of — Reappointment of petitioner as the Additional Judge of High Court — Integrity of petitioner doubted by Chief Justice of High Court — Petitioner ready to establish his innocence and sought opportunity from Supreme Court — Supreme Court cannot grant such opportunity in view of restricted scope of its jurisdiction in such case. (Per Venkataramiah J.). (Para 1215)

(ZF) Constitution of India, Arts. 224 (1), 216, 226 — Appointment of High Court Judges — Proposed appointees for initial recruitment and sitting Additional Judges are not in the same position.

There is a valid classification between proposed appointees for initial recruitment and the sitting Additional Judges whose cases for their continuance after the expiry of their initial term are to be decided and the two are not in the same position. (Para 618)

(ZG) Constitution of India, Pre. — Constitutional conventions — Use of, in interpretation of Constitution — Scope.

Per Desai, J.

The conventions generally grow where the powers of the Government are vested in different person or bodies or where, in the words of sir William Holdsworth, there is a mixed Constitution. But conventions do presuppose the law and any convention contrary to the written context is of no validity. The conventions are built, in the first instance, on the foundation of law but once they are established, they tend to form the basis for the law. It may, however, be noticed that these rules of law which are conventions are a mere matter of practice and their effect must change with the changing circumstances of national life. Implications arising from the provisions of the Constitution, constitutional conventions and constitutional practice all stand on a different footing. A constitutional convention when spread over a long period, of immemorial antiquity, followed invariably becomes entrenched as a rule of law but any convention contrary to the written provision is of no validity. Implications may arise from the context in which a provision is placed or the use of the language in the provision or from the nature of the power claimed vis-a-vis the whole constitutional scheme. Constitutional prac-

tice may be spelt out as a course of conduct over a reasonably long period which may indicate how the authorities charged with a duty to implement the Constitution have worked out or implemented a certain provision of the Constitution. A constitutional convention must be founded on some provision of law. Any convention contrary to the provision of the Constitution and its basic intendment cannot be given effect to as a convention. Its genesis must be in the provision itself. (Paras 747, 748, 749)

(ZH) Interpretation of Statutes — Language clear — Doctrine of casus omissus — Not applicable — External aid, when can be pressed into service — Mere legislative debate would not be admissible. (Constitution of India, Pre).

Per S. M. F. Ali J.

Where the language of a statute is clear and unambiguous, there is no room for the application either of the doctrine of casus omissus or of pressing into service external aid, for in such a case the words used by the Constitution or the statute speak for themselves and it is not the intention of the court to add words or expressions merely to suit what the courts think is the supposed intention of the legislature. (Paras 271, 197, 273)

Where, however, the words or expressions used in the constitutional or statutory provisions are shrouded in mystery, clouded with ambiguity and are unclear and unintelligible so that the dominant object and spirit of the legislature cannot be spelt out from the language, external aids in the nature of parliamentary debates, immediately preceding the passing of the statute, the report of the Select Committees or its Chairman, the Statement of Objects and Reasons of the statute, if any, or any statement made by the sponsor of the statute which is in close proximity to the actual introduction or insertion of the statutory provision so as to become, as it were, a result of the statement made, can be pressed into service in order to ascertain the real purport, intent and will of the legislature to make the constitutional provision workable. Although such aids may neither be decisive nor conclusive they would certainly assist the courts in interpreting the statute in order to determine the avowed object of the Act or the Constitution as the case may be. (Paras 271, 199, 261)

Except in the aforesaid cases, a mere speech of any Member made on the floor of the House during the course of a parliamentary or legislative debate would not be admissible at all because the views expressed by the speaker may be his individual views which may or may not be accepted by the majority of the Members present in the House.

(Para 271)

Legislative history of a constitutional provision though not directly germane for the purpose of construing a statute may, however, be used in exceptional cases to denote the beginning of the legislative process which results in the logical end and the finale of the statutory provision but in no case can by legislative history take the place of or be a substitute for an interpretation which is in direct contravention of the statutory provision concerned.

(Paras 271, 268)

Where the scheme of a statute clearly shows that certain words or phrases were deliberately omitted by the legislature for a particular purpose or motive, it is not open to the court to add those words either by conforming to the supposed intention of the legislature or because the insertion or the omission suits the ideology of the Judges deciding the case. (Paras 272, 198, 253)

(ZI) Constitution of India, Art. 141, Pre. — Interpretation of Statutes and/or constitutional provisions — Duty of Supreme Court. (Interpretation of Statutes).

Per S. M. F. Ali, J. :— Supreme Court which lays down the law of the land under Art. 141 must extremely careful and circumspect in interpreting statutes, more so constitutional provisions, so as to obviate the necessity of a constitutional amendment every time which is an extremely onerous task. Having carefully interpreted a particular provision of the Constitution, the Court should as far as possible stick to the doctrine of stare decisis. It must be remembered that a Constitution is a federal component and the constituents must hold a balance between all its parts. (Paras 193, 194)

(ZJ) Constitution of India, Pre. — Interpretation of Constitution — Rules as to — Power conferred by Constitution upon an authority — Cannot be denied on ground of its misuse — (Interpretation of Statutes). (Para 789)

(ZK) Precedents — Judicial precedents — Ratio is binding and not conclusion.

It is elementary that what is binding on the court in a subsequent case is not the conclusion arrived at in a previous decision but the ratio of that decision, for it is the ratio which binds as a precedent and not the conclusion (Para 61)

(ZL) Constitution of India, Preamble — Interpretation of Constitution — Court must not bend language of Constitution according to its will.

Per Bhagwati, J.:— The Court can always find reason for bending the language of the Constitution but that would be rewriting the Constitution in the guise of interpretation. It must also be remembered that the Constitution is an organic instrument intended to endure and its provisions must be interpreted having regard to the constitutional objectives and goals and not in the light of how a particular Government may be acting at a given point of time. Judicial response to the problem of constitutional interpretation must not suffer from the fault of emotionalism or sentimentalism which is likely to cloud the vision when Judges are confronted with issues of momentous importance. (1903) 193 US 197 Relied on. (Para 1)

(ZM) Constitution of India, Arts. 226 and 136 — Writ petition before High Court challenging constitutional validity of transfer of Chief Justice of High Court — Petition rejected in limine on ground that petitioner had not been able to produce documents on which he wanted to place reliance — Held, that was not valid ground — Special Leave to appeal could be granted — However, since issues sought to be raised by petition were already being agitated in other writ petitions, it was not necessary to grant special leave. (Per Bhagwati J.). (Para 2)

(ZN) Constitution of India, Arts. 226 and 32 — Powers of Court — Court does not decide academic questions.

The Court does not decide issues in the abstract. It undertakes determination of controversy provided it is necessary in order to give relief to a party and if no relief can be given because none is sought, the Court cannot take upon itself a theoretical exercise merely for the purpose of deciding academic issues, howsoever important they may be. The Court cannot embark upon an

inquiry whether there was any misuse or abuse of power in a particular case, unless relief is sought by the person who is said to have been wronged by such misuse or abuse of power. The Court cannot take upon itself the role of a commission of inquiry — a knight errant roming at will with a view to destroying evil wherever it is found. (Para 56)

In the instant case an additional judge was not appointed for a further term. A petition was filed by some lawyer challenging the non-appointment. But the Judge himself did not seek any relief from the Court.

Held, relief could not be granted by the Court. Per Venkataramiah J.

(Para 56)

(ZO) Interpretation of Statutes — External aid — Marginal Note — Use of as aid to interpretation of section — Permissibility.

If the relevant provisions in the body of the statute firmly point towards a construction which would conflict with the marginal note the marginal note has to yield. If there is any ambiguity in the meaning of the provisions in the body of the statute, the marginal note may be looked into as an aid to construction. (Para 1096)

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IN TRANSFERRED CASES Nos. 19, 20,
21 & 22/81 :

Mr. S. P. Gupta — Petitioner in person
& Mr. H. K. Puri, Advocate with him
in T. C. No. 19/81

Mr. Soli, J. Sorabjee, Sr. Advocate,
Mr. P. H. Parekh & Miss Manik Tar-
kunde, Advocates with him, for peti-
tioner in T. C. No. 20/81

Mr. P. P. Rao, Sr. Advocate, M/s. G. C.
Kumar, R. Venkataramani, Mahesh
R. Choudhary and G. D. Gupta, Advoca-
tes with him, for Petitioner in
T. C. No. 21/81.

Mr. H. M. Seervai, Sr. Advocate, Mr.
K. C. Cooper, Sr. Advocate, Mr. A. J.
Rana, Sr. Advocate, M/s. J. R. Gagrati,
B. R. Agarwal & P. G. Gokhale, Advoca-
tes with them for Petitioner in
T. C. No. 22/81.

Mr. Lal Narain Sinha, Attorney General,
Mr. K. Parasaran, Solicitor General,
Mr. Vepa P. Sarthi, Sr. Advocate, Mr.
P. R. Mridul, Sr. Advocate, Mr. V. R.
Sarthi, Sr. Advocate, M/s. G. S.
Narayana, R. N. Poddar and Miss A.
Subhashini, Advocates with them, for
Respondents in T. C. 19-22/81

Mr. R. K. Garg, Sr. Advocate, Mr. B. V.
Desai and Mr. S. J. Jain, Advocates
with him, for Respondent No. 3 in
T. C. No. 20/81.

IN W. P. No. 274/81 :—

Miss Lilly Thomas — Petitioner in person
and Mr. H. M. Seervai, Sr. Advocate.

Mr. L. N. Sinha, Attorney General, Mr.
K. Parasaran, Solicitor General, Mr.
K. S. Gurumoorthy, Miss A. Subha-
shini, Mr. R. N. Poddar, Advocates
with them for Respondent No. 1.

Mr. S. Markandeya, Advocate, for Res-
pondent No. 2.

Dr. L. M. Singhvi, Sr. Advocate, Mr.
S. K. Verma, Mr. S. K. Sinha and
Mr. A. M. Singhvi, Advocates with
him for Respondent No. 3.

Dr. L. M. Singhvi, Sr. Advocate, Mr. S. K.
Verma and Mr. N. Sudhakaran,
Advocates him for Intervener —
Kerala High Court Advocates As-
sociation,

Mr. E. C. Aggarwal, Advocate for In-
tervener.

Mr. B. C. Ghosh, Sr. Advocate, Mr.
Sushanta Kumar Dass, G. S. Chat-
terjee Mr. D. P. Mukherjee and Mr.
A. K. Ganguli, Advocates with him
for intervener.

Mr. C. L. Sahu, Mr. K. R. Nagaraja,
Mr. N. S. Das Bahal and Mr. A. K.
Srivastava, Advocates for Intervener.

IN TRANSFERRED CASE NO. 2/81—

Mr. C. S. Vaidyanathan, Advocate for
Petitioner.

Mr. L. N. Sinha, Attorney General,
Mr. K. Parasaran, Solicitor General,
Mr. K. S. Gurumoorthy, Miss A. Sub-
hashini and Mr. R. N. Poddar, Advoca-
te with them for Respondent
No. 1.

S. Markandeya, Advocate for Respon-
dent No. 2.

Dr. L. M. Singhvi, Sr. Advocate, and
Mr. S. K. Verma, Advocate with him
for Respondent No. 6.

Mr. Basudeva Pd., Sr. Advocate, Mr.
Ashok Grover, Advocate with him
for Intervener (Patna High Court Bar
Association).

Mr. B. C. Ghosh, Sr. Advocate, Mr.
Susanta Kumar Dass, Mr. D. P.
Mukherjee and Mr. G. S. Chatterjee,
Advocates with him, for intervener.

IN TRANSFERRED CASE NO. 6/81—

Mr. L. N. Sinha, Attorney General,
Mr. K. Parasaran, Solicitor General,
Mr. K. S. Gurumoorthy, Miss A. Su-
bhashini and Mr. R. N. Poddar, Advoca-
tes with them for Respondent
No. 1.

IN TRANSFERRED CASE NO. 24/81—

Dr. L. M. Singhvi, Sr. Advocate, M/s.
S. K. Verma, S. K. Sinha, L. L.
Pandey and A. M. Singhvi, Advoca-
tes with him for Petitioners.

Dr. L. N. Sinha, Attorney General,
Mr. K. Parasaran, Solicitor General,
M/s. K. S. Gurumoorthy, Miss A. Su-
bhashini and Mr. R. N. Poddar, Advoca-
tes with them for Respondents.

IN SPECIAL LEAVE PETITION
NO. 1509/81—

Mr. A. K. Srivastava, Advocate for
Petitioner.

BHAGWATI, J.:— These writ petitions filed in different High Courts and transferred to this Court under Article 139 of the Constitution raise issues of great constitutional importance affecting the independence of the judiciary and they have been argued at great length before us. The arguments have occupied as many as thirty five days and they have ranged over a large number of issues comprising every imaginable aspect of the judicial institution. Voluminous written submissions have been filed before us which reflect the enormous industry and vast erudition of the learned counsel appearing for the parties and a large number of authorities, Indian as well as foreign, have been brought to our attention. We must acknowledge with gratitude our indebtedness to the learned counsel for the great assistance they have rendered to us in the delicate and difficult task of adjudicating upon highly sensitive issues arising in these writ petitions. We find, and this is not unusual in cases of this kind, that a considerable amount of passion has been injected into the arguments on both sides and sometimes passion may appear to lend strength to an argument, but, sitting as Judges, we have to be careful to see that passion does not blind us to logic and predilections pervert proper interpretation of the constitutional provisions. We have to examine the arguments objectively and dispassionately without being swayed by populist approach or sentimental appeal. It is very easy for the human mind to find justification for a conclusion which accords with the dictates of emotion. Reason is a ready enough advocate for the decision one, consciously or unconsciously, desires to reach. I will recall the brilliant fling of Shri Arobindo in his poem "Savitri".

"An inconclusive play is Reason's toil;

Each strong idea can use her as its tool;

Accepting every brief she pleads her case,

Open to every thought she cannot know."

We have therefore to rid our mind of any pre-conceived notions or ideas and interpret the Constitution as it is and not as we think it ought to be. We can

always find some reason for bending the language of the Constitution to our will, if we want, but that would be re-writing the Constitution in the guise of interpretation. We must also remember that the Constitution is an organic instrument intended to endure and its provisions must be interpreted having regard to the constitutional objectives and goals and not in the light of how a particular Government may be acting at a given point of time. Judicial response to the problem of constitutional interpretation must not suffer from the fault of emotionalism or sentimentalism which is likely to cloud the vision when Judges are confronted with issues of momentous importance. We must constantly bear in mind the famous words of Holmes J., in *Northern Security Co. v. United States*, (1903) 193 US 197, where that great illustrious Judge said:

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

With these prefatory words we may now proceed to state the facts of these writ petitions.

2. The first writ petition is that filed by Iqbal Chagla and others in the High Court of Bombay. The petitioners in this writ petition are advocates practising in the High Court of Bombay and they have challenged a circular letter dated 18th March, 1981, addressed by Shri Shiv Shankar, the Law Minister of the Government of India, to the Governor of Punjab and the Chief Ministers of the other States. Since the circular letter has formed the subject matter of heated controversy between the parties and its constitutional validity has been assailed on behalf of the petitioners, it would be desirable to reproduce it in extenso in the words of the author himself:

"D. O. No. 66/10/81-Jus.

Ministry of Law, Justice and
Company Affairs, India
New Delhi - 110 001.

March 18, 1981.

My dear,

It has repeatedly been suggested to Government over the years by several bodies and forums including the States Reorganisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one third of the Judges of the High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction. The feeling is strong, growing and justified that some effective steps should be taken very early in this direction.

2. In this context, I would request you to:—

(a) obtain from all the Additional Judges working in the High Court of your State their consent to be appointed as permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of preference, to which they would prefer to be appointed as permanent Judges; and

(b) Obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in paragraph 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of the Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given.

4. I would be grateful if action is initiated very early by you and the written consent and preferences of all Additional Judges as well as of persons recommended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also sending a copy of this letter to the Chief Justice of your High Court. With regards.

Yours sincerely,

Sd/- (P. Shivshankar)

To

1. Governor of Punjab
2. Chief Ministers (by name) (Except North-Eastern States.)"

It appears that a copy of the Circular letter was sent by Law Minister to the Chief Justice of each High Court and the Chief Minister of each State also forwarded a copy of the circular letter to the Chief Justice of the High Court of his State. We do not know what the Chief Justices of the various High Courts did on receipt of a copy of the circular letter from the Law Minister and from the Chief Ministers of their respective States, but presumably each Chief Justice sent a copy of the circular letter to the additional Judges in his Court with a request to do the needful in view of what was stated in the circular letter. The Chief Justice of Bombay High Court in any event addressed such a communication to each of the additional Judges in his Court. We do not know what was the response of the additional Judges in Bombay to the circular letter but the record shows that out of a total number of additional Judges in the Country, quite a few additional Judges gave their consent to be appointed outside their High Court. The petitioners and other advocates practising on the original as well as appellate side of the High Court of Bombay however took the view that the circular letter was a direct attack on the independence of the judiciary which is a basic feature of the Constitution and hence the Advocates Association of Western India which represents advocates practising on the appellate side, the Bombay Bar Association which represents advocates practising on the original side and the Managing Committee of the Bombay Incorporated Law Society which represents Solicitors practising in the High Court of Bombay, passed resolutions condemning the circular letter as subversive of judicial independence and asking the Government of India to withdraw the circular letter. Since the circular letter was not withdrawn by the Law Minister,

the petitioners filed the present writ petition in the High Court of Bombay, challenging the constitutional validity of the circular letter and seeking a declaration that if consent has been given by any additional Judge or by any person whose name has been or is to be submitted for appointment as a Judge, consequent on or arising from the circular letter, it should be held to be null and void. There were several grounds on which the constitutional validity of the circular letter was challenged but it is not necessary to set them out at the present stage because we shall have occasion to refer to them in detail when we deal with the rival arguments of the parties. The petitioners impleaded the Law Minister as respondent No. 1, the Union of India as respondent No. 2 and ten additional Judges of the Bombay High Court as respondents Nos. 3 to 12. The writ petition was filed on 20th April 1981 and immediately after filing it, the petitioners applied to the learned single Judge sitting on the original side of the Bombay High Court for admission of the writ petition and interim relief. The admission of the writ petition as also the grant of interim relief were opposed on behalf of respondent Nos. 1 and 2 but the learned single Judge admitted the writ petition and issued a rule and granted interim relief in terms of prayer (e) of the writ petition. The effect of granting the interim relief was that respondents Nos. 1 and 2 were restrained from further implementing the circular letter and acting in any manner upon the consent, if any, obtained from any person following on or arising from the circular letter. Respondents Nos. 1 and 2 thereupon preferred an appeal to a Division Bench of the Bombay High Court under clause (15) of the Letters Patent but the appeal was dismissed by the Division Bench on 24th April, 1981. The Division Bench fixed the hearing of the writ petition before the learned single Judge hearing writ petitions on 25th June 1981 and also gave directions for filing of affidavits by the parties. Respondent Nos. 1 and 2 being aggrieved by the order made by the Division Bench dismissing their appeal made an application to this Court on 8th May 1981 for taking up their special leave petition directed against the order of the Division Bench on the same day, but this Court refused to take up the

special leave petition for hearing on that day and directed that it may come up for hearing in due course. Respondents Nos. 1 and 2 in the meanwhile filed Transfer Petition No. 24 of 1981 for transfer of the writ petition from the Bombay High Court to this Court under Art. 139A of the Constitution and ultimately by an order dated 9th June 1981, the vacation Judge directed that the writ petition be withdrawn from the Bombay High Court to this Court and he also gave directions for filing of affidavits and written briefs. That is how the present writ petition filed by Iqbal Chagla and others has come up for hearing before this Bench of seven Judges constituted by the Hon'ble the Chief Justice of India.

3. The second writ petition is that filed by V. M. Tarkunde in the High Court of Delhi. The petitioner in this writ petition is a senior advocate practising in the Supreme Court and he has not only challenged the constitutional validity of the circular letter issued by the Law Minister but also assailed the practice followed by the Central Govt. in appointing additional Judges in various High Courts. The grounds on which the constitutional validity of the circular letter is challenged are the same as those taken in the first petition filed by Iqbal Chagla and others, but, so far as the complaint in respect of appointment of additional Judges is concerned, this writ petition covers new ground not treaded by the first writ petition. What made it necessary to include this complaint in the writ petition was the fact that three additional Judges of Delhi High Court, namely, O. N. Vohra, S. N. Kumar and S. B. Wad who had originally been appointed as Additional Judges for a period of two years with effect from 7th March 1979, and whose term was expiring on the midnight of 6th March 1981 were further appointed as additional Judges for a period of three months only from 7th March 1981 and these short-term appointments were, according to the petitioner, unjustified by the terms of Art. 224 and were in any event subversive of the independence of the judiciary. The petitioner therefore claimed in the writ petition, in addition to the declaration that the circular letter was unconstitutional and void, a writ of mandamus

directing the Central Government to convert the posts of additional Judges into permanent Judges in the various High Courts commensurate with the regular business and the arrears in those High Courts and in particular to convert 12 posts of additional Judges in the Delhi High Court into permanent posts having regard to the regular business and the large arrears in that High Court. The petitioner also questioned the validity of short-term appointments of O. N. Vohra, S. N. Kumar and S. B. Wad and claimed that since there was an existing vacancy in a permanent post, O. N. Vohra should be appointed as a permanent Judge to fill that vacancy and so far as S. N. Kumar and S. B. Wad were concerned, they should be appointed for the full term of two years. It appears that the Union of India was the only respondent impleaded in the writ petition as originally filed, but subsequently the Law Minister as also the Joint Secretary, Ministry of Law, Justice and Company Affairs were added as respondents Nos. 2 and 3 to the writ petitions. The High Court of Delhi by its order dated 23rd April, 1981, admitted the writ petition and issued rule upon it. However, since the questions arising in the writ petition were questions of great constitutional importance and the first writ petition had already been filed in the Bombay High Court and another writ petition to which we shall presently refer had also been presented in the High Court of Allahabad raising substantially the same questions, an application was made to this Court on 24th April 1981 for transfer of the writ petition to this Court and by an order dated 1st May, 1981 this Court transferred the writ petition to itself from the Delhi High Court. Meanwhile, the further term of O. N. Vohra, S. N. Kumar and S. B. Wad was about to expire on 6th June, 1981 and no decision appeared to have been taken till then for continuing these three additional Judges for a further term and the petitioner apprehended that if these three additional Judges were not continued as additional Judges on the expiration of their term on 6th June, 1981, the writ petition might become infructuous. The petitioner therefore, presented an application to this Court on 4th May 1981, for an order directing that the writ petition be heard

and disposed of before 6th June, 1981 and that in any event, the respondents should maintain status quo by extending the period of appointment of additional Judges in the various High Courts till the disposal of the writ petition. Immediately on filing this application the petitioner requested the Court to fix an early date of hearing of the writ petition so that it could be disposed of before 6th June, 1981, but since the Court was closing for the summer vacation from 9th May, 1981, it was not possible to fix the hearing of the writ petition until the reopening of the court after the summer vacation. The petitioner thereupon prayed for an interim order that on the expiration of their term on 6th June, 1981, the additional Judges should be continued and their term extended until the final disposal of the writ petition. But, obviously this was not a prayer which could be granted by the Court because it is for the President and not for the Court to appoint Additional Judges and once the term of an Additional Judge has come to an end by efflux of time, it is not competent for the court to reappoint him for a further term. Since, however, an allegation was made in the application that the appointments of additional Judges for a further term were being made at the last minute and three additional Judges of the Bombay High Court at Nagpur were not informed about the extension of their term until the evening of the last day on which their original term was due to expire, this Court made an order dated 8th May 1981 directing that, since the hearing of the writ petition would not be taking place until the reopening of the Court after the summer vacation, the Union of India should "decide not less than ten days before 6th June, 1981 whether any of the three additional Judges should be reappointed for a further term as additional Judges or they should be appointed as permanent Judges or otherwise". So far as the circular letter was concerned, though no prayer for interim relief was made in the written application, this Court, on an oral application made on behalf of the petitioner, directed that any additional Judge who does not wish to respond to the circular letter may do so until the disposal of the writ petition and he shall not be refused extension nor shall he be refused

permanent appointment, as the case may be, on the ground that he has not sent any reply to the circular letter or has not indicated his preference as asked for in the circular letter. Now, according to this order, the Central Government was bound to take its decision in regard to the continuance or otherwise of O. N. Vohra, S. N. Kumar and S. B. Wad on or before 27th May, 1981 but since no such decision was communicated to the three additional Judges, the petitioner, presuming that such decision must not have been reached by the Central Government, preferred an application to this court on 1st June, 1981 for directing the Central Government to communicate its decision regarding the continuance or otherwise of the three additional Judges. Before this application came up for hearing, the petitioner came to know that a decision had been taken by the Central Government in regard to O. N. Vohra S. N. Kumar and S. B. Wad and while S. B. Wad was continued as an additional Judge for a period of one year from 7th June, 1981, O. N. Vohra and S. N. Kumar were not continued for a further term. The petitioner thereupon preferred another application to this Court on 4th June, 1981 and in this application the petitioner pointed out that there were still large arrears of work in the Delhi High Court and therefore there was no lawful and bona fide reason for the non-continuance of O. N. Vohra and S. N. Kumar and not granting fresh appointments to them was mala fide and unconstitutional and prayed that in the circumstances, an interim order should be made by the Court directing that O. N. Vohra and S. N. Kumar shall continue to function as Judges of the Delhi High Court. Both these applications came up for hearing before the learned Vacation Judge and by an order dated 6th June, 1981, the learned Vacation Judge declined to grant interim relief that O. N. Vohra and S. N. Kumar shall continue as additional Judges but directed that notice be issued to show cause why status quo in respect of these two Judges should not be maintained and continued till the pendency of the writ petition. It appears that no order was thereafter made on the notice, since the writ petition itself was directed to be heard at an early date and in the meanwhile, O. N. Vohra

and S. N. Kumar were impleaded as respondent Nos. 4 and 5, to the writ petition. O. N. Vohra did not appear at the hearing of the writ petition but S. N. Kumar appeared through counsel, filed a counter-affidavit and claimed that the decision of the Central Government not to appoint him for a further term was vitiated since it was reached without full and effective consultation with the Chief Justice of India and in any event it was based on irrelevant considerations and that on a proper construction of Article 224 read with Article 217, he must be deemed to have been appointed a permanent Judge and in any event, he was entitled to be appointed as an additional Judge for a further term. The Union of India also filed an affidavit in answer to the writ petition and a further affidavit in reply to the counter-affidavit of S. N. Kumar. The writ petition was thereafter placed for hearing before this Bench of seven Judges along with the writ petition filed by Iqbal Chagla and others.

4. The third writ petition is that filed by J. L. Kalra and others in the High Court of Delhi. The petitioners in this writ petition are advocates practising in the Delhi High Court and they have prayed for the issue of a writ in the nature of mandamus directing the Central Government to make an assessment of the number of permanent and additional Judges required by the Delhi High Court having regard to its current business and the accumulated arrears, to create such number of posts of permanent and additional Judges as may be necessary and to make appointments to these posts. The other reliefs asked for in this writ petition are substantially the same as the reliefs prayed for in the writ petition filed by V. M. Tarkunde. This writ petition was also like the other writ petitions withdrawn and transferred to itself by this Court. Since the issues arising in this writ petition are identical with the issues arising in the other two writ petitions, it was heard by this Bench of seven Judges along with those writ petitions.

5. The fourth writ petition is that filed by S. P. Gupta in the High Court of Allahabad. The petitioner in that writ petition is an advocate practising in the Allahabad High Court and he has filed this writ petition for substantially the

same reliefs as the writ petitions of Iqbal Chagla and V. M. Tarkunde, with only this difference that the reliefs claimed by him relate to the appointments of additional Judges in the High Court of Allahabad. The petitioner has inter alia prayed for a declaration that the three additional Judges of the Allahabad High Court, namely, Mr. Justice Murli-dhar, Mr. Justice A. N. Verma and Mr. Justice N. N. Mittal must be deemed to have been appointed permanent Judges under the warrants already issued to them and that the circular letter of the Law Minister must be held to be void. This writ petition was also heard along with the other writ petitions by this Bench of seven Judges,

6. Since these four writ petitions to which we have just referred raise the same issues in regard to the circular letter issued by the Law Minister and the scope and ambit of the power of the Central Government in regard to appointment or non-appointment of additional Judges, it would be convenient to deal with them in a group and we shall hereafter for the sake of convenience refer to them as the first group of writ petitions.

7. The fifth writ petition is that filed by Miss Lily Thomas, an advocate practising in the Supreme Court. This writ petition has challenged the transfer of Mr. Justice M. M. Ismail, Chief Justice of the High Court of Madras as the Chief Justice of Kerala High Court. What occasioned the filing of this writ petition was an order dated 19th Jan., 1981 made by the President transferring Mr. Justice M. M. Ismail, Chief Justice of the Madras High Court as Chief Justice of the Kerala High Court with effect from the date he assumed charge of his office. This order recited that it was made by the President in exercise of the powers conferred under Cl. (1) of Article 222 and after consultation with the Chief Justice of India. Simultaneously with the making of this order, another order of the same date was issued by the President whereby the President in exercise of the powers conferred by clause (1) of Article 222 after consultation with the Chief Justice transferred Mr. Justice K. B. N. Singh, Chief Justice of the High Court of Patna as Chief Justice of the High Court of Madras with effect from the date he

assumed charge of his office. It was the first order of transfer of Mr. Justice M. M. Ismail as Chief Justice of the Kerala High Court that was challenged by the petitioner in this writ petition. There were several grounds on which the transfer was challenged and they were inter alia that the power of transfer conferred under clause (1) of Art. 222 was confined only to transfer of a High Court Judge and did not cover transfer of the Chief Justice of a High Court, even if the Chief Justice of a High Court could be transferred in exercise of the power conferred under clause (1) of Article 222, such transfer could be effected only with consent of the Judge sought to be transferred and in any event, even if consent was not necessary, such transfer could be effected only in public interest and after full and effective consultation with the Chief Justice of India and in the case of transfer of Chief Justice M. M. Ismail, none of these conditions was satisfied, since the transfer was not effected with his consent and it was neither in public interest nor after full and effective consultation with the Chief Justice of India. This writ petition was filed by the petitioner under Article 32 of the Constitution and therefore when it came up for admission before a Bench of this Court, the Bench asked the petitioner as to how it was maintainable under Article 32. The Bench was inclined to throwout the petition summarily on the ground that it did not lie under Article 32, but the Attorney General of India appearing on behalf of the Union of India submitted that since the writ petition raised important questions of law, it may be entertained by the Court, because in any event, even if this writ petition were rejected on the ground that it was not maintainable under Article 32, a new writ petition for the same reliefs could always be filed under Article 226 and then it could be brought to this Court either by way of transfer under Article 124A or by way of an appeal under Article 136. The Bench therefore decided to admit this writ petition and issued rule nisi. After this writ petition was admitted, there were several interlocutory proceedings taken out by the petitioner, but it is not necessary to refer to them since most of them were rejected. The Union of India filed a counter-affidavit in reply to this writ peti-

tion contesting the various grounds urged on behalf of the petitioner. Chief Justice M. M. Ismail who was impleaded as respondent No. 2 in this writ petition, also filed an affidavit but the stand he took was that he had decided not to challenge the legality or validity of the order of the President transferring him as Chief Justice of the Kerala High Court and he did not want anyone to litigate for or against him. Since Chief Justice M. M. Ismail, who was the person to whom legal injury was caused by the order of transfer, did not claim any relief and made it clear that he did not want anyone to litigate for him, this writ petition could not be maintained by the petitioner and it was liable to be dismissed, but since the petitioner who was appearing in person, wanted to make a few submissions in regard to the scope and ambit of the power of transfer, we heard her for sometime. We may point out that whilst this writ petition was pending, Chief Justice M. M. Ismail resigned his office as Chief Justice of the Madras High Court and therefore, all the more, nothing survives in this writ petition.

8. The sixth writ petition is that filed by A. Rajappa an advocate practising in the High Court of Madras. This writ petition was originally filed in the High Court of Madras under Article 226 of the Constitution and in this writ petition the petitioner challenged the constitutional validity of the orders of transfer passed by the President on 19th Jan., 1981 transferring Mr. Justice M. M. Ismail, Chief Justice of Madras High Court as the Chief Justice of Kerala High Court and Mr. Justice K. B. N. Singh, Chief Justice of Patna High Court as the Chief Justice of Madras High Court. The principal grounds on which these two orders of transfer were assailed as unconstitutional and void were substantially the same as those urged in the fifth writ petition filed by Miss Lily Thomas, with only two additional grounds, namely, that the transfers having been effected without prior consultation with the Governors of the States to which the two Chief Justices were transferred, were violative of clause (1) of Article 217 and so far as the transfer of Chief Justice K. B. N. Singh as Chief Justice of Madras High Court was concerned, it was not in

public interest, since Chief Justice K. B. N. Singh did not know the Tamil language. This writ petition was withdrawn and transferred to itself by this Court since it raised substantially the same issues as the fifth writ petition filed by Miss Lily Thomas which was pending in this Court. The Union of India opposed this writ petition by filing a counter-affidavit where it contended that the transfers of both the Chief Justices were effected in public interest and after consultation with the Chief Justice of India who is the only authority required to be consulted whilst exercising the power of transfer under Article 222, clause (1) and the procedure prescribed by Article 217 clause (1) had no application in the case of transfer of a Judge or Chief Justice from one High Court to another. This writ petition was also referred to a Bench of seven Judges along with the fifth writ petition and that is how both these writ petitions have come up for hearing before us.

9. The seventh writ petition is that filed by P. Subramanian, an advocate practising in the Madras High Court. This writ petition was originally filed in the Madras High Court under Article 226 and along with the other writ petitions it was transferred to this Court for hearing and final disposal. The averments and prayers made in this writ petition are substantially the same as those in the sixth writ petition filed by A. Rajappa and so also are the statements made in the counter-affidavit filed on behalf of the Union of India. This writ petition does not therefore need any separate or independent consideration.

10. The eighth writ petition is that filed by D. N. Pandey and Thakur Ramapati Sinha, two advocates practising in the High Court of Patna. This writ petition was originally filed in the High Court of Patna under Article 226 and it challenged the constitutional validity of the Orders transferring Chief Justice M. M. Ismail to the Kerala High Court and Chief Justice K. B. N. Singh to the Madras High Court. The averments and prayers made in the writ petition are substantially the same as those made in the fifth, sixth and seventh writ petitions filed respectively by Miss Lily Thomas, A.

Rajappa and P. Subramanian and it is therefore not necessary to repeat them. Suffice it to state that this writ petition was also transferred to this Court along with the other writ petitions under Art. 124A. Whilst this writ petition was pending, Chief Justice K. B. N. Singh, who was originally impleaded as respondent No. 3 in the writ petition, applied for being transposed, as petitioner No. 3 and since the original petitioners had no objection to Chief Justice K. B. N. Singh joining them as co-petitioner, this Court made an Order on 17th Sept., 1981 transposing Chief Justice K. B. N. Singh as petitioner No. 3. Chief Justice K. B. N. Singh thereafter filed an affidavit setting out in extenso what transpired between him and the Chief Justice of India in regard to the proposal for his transfer and detailing the various grounds on which he contended that the order transferring him as Chief Justice of the Madras High Court was unconstitutional and void. Chief Justice K. B. N. Singh contended inter alia that the order transferring him as Chief Justice of the Madras High Court was passed by the President by way of punishment and it was based on irrelevant and insufficient grounds and was not in public interest and in any event, it was not preceded by full and effective consultation with the Chief Justice of India. The averments made by Chief Justice K. B. N. Singh in his affidavit were disputed by the Union of India in an affidavit sworn by K. C. Kankan, Deputy Secretary, Department of Justice, Ministry of Law, Justice and Company Affairs and the Chief Justice of India also filed a counter-affidavit in reply to the affidavit of Chief Justice K. B. N. Singh. The counter-affidavit of the Chief Justice of India prompted two affidavits in rejoinder, one by Chief Justice K. B. N. Singh and the other by petitioners Nos. 1 and 2. We shall have occasion to refer to these various affidavits when we deal with the rival arguments advanced on behalf of the parties.

11. These last four writ petitions challenging the constitutional validity of Orders of transfer of Chief Justice M. M. Ismail and Chief Justice K. B. N. Singh raised identical issues and we would therefore dispose them of together in one

group. They may for the sake of convenience be referred as the second group of writ petitions.

12. We may also at this stage refer to S. L. P. No. 1509 of 1981, filed by Ripudaman Prasad Sinha in this Court. This petition for special leave is directed against an order passed by the High Court of Patna rejecting the writ petition of the petitioner challenging the constitutional validity of the order of transfer of Chief Justice K. B. N. Singh, on the ground that the petitioner had not been able to produce the documents on which he wanted to place reliance. This is hardly a ground on which the writ petition should have been rejected by the High Court in limine and we would have therefore, ordinarily granted special leave to appeal against the decision of the High Court, but in view of the fact that the issues sought to be raised by the petitioner have already been agitated in the other writ petitions, it is not necessary to grant special leave and hence we do not propose to make any order on the special leave petition.

Locus Standi :

13. When these writ petitions reached hearing before us, a preliminary objection was raised by Mr. Mridul, appearing on behalf of the Law Minister, challenging the locus standi of the petitioners in Iqbal Chagla's writ petition. He urged that the petitioners in that writ petition had not suffered any legal injury as a result of the issuance of the Circular by the Law Minister or the making of short term appointments by the Central Government and they had therefore no locus standi to maintain the writ petition assailing the constitutional validity of the Circular or the short term appointments. The legal injury, if at all, was caused to the additional Judges whose consent was sought to be obtained under the Circular or who were appointed for short terms and they alone were therefore entitled to impugn the constitutionality of the Circular and the short term appointments and not the petitioners. The basic postulate of the argument was that it is only a person who has suffered legal injury who can maintain a writ petition for redress and no third party can be permitted to have access to the Court for the purpose of seeking redress for the person injured. The same preliminary objection was urged by Mr.

Mridul against the writ petition of S. P. Gupta and the contention was that the petitioner in that writ petition not having suffered any legal injury had no locus standi to maintain the writ petition. So far as the writ petition of V. M. Tarkunde is concerned, Mr. Mridul said that he would have had the same preliminary objection against the locus standi of the petitioner to maintain that writ petition because the petitioner had suffered no legal injury, but since S. N. Kumar had appeared, albeit as a respondent, and claimed relief against the decision of the Central Government not to appoint him for a further term and sought redress of the legal injury said to have been caused to him as a result of such decision, the lack of locus standi on the part of the petitioner was made good and the writ petition was maintainable. Mr. Mridul asserted that if S. N. Kumar had not appeared and sought relief against the decision of the Central Government discontinuing him as an additional Judge, the writ petition would have been liable to be rejected at the threshold on the ground that the petitioner had no locus standi to maintain the writ petition. This preliminary objection urged by Mr. Mridul raised a very interesting question of law relating to locus standi, or as the Americans call it 'Standing', in the area of public law. This question is of immense importance in a country like India where access to justice being restricted by social and economic constraints, it is necessary to democratise judicial remedies, remove technical barriers against easy accessibility to Justice and promote public interest litigation so that the large masses of people belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socio-economic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes.

14. The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legal protected interest by the impugned action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal

injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born. The leading case in which this rule was enunciated and which marks the starting point of almost every discussion on locus standi is *Ex parte Sidebotham*, (1980) 14 Ch D 458. There the Court was concerned with the question whether the appellant could be said to be a 'person aggrieved' so as to be entitled to maintain the appeal. The Court in a unanimous view held that the appellant was not entitled to maintain the appeal because he was not a 'person aggrieved' by the decision of the lower Court. James, L. J. gave a definition of 'person aggrieved' which, though given in the context of the right to appeal against a decision of a lower Court, has been applied widely in determining the standing of a person to seek judicial redress, with the result that it has stultified the growth of the law in regard to judicial remedies. The learned Lord Justice said that a 'person aggrieved' must be a man "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something." Thus definition was approved by Lord Esher M. R. in *In Re Reed Bowen & Co.* (1887) 19 QBD 174 and the learned Master of the Rolls made it clear that when James L. J. said that a person aggrieved must be a man against whom a decision has been pronounced which has wrongfully refused him of something, he obviously meant that the person aggrieved must be a man who has been refused something which he had a right to demand. There have been numerous subsequent decisions of the English Courts where this definition has been applied for the purpose of determining whether the person seeking judicial redress had locus standi to maintain the action. It will be seen that, according to this rule, it is only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal right or legally protected interest who can bring an action for judicial redress. Now obviously where an applicant has a legal right or a legal-

ly protected interest, the violation of which would result in legal injury to him, there must be a corresponding duty owed by the other party to the applicant. This rule in regard to locus standi thus postulates a right-duty pattern which is commonly to be found in private law litigation. But, narrow and rigid though this rule may be, there are a few exceptions to it which have been evolved by the Courts over the years.

15. In the first place a rate payer of a local authority is accorded standing to challenge an illegal action of the local authority. Thus, a rate payer can question the action of the municipality in granting a cinema licence to a person. vide: *K. R. Shenoy v. Udupi Municipality*, AIR 1974 SC 2177. Similarly, the right of a rate payer to challenge misuse of funds by a municipality has also been recognised by the Courts vide: *Varadarajan v. Salem Municipality*, AIR 1973 Mad 55. The reason for this liberalisation of the rule in the case of a tax payer of a municipality is that his interest in the application of the money of the municipality is direct and immediate and he has a close relationship with the municipality. The Courts in India have, in taking this view, followed the decisions of the English Courts. Secondly, if a person is entitled to participate in the proceedings relating to the decision making process culminating in the impugned decision he would have locus standi to maintain an action challenging the impugned decision. Vide: *Queen v. Bowman*, (1898) 1 QB 663 where it was held that any member of the public had a right to be heard in opposition to an application for a licence and having such right, the applicant was entitled to ask for mandamus directing the licencing Justices to hear and determine the application for licence according to law. Thirdly, the statute itself may expressly recognise the locus standi of an applicant, even though no legal right or legally protected interest of the applicant has been violated resulting in legal injury to him. For example, in *J. M. Desai v. Roshan Kumar* (1976) 3 SCR 58 : (AIR 1976 SC 578), this Court noticed that the Bombay Cinematograph Act, 1918 and the Bombay Cinema Rules, 1954 made under that Act, recognised a special interest of persons residing, or concerned with any institution such as a school, temple, mosque etc. located within a distance of 200 yards of the site on

which the cinema house is proposed to be constructed and held that as the petitioner, a rival cinema owner, did not fall within the category of such persons having a special interest in the locality, he had no locus standi to maintain the petition for a writ of certiorari to quash the No Objection Certificate granted by the District Magistrate. to respondents Nos. 1 and 2. It is obvious from the observations made at page 72 (of SCR) : (at p. 586 of AIR) of the Report that if the petitioner had been a person falling within this category of persons having a special interest in the locality, he would have been held entitled to maintain the petition. There is also another decision of this Court illustrating the situation where a statute expressly gives locus standi to persons to complain against a public wrong and that is the decision in *Ratlam Municipality v. Vardhi Chand*, AIR 1980 SC 1622. The statutory provision which came up for consideration in this case was S. 133 of Criminal P. C. which empowers a Magistrate on receiving the report of a police officer or other information to make an order for remedying a public nuisance. What happened in this case was that the Ratlam Municipality filed to carry out its statutory duty of constructing a drain pipe to carry the filth etc. on a particular road. The local residents decided to invoke S. 133 of Criminal P. C. against the Municipality. The Magistrate made an order requiring the Municipality to construct drain pipes and this order was confirmed in appeal by this Court. The Municipality pleaded lack of funds but this was not accepted as a valid defence. However, to have a viable scheme keeping in view the financial position of the Municipality, this Court examined the three schemes submitted to it and directed the Municipality to implement one of them. The standing of the local residents to move the Magistrate was recognised since S. 133 of Criminal P. C. expressly conferred such right on them.

16. There is also another exception which has been carved out of this strict rule of standing which requires that the applicant for judicial redress must have suffered a legal wrong or injury in order to entitle him to maintain an action for such redress. It is clear that, having regard to this rule, no one can ordinarily seek judicial redress for legal injury suffered by another person; it is only

such other person who must bring action for judicial redress. It is on this principle that the Supreme Court of the United States held in *United States v. James Griggs Raines*, (1960) 362 US 17 : 4 L Ed 2d 524 that a litigant may only assert his own constitutional rights or immunities and save in exceptional cases, no person can claim standing to vindicate the constitutional rights of a third party. But it must now be regarded as well settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the Court on account of some disability or it is not practicable for him to move the Court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke assistance of the Court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him. Take for example, the case of a minor to whom a legal wrong has been done or a legal injury caused. He obviously cannot on his own approach the Court because of his disability arising from minority. The law therefore provides that any other person acting as his next friend may bring an action in his name for judicial redress vide : Order XXXII of Civil P. C. So also where a person is detained and is therefore not in a position to move the Court for securing his release, any other person may file an application for a writ of habeas corpus challenging the legality of his detention. Of course, this Court has ruled in a number of cases that a prisoner is entitled to address a communication directly to the Court complaining against his detention and seeking release and if he addresses any such communication to the Court, the Superintendent of the prison is bound to forward it to the Court and, in fact, there have been numerous instances where this Court has acted on such communication received from a prisoner and treating it as an application for a writ of habeas corpus, called upon the detaining authority to justify the legality of such detention and on the failure of the detaining authority to do so, released the prisoner. But since a person detained would ordinarily be unable to communicate with the outside world, the law presumes that he will not be able to ap-

proach the Court and hence permits any other person to move the Court for judicial redress by filing an application for a writ of habeas corpus. Similarly, where a transaction is entered into by the Board of Directors of a company which is illegal or ultra vires the company, but the majority of the shareholders are in favour of it and hence it is not possible for the company to sue for setting aside the transaction, any shareholder may file an action impugning the transaction. Here it is the company which suffers a legal wrong or a legal injury by reason of the illegal or ultra vires transaction impugned in the action, but an individual shareholder is permitted to sue for redressing such legal wrong or injury to the company, because otherwise the company, being under the control of the majority shareholders would be without judicial redress. Vide: *Atwood v. Merry Weather*, (1867) 5 Eq 464, The Judicial Committee of the Privy Council also affirmed this exception to the strict rule of standing in *Durayappah v. Fernando*, (1967) 2 AC 337. There what happened was that the Jaffna Municipal Council was dissolved by the Minister of Local Government without giving it an opportunity to be heard. The order of dissolution was therefore voidable at the instance of the Council, but the Council did not complain. The appellant was a mayor at the time of the dissolution and he petitioned for a writ in the nature of certiorari to quash the order of dissolution. Lord Upjohn speaking on behalf of the Judicial Committee denied standing to the appellant in the following words :

"The appellant was no doubt mayor at the time of its dissolution but that does not give him any right to complain independently of the Council. He must show that he is representing the Council or suing on its behalf or that by reason of certain circumstances, such, for example, as that the council could not use its seal because it is in the possession of the Municipal Commissioner, or for other reasons it has been impracticable for the members of the council to meet to pass the necessary resolutions, the council cannot be the plaintiff."

The Judicial Committee thus clearly laid down that for a legal wrong or legal injury caused to the council, it is only the council which can sue but if a member of the council can show that for some sufficient reasons it is not possible for the

council to take action for challenging the order of dissolution, he can file an application for a writ to assert the right of the council and to redress the legal wrong or injury done to the council. We find that in the United States of America also this exception has been recognised and the strict rule of standing has been liberalised in the interest of justice. In *Barrows v. Jackson*, (1952) 346 US 249 : 97 Law Ed 1586, the defendant was sued for breach of a restrictive covenant binding the defendant not to sell his property to non-caucasians and claiming damages. The defendant raised the plea that the judgment of the Court allowing damages for breach of the covenant would constitute denial of the equal protection clause to non-caucasians, because a prospective seller of restricted land would either refuse to sell to non-caucasians or else would require non-caucasians to pay a higher price to meet the damages which the seller may have to pay. The argument put forward in answer to this plea was that the defendant was not entitled to plead in defence the constitutional rights of non-Caucasians. But the Supreme Court of the United States negatived this argument observing : "We are faced with a unique situation in which it is an action of the State Court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any Court". Even in our own country we have recognised this departure from the strict rule of *locus standi* in cases where there has been a violation of the constitutional or legal rights of persons who by reason of their socially or economically disadvantaged position are unable to approach the Court for judicial redress. We have in such cases permitted a member of the public to move the Court for enforcement of the constitutional or legal rights of such persons and judicial redress for the legal wrong or legal injury caused to them. Take for example, the decision of this Court in *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579 where this Court accepted the habeas corpus petition of a prisoner complaining of brutal assault by a head warden on another prisoner. It may be incidentally mentioned and this is a point of some importance in the area of judicial remedies — that in this case the Court broadened the scope of habeas

corpus by making it available to a prisoner, not only for seeking his liberty, but also for the enforcement of a constitutional right to which he was lawfully entitled even in confinement. Similarly, in *Dr. Upendra Baxi v. State of U. P.* (1981) 3 Scale 1137 when it was found that the inmates of the Protective Home at Agra were living in inhuman and degrading conditions in blatant violation of Art. 21 of the Constitution and by reason of their socially and economically disadvantaged position, they were not in a position to move the Court for judicial redress, two law professors of the Delhi University addressed a letter, to this Court seeking enforcement of the constitutional right of the inmates under Art. 21 by improvement of the living conditions in the Protective Home, so that the inmates can live with human dignity in the Protective Home. This Court treated the letter as a writ petition and permitted the two law professors to maintain an action for an appropriate writ for the purpose of enforcing the constitutional right of the inmates of the Protective Home and providing judicial redress to them. This Court has also entertained a letter addressed by a journalist claiming relief against demolition of hutments of pavement dwellers by the Municipal Corporation of Bombay and this letter has been treated as a Writ Petition by a Bench presided over by the Chief Justice of India and interim relief has been granted to the pavement dwellers.

17. It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art. 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Art. 32 seeking judicial redress for the legal wrong or injury caused to such

person or determinate class of persons. Where the weaker sections of the community are concerned, such as under-trial prisoners languishing in jails without a trial inmates of the Protective Home in Agra or Harijan workers engaged in road construction in the Ajmer District, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be filed by the public spirited individual espousing their cause and seeking relief for them. This Court will readily respond even to a letter addressed by such individual acting *pro bono publico*. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Art. 32 and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The Court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public minded individual as a writ petition and act upon it. Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief. It is in this spirit that the Court has been entertaining letters for judicial redress and treating them as writ petitions and we hope and trust that the High Courts of the country will also adopt this pro-active, goal-oriented ap-

proach. But we must hasten to make it clear that the individual who moves the Court for judicial redress in cases of this kind must be acting *bona fide* with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be activated at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the Court or even in the form of a regular writ petition filed in Court. We may also point out that as a matter of prudence and not as a rule of law, the Court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal aid organisation which can take care of such cases.

18. The types of cases which we have dealt with so far for the purpose of considering the question of *locus standi* are those where there is a specific legal injury either to the applicant or to some other person or persons for whose benefit the action is brought, arising from violation of some constitutional or legal right or legally protected interest. What is complained of in these cases is a specific legal injury suffered by a person or a determinate class or group of persons. But there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury. Who would have standing to complain against such act or omission of the State or public authority? Can any member of the public sue for judicial redress? Or is the standing limited only to a certain class of persons? Or there is no one who can complain and the public injury must go unredressed. To answer these questions it is first of all necessary to understand what is the true purpose of the Judicial function. This is what Prof. Thio states in his book on "*Locus Standi and Judicial Review*";

"Is the judicial function primarily aimed at preserving legal order by confining the legislative and executive organs of government within their powers in the interest of the public (*Jurisdiction de droit objectif*) or is it mainly directed towards the protection of private individuals by preventing illegal encroachments on their individual rights (*jurisdiction de droit subjectif*)? The first contention rests on the theory that Courts are the final arbiters of what is legal and illegal Requirements of *locus standi* are therefore unnecessary in this case since they merely impede the purpose of the function as conceived here. On the other hand, where the prime aim of the judicial process is to protect individual rights, its concern with the regularity of law and administration is limited to the extent that individual rights are infringed."

We would regard the first proposition as correctly setting out the nature and purpose of the judicial function, as it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law. If the State or any public authority acts beyond the scope of its power and thereby causes a specific legal injury to a person or to a determinate class or group of persons, it would be a case of private injury actionable in the manner discussed in the preceding paragraphs. So also if the duty is owed by the State or any public authority to a person or to a determinate class or group of persons, it would give rise to a corresponding right in such person or determinate class or group of persons and they would be entitled to maintain an action for judicial redress. But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The Courts cannot countenance such a

situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the Courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redress of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddling interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and care thereby improving the administration of justice. Lord Diplock rightly said in *Rex v. Inland Revenue Commrs.* (1981) 2 WLR 722 at p. 740:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by out-dated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped..... It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of Justice for the lawfulness of what they do, and of that the Court is the only judge."

This broadening of the rule of *locus standi* has been largely responsible for the development of public law, because it is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality. It is only by liberalising the rule of *locus standi* that it is possi-

sible to effectively police the corridors of powers and prevent violations of law. It was pointed out by Schwartz and H. W. R. Wade in their book on "Legal Control of Government" at page 354:

"Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged?" It is also necessary to point out that if no one can have standing to maintain an action for judicial redress in respect of a public wrong or public injury, not only will the cause of legality suffer but the people not having any judicial remedy to redress such public wrong or public injury may turn to the street and in that process, the rule of law will be seriously impaired. It is absolutely essential that the rule of law must wean the people away from the lawless street and win them for the court of law.

19. There is also another reason why the rule of locus standi needs to be liberalised. Today we find that law is being increasingly used as a device of organised social action for the purpose of bringing about socio-economic change. The task of national reconstruction upon which we are engaged has brought about enormous increase in developmental activities and law is being utilised for the purpose of development, social and economic. It is creating more and more a new category of rights in favour of large sections of people and imposing a new category of duties on the State and the public officials with a view to reaching social justice to the common man. Individual rights and duties are giving place to meta-individual, collective, social rights and duties of classes or groups of persons. This is not to say that individual rights have ceased to have a vital place in our society but it is recognised that these rights are practicably meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all. The new social and economic rights which are

sought to be created in pursuance of the Directive Principles of State Policy essentially require active intervention of the State and other public authorities. Amongst these social and economic rights are freedom from indigency, ignorance and discrimination as well as the right to a healthy environment, to social security and to protection from financial commercial, corporate or even governmental oppression. More and more frequently the conferment of these socio-economic rights and imposition of public duties on the State and other authorities for taking positive action generates situations in which single human action can be beneficial or prejudicial to a large number of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. For example, the discharge of affluent in a lake or river may harm all who want to enjoy its clean water; emission of noxious gas may cause injury to large numbers of people who inhale it along with the air, defective or unhealthy packaging may cause damage to all consumers of goods and so also illegal raising of railway or bus fares may affect the entire public which wants to use the railway or bus as a means of transport. In cases of this kind it would not be possible to say that any specific legal injury is caused to an individual or to a determinate class or group of individuals. What results in such cases is public injury and it is one of the characteristics of public injury that the act or acts complained of cannot necessarily be shown to affect the rights of determinate or identifiable class or group of persons: public injury is an injury to an indeterminate class of persons. In these cases the duty which is breached giving rise to the injury is owed by the State or a public authority not to any specific or determinate class or group of persons, but to the general public. In other words, the duty is one which is not correlative to any individual rights. Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law. It would also open the door for corruption and inefficiency because there would be no check on exercise of public power

except what may be provided by the political machinery, which at best would be able to exercise only a limited control and at worst, might become a participant in misuse or abuse of power. It would also make the new social collective rights and interests created for the benefit of the deprived sections of the community meaningless and ineffectual.

19A. Now, as pointed out by Cappelletti in Vol III of his classic work on "Access to Justice" at page 520, "The traditional doctrine of standing (*legitimus ad causam*) attributes the right to sue either to the private individual who 'holds' the right which is in need of judicial protection or in case of public rights, to the State itself, which sues in courts through its organs". The principle underlying the traditional rule of standing is that only the holder of the right can sue and it is therefore, held in many jurisdictions that since the State representing the public is the holder of the public rights, it alone can sue for redress of public injury or vindication of public interest. It is on this principle that in the United Kingdom, the Attorney-General is entrusted with the function of enforcing due observance of the law. The Attorney-General represents the public interest in its entirety and as pointed out by S. A. de Smith in "Judicial Review of Administrative Action" (Third edition) at page 403; "the general public has an interest in seeing that the law is obeyed and for this purpose, the Attorney General represents the public." There is, therefore, a machinery in the United Kingdom for judicial redress for public injury and protection of social, collective, what Cappelletti calls 'diffuse' rights and interests. We have no such machinery here. We have undoubtedly an Attorney General as also Advocates General in the States, but they do not represent the public interest generally. They do so in a very limited field; see Sections 91 and 92 of the Civil Procedure Code. But, even if we had a provision empowering the Attorney General or the Advocate General to take action for vindicating public interest, I doubt very much whether it would be effective. The Attorney General or the Advocate General would be too dependent upon the political branches of Government to act as an advocate against abuses which are frequently generated at least tolerated by political and administrative bodies. Be that as it may, the fact

remains that we have no such institution in our country and we have therefore to liberalise the rule of standing in order to provide judicial redress for public injury arising from breach of public duty or from other violation of the Constitution or the law. If public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though they may not be directly injured in their own rights. It is for this reason that in public interest litigation — litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing. What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the Court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting 'sufficient interest'. It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable sections of the people by creating new social, collective 'diffuse' rights and interests and imposing new public duties on the State and other public authorities, infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public, moving the court in a particular case has sufficient interest to initiate the action.

20. It is interesting to note that the concept of public interest litigation had its origin in the United States and over the years, it has passed through various vicissitudes in the country of its origin. We do not propose to enumerate or examine various decisions given by the Supreme Court of the United States from time to time in regard to standing in public interest litigation, for no useful

purpose would be served by such exercise. Suffice it to state that in that country, the strict requirement of legal interest has been watered down. Justice Douglas said in *Association of Data Processing Service v. William B. Camp* (1970) 397 US 150 : 25 Law Ed 2d 184 that "the legal interest test goes to the merits. The question of standing is different". Similarly Justice Brennan, citing Flast, observed that "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the plaintiff had a legally protected interest which the defendant's action invaded".

Italics (herein underline) supplied. This view also found expression in *Office of Communication of United Church of Christ v. FCC* 123 US App DC 328 where the standing of television viewers was upheld with the following observations: Since the concept of standing is "one designed to assure that only one with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience." Vide article on "Evolving Trends in Locus Standi: Models For Decision-Making" by D. Y. Chandrachud. But of late, there has been a slight regression in this dynamic approach. See *United States v. William B. Richardson*, (1974) 418 US 166 and *Warth v. Seldin*, (1974) 422 US 490, where the Supreme Court of United States seems to have recoiled a little against expansion of its judicial power.

21. So far as the United Kingdom is concerned, there have been remarkable developments in this area in recent times largely due to the dynamic activism of Lord Denning. The *Mc Whirter* case and the three well known *Blackburn* cases clearly establish that any member of the public having sufficient interest can maintain an action for enforcing a public duty against a statutory or public authority. We need not make a detailed reference to all these cases but it will be sufficient if we refer to the *Mc Whirter* case and one of the three *Blackburn* cases. The *McWhirter* case is reported in *Attorney General v. Independent Broadcasting Authority* (1973) 1 All ER 689. This was an action by *McWhirter* for injunction against the Broadcasting Authority which was threatening to show a

film which did not comply with the statutory requirements and the showing of which would therefore be illegal. Lord Denning considered the question whether *McWhirter* had locus standi to bring the action when leave to bring a relator action was refused by the Attorney General, and answering this question in the affirmative, he said:

"We live in an age when Parliament has placed statutory duties on government departments and public authorities for the benefit of the public — but has provided no remedy for the breach of them. If a government department or a public authority transgresses the law laid down by Parliament, or threatens to transgress it, can a member of the public come to the Court and draw the matter to its attention.....I am of the opinion that, in the last resort, if the Attorney General refuses leave in a proper case or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public who has sufficient interest, can himself apply to the court itself."

Lord Denning held that *McWhirter* had sufficient interest to bring the action since he had a television set for which he had paid licence fee and his susceptibility would be offended like that of many others watching television if the film was shown in breach of the statutory requirements. It may be noticed that in this case the duty which was sought to be enforced against the Broadcasting Authority was one which the Broadcasting Authority owed to the general public and not to any specific individual or class or group of individuals. The same principle was applied by Lord Denning in *Reg v. Greater London Council, Ex parte Blackburn*, (1976) 3 All ER 184 to accord standing to *Blackburn* to maintain an action for an order of prohibition preventing the greater London Council from allowing, contrary to law, the exhibition of pornographic films. Here again the duty owed by the Greater London Council was to the general public and not to any specific or determinate class or group of persons and there was no one who could claim that a specific legal injury was caused to him by the exhibition of pornographic films. But even so Lord Denning held that *Blackburn* was entitled to maintain an action because he had sufficient interest, he was a citizen of London,

his wife was a rate payer and he had children who might be harmed by the exhibition of pornographic films. The learned Master of the Rolls emphasized that if Blackburn had no sufficient interest, no other citizen had, and in that event no one would be able to bring an action for enforcing the law and the transgression of the law would continue unabated. The principle on which the learned Master of the Rolls proceeded was formulated by him in these words:

"I regard it as a matter of high constitutional principle, that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of his Majesty's subjects, then anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."

The House of Lords, of course, in *Gouriet v. UPW* 1978 AC 482 took the view that the Attorney General alone can sue for enforcing the observance of the law and if he refuses to give his consent to a relator action, such refusal was not reviewable by the courts and without such consent, a member of the public could not maintain his action. We do not think it necessary to examine this decision because it has no binding effect upon us. But we may point out that this decision has been severely criticised by jurists in England and elsewhere. It is clearly erroneous and shows the high water mark of abdication of judicial power which is likely to stultify the development of public law in the United Kingdom. There is however one distinguishing feature which we must point out, namely, that the action in that case was a relator action and not application for a writ.

22. We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the con-

stitutional objective "Law", as pointed out by Justice Krishna Iyer in *Fertilizer Corporation Kamgar Union v. Union of India*, AIR 1981 SC 344 "is a social auditor and this audit function can be put into action when some one with real public interest ignites the jurisdiction. A fear is sometimes expressed that if we keep the door wide open for any member of the public to enter the portals of the Court to enforce public duty or to vindicate public interest, the Court will be flooded with litigation. But this fear is totally unfounded and the argument based upon it is answered completely by the Australian Law Reforms Commission in the following words:

"The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the court room (Prof. K. E. Scott: "Standing in the Supreme Court: A Functional Analysis" (1973) 86)

A major expressed reason for limiting standing rights is fear of a spate of actions brought by busybodies which will unduly extend the resources of the courts. No argument is easier put, none more difficult to rebut. Even if the fear be justified it does not follow that present restrictions should remain. If proper claims exist it may be necessary to provide resources for their determination. However, the issue must be considered.

.....Over recent years successive decisions of the United States Supreme Court have liberalised standing so as to afford a hearing to any person with a real interest in the relevant controversy. Surveying the result in 1973 Professor Scott commented: (Op Cit, 673)

"When the floodgates of litigation are opened to some new class of controversy by a decision it is notable how rarely one can discern the flood that the dissenters feared.

Professor Scott went on to point out that the liberalised standing rules had caused no significant increase in the number of actions brought, arguing that parties will not litigate at considerable personal cost unless they have a real interest in a matter."

We wholly endorse these remarks of the Australian Law Reforms Commission. We may add, with Justice Krishna Iyer: "In a society where freedoms suffer from atrophy, and activism is essential for participative public justice, some risks have to be taken and more opportunities opened for the public minded citizen to rely

on the legal process and not be repelled from it by narrow pedantry now surrounding locus standi." It is also interesting to note that in India, as in other Commonwealth countries, the strict rule of standing does not apply to a writ of quo warranto or a rate payer's action against a municipality, but there is no evidence that this has let loose the flood gates of litigation in these areas. The time, money and other inconveniences involved in litigating a case act as sufficient deterrents for most of us to take recourse to legal action vide article of Dr. S. N. Jain on "Standing and Public Interest Litigation."

23. But we must be careful to see that the member of the public, who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective. Andre Rabie has warned that "political pressure groups who could not achieve their aims through the administrative process" and we might add, through the political process, "may try to use the courts to further their aims." These are some of the dangers in public interest litigation which the court has to be careful to avoid. It is also necessary for the court to bear in mind that there is a vital distinction between locus standi and justiciability and it is not every default on the part of the State or a public authority that is justiciable. The court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the Legislature by the Constitution. It is a fascinating exercise for the Court to deal with public interest litigation because it is a new jurisprudence which the court is evolving, a jurisprudence which demands judicial statesmanship and high creative ability. The frontiers of public law are expanding far and wide and new concepts and doctrines which will change the complexion of the law and which were so far as embedded in the womb of the future, are beginning to be born.

24. Before we part with this general discussion in regard to locus standi, there is one point we would like to emphasise and it is that cases may arise where there is undoubtedly public injury by the act

or omission of the State or a public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission, but if the person or specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protest, the member of the public who complains of a secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a relief on the person or specific class or group of persons primarily injured, which they do not want.

25. If we apply these principles to determine the question of locus standi in the writ petition of Iqbal Chagla & Ors. in which alone this question has been sharply raised, it will be obvious that the petitioners had clearly and indisputably locus standi to maintain their writ petition. The petitioners are lawyers practising in the High Court of Bombay. The first petitioner is a member of the Bombay Bar Association, petitioners, Nos. 2 and 3 are members of the Advocates Association of Western India and petitioner No. 4 is the President of the Incorporated Law Society. There can be no doubt that the petitioners have a vital interest in the independence of the judiciary and if an unconstitutional or illegal action is taken by the State or any public authority which has the effect of impairing the independence of the judiciary, the petitioners would certainly be interested in challenging the constitutionality or legality of such action. The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice. They assist the court in dispensing justice and it can hardly be disputed that without their help, it would be well nigh impossible for the Court to administer justice. They are really and truly officers of the Court in which they daily sit and practice. They have, therefore, a special interest in preserving the integrity and independence of the judicial system and if the integrity or independence of the judiciary is threatened by any act of the State or any public authority, they would natural-

ly be concerned about it, because they are equal partners with the Judges in the administration of justice. Iqbal Chagla and others cannot be regarded as mere bystanders or meddling interlopers in filing the writ petition. The complaint of the petitioners in the writ petition was that the circular letter issued by the Law Minister constituted a serious threat to the independence of the judiciary and it was unconstitutional and void and if this complaint be true, and for the purpose of determining the standing of the petitioners to file the writ petition, we must assume this complaint to be correct the petitioners already had locus standi to maintain the writ petition. The circular letter, on the averments made in the writ petition, did not cause any specific legal injury to an individual or to a determinate class or group of individuals, but it caused public injury by prejudicially affecting the independence of the judiciary. The petitioners being lawyers had sufficient interest to challenge the constitutionality of the circular letter and they were, therefore, entitled to file the writ petition as a public interest litigation. They had clearly a concern deeper than that of a busybody and they cannot be told off at the gates. We may point out that this was precisely the principle applied by this Court to uphold the standing of the Fertiliser Corporation Kamgar Union to challenge the sale of a part of the undertaking by the Fertiliser Corporation of India in *Fertiliser Corporation Kamgar Union v. Union of India* (AIR 1981 SC 344) (supra). Justice Krishna Iyer pointed out that if a citizen "belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered." We must, therefore, hold that Iqbal Chagla and others had locus standi to maintain their writ petition. What we have said in relation to the writ petition of Iqbal Chagla and others must apply equally in relation to the writ petitions of S. P. Gupta and J. C. Kalra and others. So far as the writ petition of V. M. Tar-kunde is concerned, Mr Mridul, learned advocate appearing on behalf of the Law Minister, did not contest the maintainability of that writ petition since S. N. Kumar to whom, according to the averments made in the writ petition, a specific

legal injury was caused, appeared in the writ petition and claimed relief against the decision of the Central Government to discontinue him as an additional Judge. We must, therefore, reject the preliminary objection raised by Mr. Mridul challenging the locus standi of the petitioners in the first group of writ petitions.

Concept of Independence of the Judiciary

26. Having disposed of the preliminary objection in regard to locus standi of the petitioners, we may now proceed to consider the questions which arise for determination in these writ petitions. The questions are of great constitutional significance affecting the principle of independence of the judiciary which is a basic feature of the Constitution and we would therefore prefer to begin the discussion by making a few prefatory remarks highlighting what the true function of the judiciary should be in a country like India which is marching along the road to social justice with the banner of democracy and the rule of law, for the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values. It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned rational charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a socio-economic destination and a creative function. It has to use the words of Glanville Austin, to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio-economic justice. The British concept of justicing, which to quote Justice Krishna Iyer, is still "hugged by the heirs of our colonial legal culture and shared by many on the Bench" is that "the business of a Judge is to hold his tongue until the last possible moment and to try to be as

wise as he is paid to "look" and in the same strain are the words quoted by professor Gordon Reid from a memorandum to the Victorian Government by Irvin, C. J. in 1923 where the judicial function was idealised in the following words:

"The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the king and the subject or between a subject and a subject presented in a form enabling judgment to be passed upon them, and when passed, to be enforced by a process of law. There begins and ends the function of the judiciary."

Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic unequals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process, ready to use law in the service of social justice through a pro-active goal oriented approach. But this cannot be achieved unless we have judicial cadres who share the fighting faith of the Constitution and who are imbued with the constitutional values. The necessity of a judiciary which is in tune with the social philosophy of the Constitution has nowhere been better emphasized than in the words of Justice Krishna Iyer which we quote:

"Appointment of Judges is a serious process where judicial expertise, legal learning, life's experience and high integrity are components, but above all are two indispensables — social philosophy in active unison with the socialistic Articles of the Constitution, and second, but equally important, built-in resistance to pushes and pressures by class interests, private prejudices, government threats and blandishments, party loyalties and contrary economic and political ideologies projecting into pronouncements."

Justice Krishna Iyer goes on to say in his inimitable style:

"Justice Cardozo approvingly quoted President Theodore Roosevelt's stress on the social philosophy of the Judges, which shakes and shapes the course of a

nation and, therefore, the choice of Judges for the higher Courts which makes and declares the law of the land, must be in tune with the social philosophy of the Constitution. Not mastery of the law alone, but social vision and creative craftsmanship are important inputs in successful justicing."

What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives. This has to be the broad blue-print of the appointment project for the higher echelons of judicial service. It is only if appointments of Judge are made with these considerations weighing predominantly with the appointing authority that we can have a truly independent judiciary committed only to the Constitution and to the people of India. The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse of abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses

and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra). But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. If we may again quote the eloquent words of Justice Krishna Iyer:

"Independence of the judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure.

The tycoon, the communalist, the parochialist, the faddist, the extremist and radical reactionary lying coiled up and sub-consciously shaping judicial mentations are menaces to judicial independence when they are at variance with Parts III and IV of the Paramount Parchment."

Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution. Can mandamus issue for fixation of strength of Judges in a High Court: Article 216:

27. We may first examine the true meaning and import of Art. 216 which provides for the constitution of High Courts. This Article when originally enacted in the Constitution consisted of the main provision and a proviso but the proviso was deleted by S. 11 of the Constitu-

tion (Seventh Amendment) Act, 1956 with the result that since 1st Nov., 1956 when the amending Act came into force, this Article consists of only one clause which reads as under:

"Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint."

This Article confers power on the President to appoint such number of Judges in a High Court as he may deem necessary. The Union of India has placed before us figures showing that as on 18th Mar., 1981 the aggregate sanctioned strength of permanent and additional Judges was 308 and 97 respectively while the aggregate actual strength was only 277 and 43 respectively. The figures given by the Union of India also show the large arrears pending in the different High Courts and it is clear from these figures that the total number of pending main cases has been steadily rising from 6,13,799 on 31st Dec. 1978 to 6,78,951 on 31st Dec., 1980. The average rate of disposals per Judge per year fixed at one of the Chief Justice's Conference was 650 but the figures produced by the Union of India show that the average rate of disposals of main cases per Judge per year during the years 1978-1979 and 1980 was higher namely, 860. It is obvious that even on the basis of the average rate of disposals per Judge per year being taken at the higher figure of 860; if no judicial reform is brought about and the present system continues as it is without any change, many more Judges would be required than the total sanctioned strength of permanent and additional Judges in order to dispose of the pending cases which include not only main cases but also interlocutory and miscellaneous cases which do take the time of the Court. It was therefore contended on behalf of the petitioners that the President has failed to discharge his constitutional duty under Art. 216 by not appointing the requisite number of Judges necessary for the purpose of disposing of the pending cases. The argument was that the President was under a constitutional obligation to apply his mind to the question as to how many Judges were necessary to be appointed in each High Court for the purpose of disposing of the cases pending in that High Court, but the President had failed to apply his mind to this question and not taken the necessary steps for the purpose of appointing the requisite number of Judges in each High

Court. The petitioners therefore sought a writ of mandamus against the Union of India requiring the Union of India to re-fix the strength of Judges in each High Court having regard to the number of pending cases in that High Court and on the basis of the average rate of disposals per judge per year. We do not think we can issue such a writ of mandamus against the Union of India for fixing a particular strength of judges in each High Court. The fixation of the strength of judges in each High Court is a purely executive function which is entrusted by Art. 216 to the President, that is, the Government of India and it is entirely for the Government of India to decide in the exercise of its judgment as to what shall be the strength of judges in each High Court. How many judges are necessary to be appointed in a particular High Court is left to the discretion of the Government of India and there are no judicially manageable standards for the purpose of controlling or guiding the discretion of the Union of India in that respect. It is not possible for this Court to lay down any standards or norms on the basis of which it can require the Union of India to appoint a certain number of Judges in a particular High Court. The fixation of the number of judges necessary to be appointed in a particular High Court does not depend upon the application of a mathematical formula dividing the number of pending cases by the average rate of disposal per judge per year. It is singularly complex problem and merely increasing the number of judges in a High Court would not necessarily solve the problem of disposal of pending cases. Some times when the number of judges in a High Court is increased, the law of diminishing returns begins to operate and the disposal of cases do not increase commensurately with the addition to the number of judges. Sometimes it is difficult to recruit competent judges and no useful purpose is served by appointing mediocre judges who ultimately would not be able to make any impact so far as the arrears of pending cases are concerned and who would dilute the quality of justice administered in the High Court. Then there are also problems of finding court rooms for the new judges who might be appointed because at most places the High Court buildings are heavily congested and there is hardly any space which can be spared. There may also be many other constraints operating with

the Government of India which may dissuade it from taking a decision to increase the number of judges in a High Court. The Government of India may legitimately feel that increasing the number of judges in a particular High Court may not solve the problem of arrears of pending cases but that some other strategies may have to be adopted for that purpose, such as the setting up of administrative tribunals or reducing the number of appeals etc. There would therefore be many policy considerations which would influence the Government of India in taking a decision as to what number of judges are necessary to be appointed in a particular High Court. It would not be possible to lay down any judicially manageable standards with reference to which the Government of India could be directed to appoint a particular number of judges in a High Court. What should be the number of Judges necessary to be appointed in a particular High Court must essentially remain a matter within the discretion of the Government of India and if the Government of India does not appoint sufficient number of judges, the appeal must be to the legislature and not to the Court. All that the Court can do is to express the hope that the Govt. of India will periodically review the strength of judges in each High Court and appoint as many judges as are found necessary for the purpose of disposing of arrears of pending cases.

The power of Appointment of Judges. Article 217.

28. The next question that arises for consideration is as to where is the power to appoint Judges of the High Courts and the Supreme Court located? Who has the final voice in the appointment of Judges of High Courts and the Supreme Court? The power of appointment of Judges of the Supreme Court is to be found in cl. (2) of Article 124 and this clause provides that every Judge of the Supreme Court shall be appointed by the President after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary for the purpose, provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. It is obvious on a plain reading of cl. (2) of Art. 124 that it is the President, which in effect and substance means the Central Government, which is empowered by the Constitution to appoint Judges of

the Supreme Court. So also Article 217, cl. (1) vests the power of appointment of Judges of High Courts in the Central Government, but such power is exercisable only "after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court." It is clear on a plain reading of these two Articles that the Chief Justice of India, the Chief Justice of the High Court and such other Judges of the High Court and of the Supreme Court as the Central Government may deem it necessary to consult, are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government. It is not an unfettered power in the sense that the Central Government cannot (can?) act arbitrarily without consulting the constitutional functionaries specified in the two Articles but it can act only after consulting them and the consultation must be full and effective consultation.

29. The question immediately arises what constitutes 'consultation' within the meaning of Cl. (2) of Art. 124 and cl. (1) of Art. 217. Fortunately, this question is no longer *res integra* and it stands concluded by the decision of this Court in *Sankalchand Sheth's case* (AIR 1977 SC 2328) (*supra*). It is true that the question in *Sankalchand Sheth's case* (*supra*) related to the scope and meaning of 'consultation' in cl. (1) of Art. 222, but it was common ground between the parties that 'consultation' for the purpose of Cl. (2) of Art. 124 and Cl. (1) of Article 217 has the same meaning and content as 'consultation' in cl. (1) of Art. 222. Chandrachud, J., as he then was in his judgment in *Sankalchand Sheth's case* (*supra*) quoted with approval the following passage from the judgment given by Justice Subba Rao, when he was a Judge of the Madras High Court in *R. Pushpam v. State of Madras* AIR 1953 Mad 392, "the word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or at least a satisfactory solution" and added "In order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts which can at once constitute both the source and foundation of the final decision". Krishna Iyer, J. speaking on behalf of himself and Fazal Ali, J. also pointed

out that "all the materials in the possession of one who consults must be unreservedly placed before the consultee" and further "a reasonable opportunity for getting information, taking other steps and getting prepared for tendering effective and meaningful advice must be given to him." and "the consultant in turn must take the matter seriously since the subject is of grave importance." The learned Judge proceeded to add: "Therefore, it follows that the President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice, in turn, must collect necessary information through responsible channels or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system." These observations apply with equal force to determine the scope and meaning of 'consultation' within the meaning of cl. (2) of Art. 124 and cl. (1) of Art. 217. Each of the constitutional functionaries required to be consulted under these two articles must have for his consideration full and identical facts bearing upon appointment or non-appointment of the person concerned as a Judge and the opinion of each of them taken on identical material must be considered by the Central Government before it takes a decision whether or not to appoint the person concerned as a Judge. But, while giving the fullest meaning and effect to 'consultation', it must be borne in mind that it is only consultation which is provided by way of fetter upon the power of appointment vested in the Central Govt. and consultation cannot be equated with concurrence. We agree with what Krishna Iyer, J. said in *Sankalchand Sheth's case* (AIR 1977 SC 2328) (*supra*) that "consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur." It would therefore be open to the Central Government to override the opinion given by the constitutional functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court, so long as such decision is based on relevant considerations and is not otherwise mala fide. Even if the opinion given by all the constitutional functionaries consulted by it is identical,

the Central Government is not bound to act in accordance with such opinion, though being a unanimous opinion of all the three constitutional functionaries, it would have great weight and if an appointment is made by the Central Govt. in defiance of such unanimous opinion, it may become vulnerable to attack on the ground that it is mala fide or based on irrelevant grounds. But we do not think that ordinarily the Central Government would make an appointment of a Judge in a High Court if all the three constitutional functionaries have expressed an opinion against it. We may, however, make it clear that on a proper interpretation of cl. (2) of Art. 124 and cl. (1) of Art. 217, it is open to the Central Government to take its own decision in regard to appointment or non-appointment of a Judge in a High Court or the Supreme Court after taking into account and giving due weight to the opinions expressed by the constitutional functionaries required to be consulted under these two Articles and the only ground on which such decision can be assailed is that it is mala fide or based on irrelevant considerations. Where there is a difference of opinion amongst the constitutional functionaries who are consulted, it is for the Central Government to decide whose opinion should be accepted and whether appointment should be made or not. It was contended on behalf of the petitioners that where there is difference of opinion amongst the constitutional functionaries required to be consulted, the opinion of the Chief Justice of India should have primacy, since he is the head of the Indian Judiciary and pater familias of the judicial fraternity. We find ourselves unable to accept this contention. It is difficult to see on what principle can primacy be given to the opinion of one constitutional functionary, when cl. (1) of Art. 217 places all the three constitutional functionaries on the same pedestal so far as the process of consultation is concerned and does not make any distinction between one constitutional functionary and another. Each of the three constitutional functionaries occupies a high constitutional office and cl. (1) of Art. 217 provides that the appointment of a High Court Judge shall be made after consultation with all the three constitutional functionaries without assigning superiority to the opinion of one over that of another. It is true that the Chief Justice of India is the head of

the Indian judiciary and may be figuratively described as pater familias of the brotherhood of Judges but the Chief Justice of a High Court is also an equally important constitutional functionary and it is not possible to say that so far as the consultative process is concerned, he is in any way less important than the Chief Justice of India. In fact, under the constitutional scheme, the Chief Justice of a High Court is not subject to the administrative superintendence of the Chief Justice of India nor is he under the control or supervision of the Chief Justice of India. It is only the power of hearing appeals against the decision of the Chief Justice of a High Court that is possessed by the Chief Justice of India and there, his superiority over the Chief Justice of the High Court ends. If we look at the raison d'être of the provision for consultation enacted in cl. (1) of Art. 217, it will be obvious that the opinion given by the Chief Justice of the High Court must have at least equal weight as the opinion of the Chief Justice of India, because ordinarily the Chief Justice of the High Court would be in a better position to know about the competence, character and integrity of the person recommended for appointment as a Judge in the High Court. The opinion of the Governor of the State, which means the State Government would also be entitled to equal weight, not in regard to the technical competence of the person recommended and his knowledge and perception of law on which the Chief Justice of the High Court would be the proper person to express an opinion, but in regard to the character and integrity of such person, his antecedents and his social philosophy and value-system. So also the opinion of the Chief Justice of India would be valuable because he would not be affected by caste, communal or other parochial considerations and standing outside the turmoil of local passions and prejudices, he would be able to look objectively at the problem of appointment. There is, therefore, a valid and intelligible purpose for which the opinion of each of the three constitutional functionaries is invited before the Central Government can take a decision whether or not to appoint a particular person as a Judge in a High Court. The opinion of each of the three constitutional functionaries is entitled to equal weight and it is not possible to say that the opinion of the Chief Justice of India

must have primacy over the opinions of the other two constitutional functionaries. If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But as we pointed out earlier, it is only consultation and not concurrence of the Chief Justice of India that is provided in cl. (1) of Art. 217. When, in the course of debates in the Constituent Assembly, an amendment was moved that the appointment of a Judge of a High Court or the Supreme Court should be made with the concurrence of the Chief Justice of India, Dr. B. R. Ambedkar made the following comment which is very significant:

"With regard to the question of the concurrence of the Chief Justice, it seems to me that those advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition."

It is, therefore, clear that where there is difference of opinion amongst the constitutional functionaries in regard to appointment of a Judge in a High Court, the opinion of none of the constitutional functionaries is entitled to primacy but after considering the opinion of each of the constitutional functionaries and giving it due weight, the Central Government is entitled to come to its own decision as to which opinion it should accept in deciding whether or not to appoint the particular person as a Judge. So also where a Judge of the Supreme Court is to be appointed, the Chief Justice of India is required to be consulted, but again it is not concurrence but only consultation and the Central Government is not bound to act in accordance with the

opinion of the Chief Justice of India. The ultimate power of appointment rests with the Central Government and that is in accord with the constitutional practice prevailing in all democratic countries. Even in the United Kingdom, a country from which we have inherited our system of administration of justice and to which many of our anglophiles turn with reverence for inspiration and guidance, the appointment of High Court Judges is made by or on the advice of the Lord Chancellor, who is a member of the Cabinet while appointments to the Court of appeal and the House of Lords and to the offices of Lord Chief Justice Master of the Rolls and President of the family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor. Thus the appointment of a Judge belonging to the higher echelons of judicial service is wholly in the hands of the Executive. So also in the commonwealth countries like Canada, Australia and New Zealand, the appointment of High Court and Supreme Court Judges is made by the Executive. This is, of course, not an ideal system of appointment of Judges, but the reason why the power of appointment of Judges is left to the Executive appears to be that the Executive is responsible to the Legislature and through the Legislature, it is accountable to the people who are consumers of justice. The power of appointment of Judges is not entrusted to the Chief Justice of India or to the Chief Justice of a High Court because they do not have any accountability to the people and even if any wrong or improper appointment is made, they are not liable to account to anyone for such appointment. The appointment of a Judge of a High Court or the Supreme Court does not depend merely upon the professional or functional suitability of the person concerned in terms of experience or knowledge of law though this requirement is certainly important and vital and ignoring it might result in impairment of the efficiency of administration of justice, but also on several other considerations such as honesty, integrity and general pattern of behaviour which would ensure dispassionate and objective adjudication with an open mind, free and fearless approach to matters in issue, social acceptability of the person concerned to the high judicial office in terms of current norms and ethos of the society, commitment to democracy and the rule of law,

faith in the constitutional objectives indicating his approach towards the Preamble and the Directive Principles of State Policy, sympathy or absence thereof with the constitutional goals and the needs of an activist judicial system. These various considerations, apart from professional and functional suitability, have to be taken into account while appointing a Judge of a High Court or the Supreme Court and it is presumably on this account that the power of appointment is entrusted to the Executive. But, as pointed out above, there is a fetter placed upon the power of appointment by the requirement of consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India in case of appointment of a High Court Judge and with the Chief Justice of India in case of appointment of a Supreme Court Judge.

30. However, at this stage, it is necessary to point out that so far as appointment of a Supreme Court Judge is concerned, it is not consultation with the Chief Justice of India alone that is provided in Cl. (2) of Art. 124. Undoubtedly, consultation with the Chief Justice of India is a mandatory requirement but in addition "such of the Judges of the Supreme Court and of the High Courts" as the Central Government may deem necessary are also required to be consulted. One argument advanced on behalf of the petitioners was that when Cl. (2) of Article 124 uses the expression "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose", it does not impose a mandatory obligation on the Central Government to consult one or more of the Judges of the Supreme Court or the High Courts but it leaves it to the discretion of the Central Government whether or not to consult one or more of the Judges of the Supreme Court or the High Courts before making appointment of a Judge of the Supreme Court. The petitioners contended that the Central Government may, if it thinks fit, consult one or more of the Judges of the Supreme Court and of the High Courts or it may not consult any and where it does not, the Chief Justice of India will be the only constitutional functionary required to be consulted and in such a case the Central Government must accept the opinion of the Chief Justice of India as binding upon it. We do

not think this argument is well founded. In the first place it is not justified by the plain language of cl. (2) of Art. 124. This clause clearly provides for consultation as a mandatory exercise and the only matter which is left to the discretion of the Central Government is the choice of the Judge of the Supreme Court and the High Courts who may be consulted. The words "as the President may deem necessary" qualify only the preceding words "such of the Judges of the Supreme Court and of the High Courts in the States". Which of the Judges of the Supreme Court and of the High Courts should be consulted is left to the discretion of the Central Government but consultation there must be with one or more of the Judges of the Supreme Court and of the High Courts. The Central Government must consult at least one Judge out of the Judges of the Supreme Court and of the High Courts before exercising the power of appointment conferred by cl. (2) of Art. 124. This requirement is prescribed obviously because the Constitution makers did not think it desirable that one person alone, howsoever high and eminent he may be, should have a predominant voice in the appointment of a Judge of the Supreme Court. But it seems that this requirement is not complied with in making appointments on the Supreme Court Bench presumably under a misconception that it is not a mandatory but only an optional provision. The result is that the Chief Justice of India alone is consulted in the matter of appointment of a Supreme Court Judge and largely as a result of a healthy practice followed through the years, the recommendation of the Chief Justice of India is ordinarily accepted by the Central Government, the consequence being that in a highly important matter like the appointment of a Supreme Court Judge, it is the decision of the Chief Justice of India which is ordinarily, for all practical purposes final. But, as it happens, there are no criteria laid down or evolved to guide the Chief Justice in this respect nor is there any consultation with wider interests. This is, to our mind, not a very satisfactory mode of appointment, because wisdom and experience demand that no power should be vested in a single individual howsoever high and great he may be and howsoever honest and well meaning. We are all human beings with our own likes and dislikes, our own predilections and prejudices and our mind is not so com-

prehensive as to be able to take in all aspects of a question at one time and moreover sometimes, the information on which we base our judgments may be incorrect or inadequate and our judgment may also sometimes be imperceptibly influenced by extraneous or irrelevant considerations. It may also be noticed that it is not difficult to find reasons to justify what our bias or predilection or inclination impels us to do. It is for this reason that we think it is unwise to entrust power in any significant or sensitive area to a single individual, howsoever high or important may be the office which he is occupying. There must be checks and controls in the exercise of every power, particularly when it is a power to make important and crucial appointments and it must be exercisable by plurality of hands rather than be vested in a single individual. That is perhaps the reason why the Constitution makers introduced the requirement in Cl. (2) of Art. 124 that one or more Judges out of the Judges of the Supreme Court and of the High Courts should be consulted in making appointment of a Supreme Court Judge. But even with this provision, we do not think that the safeguard is adequate because it is left to the Central Government to select any one or more of the Judges of the Supreme Court and of the High Courts for the purpose of consultation. We would rather suggest that there must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential — it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity. We may point out that even countries like Australia and New Zealand have veered round to the view that there should be a Judicial Commission for appointment of the higher judiciary. As recently as July, 1977 the Chief Justice of Australia publicly stated that the time had come for

such a commission to be appointed in Australia. So also in New Zealand, the Royal Commission on the Courts chaired by Mr. Justice Beattie, who has now become the Governor General of New Zealand, recommended that a Judicial Commission should consider all Judicial appointments including appointments of High Court Judges. This is a matter which may well receive serious attention of the Government of India.

The position of an Additional Judge : Article 224.

31. We then turn to consider what is the position of an additional Judge under the Constitution. This question is of the greatest importance because as against a total sanctioned strength of 308 permanent Judges, there is a total sanctioned strength of as many as 97 additional Judges, which means that the total sanctioned strength of additional Judges is almost one third the total sanctioned strength of permanent Judges. There are a large number of additional Judges in various High Courts whose tenure is short and precarious and their fate should therefore naturally be a matter of serious concern for this Court. The power to appoint an additional Judge in a High Court is to be found in Cl. (1) of Art. 224 which reads as follows :

"If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify."

Cl. (2) of Art. 224 provides for appointment of an acting Judge during the period when any Judge of a High Court other than the Chief Justice is, by reason of absence or for any other reason, unable to perform the duties of his office or is appointed temporarily as Chief Justice. It is obvious that the tenure of an acting Judge is by its very nature limited because he is appointed to act as a Judge only during the period when the permanent Judge in whose place he is acting is unable to perform the duties of his office and he would therefore cease to be a Judge as soon as the permanent Judge resumes his duties. We are not concerned in these writ petitions with the case of an acting Judge and we need not therefore

dwell any further on this clause. Cl. (3) of Art. 224 provides inter alia that no person appointed as an additional Judge shall hold office after attaining the age of 62 years. Therefore even if an additional Judge has been appointed for a period of two years, he would cease to be a Judge if he attains the age of 62 years prior to the expiration of his term of two years.

32. It is clear from the provisions of Cl. (1) of Art. 224 that the maximum period for which an additional Judge can be appointed by the President is two years. This provision for appointment of a Judge for a period not exceeding two years seems to be peculiar to this country. There is no such practice of appointing a Judge for a short term either in the United Kingdom or in the United States of America. Even in India, there are no Judges either in the Supreme Court or in the subordinate judiciary whose tenure is so short. It is rather an unusual provision and in order to understand its true scope and effect, it is necessary to trace briefly its historical evolution.

33. There was no provision in the High Courts Act or the Charter Act, 1861 for appointment of an additional Judge with a restricted tenure in a High Court. It was for the first time in the Govt. of India Act, 1915 that a provision was enacted for appointment of additional Judges. Sub-sec. (2) of S. 101 provided that each High Court shall consist of the Chief Justice and as many other Judges as His Majesty may think fit to appoint and Cl. (i) of the proviso to that sub-section authorised the Governor General in Council to appoint persons to act as additional Judges of any High Court for such period not exceeding two years as may be required. The additional Judges were to have all the powers of a Judge of the High Court appointed by His Majesty. The Government of India Act, 1915 was replaced by the Government of India Act, 1935 and S. 220 of that Act provided that every High Court shall consist of a Chief Justice and such other Judges as His Majesty may from time to time deem it necessary to appoint and there was a proviso to this section which said that the Judges so appointed together with any additional Judges appointed by the Governor General shall at no time exceed in number such maximum number as the Governor-General may by order

fix in relation to that Court. Sec. 222 sub-sec. (3) provided for appointment of additional Judges in these terms :

"Section 222 (3). If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such Court it appears to the Governor-General that the number of the Judges of the Court should be for the time being increased, the Governor-General (in his discretion) may, subject to the foregoing provisions of this chapter with respect to them maximum number of Judges, appoint persons duly qualified for appointment as Judges to be additional Judges of the Court for such period not exceeding two years as he may specify."

The System of appointment of additional Judges was therefore in vogue when the Constituent Assembly met to frame the Constitution. Article 199 of the Draft Constitution was almost in the same terms as sub-sec. (3) of S. 222 of the Government of India Act, 1935. There was also Art. 198 in the Draft Constitution which in Cl. (1) provided for appointment of an acting Chief Justice and in Cl. (2) for appointment of an acting Judge. The provision for appointment of an acting Judge made in Cl. (2) of Art. 198 was that when the office of any Judge of a High Court is vacant or when any such Judge is appointed to act temporarily as a Chief Justice or is unable to perform the duties of his office by reason of absence or otherwise, the President may appoint a person duly qualified for appointment as a Judge to act as a Judge of that Court. The acting Judge contemplated by this clause of Art. 198 was therefore clearly a temporary Judge. Now when Arts. 198 and 199 in the Draft Constitution came to be considered in the Constituent Assembly, a number of representations were received suggesting that both these articles should be deleted from the Constitution. It was felt by many that the practice of appointing acting or additional Judges was pernicious and it should be done away with. Tej Bahadur Sapru expressed his firm opposition to this practice of appointing acting or additional Judges in the course of his speech in the Constituent Assembly. He said, decrying this practice in no uncertain terms :

"Additional Judges under the old Constitution were appointed by the Governor-General for a period not exceeding

two years. I do not know whether that condition has been reproduced in the proposed Constitution. This prohibition, however, does not apply to acting judges or temporary judges. I think the rule in future should be that any barrister or advocate, who accepts a seat on the Bench, shall be prohibited from resuming practice anywhere on retirement. I would not, however, apply this to temporary judges taken from the services who hold a seat on the Bench for a few months. but I would add that the practice of appointing additional and temporary judges should be definitely given up. When I said at the Round Table Conference that there were acting, additional and temporary judges in India, some of the English lawyers not accustomed to India Law felt rather surprised. I am also of the opinion that temporary or acting judges do greater harm than permanent judges, when after their seat on the Bench for a short period they revert to the Bar. A seat on the Bench gives them a pre-eminence over their colleagues and embarrasses the subordinate judges who were at one time under their control and thus instead of their helping justice they act as a hindrance to free justice. I have very strong feeling in this matter and have during my long experience seen the evil effects of unchecked resumption of practice by barristers and advocates."

There were also many others who expressed the same view. The Drafting Committee agreed with this view and expressed the opinion that "it would be better to delete Articles 198 and 199 relating to the appointment of temporary and additional Judges, than to retain those articles without the ban on practice by persons who hold office as additional or temporary judges." The Drafting Committee took the view that "it was possible to discontinue the system of appointment of temporary and additional Judges in the High Courts altogether by increasing, if necessary, the total number of permanent judges of such Courts." The Constituent Assembly adopted the recommendation of the Drafting Committee to delete Arts. 198 (2) and 199 of the Draft Constitution providing for appointment of acting and additional Judges in High Courts, with the result that when the Constitution came to be enacted, there was no provision in the Constitution for appointment of acting or additional Judges.

34. It is clear from the discussions which took place in the Constituent Assembly that the Constitution makers realised that an acting or additional Judge would have to go back to the Bar on the expiration of his term of office and his tenure was of a strictly limited duration. The Constitution makers did not oppose the practice of appointing acting or additional Judge on the ground that on the expiration of his term of office, an acting or additional Judge would have to go back to the Bar, but their anxiety was that after going back to the Bar he would resume his practice and this might lead to abuses and it was this undesirable consequence which they wanted to prevent and that is why they deleted Arts. 198 (2) and 199 with a view to abolishing the practice of appointing acting or additional Judges. The underlying postulate of Articles 198 (2) and 199 was that an acting or additional Judge would come back to the Bar on the expiration of his term and start practice and this was intended to be stopped, but since it was not possible to debar an acting or additional Judge from practising after he came back on the expiration of term, it was decided that the institution of acting and additional Judges should be done away with. There was no assumption by the Constitution makers that an acting or additional Judge would necessarily be made permanent and he would not have to go back to the Bar. On the contrary, going back to the Bar was clearly contemplated and hence Articles 198 (2) and 199 were deleted. The Constitution makers also thought that it would be possible to discontinue the system of appointing acting and additional Judges altogether without any detriment to early disposal of cases, if the total number of permanent Judges was sufficiently increased.

35. But within six years of the coming into force of the Constitution it was found that the arrears in the High Courts were increasing and it was becoming difficult to bring them under control. There was Art. 224 in the Constitution which provided that the Chief Justice of a High Court may at any time with the previous consent of the President request any retired Judge to sit and act as a Judge of the High Court, but this provision for recalling retired Judges to function on the Bench of a High Court for short periods was found to be neither adequate nor satisfactory and it was of no assistance in reducing the arrears of

cases which were mounting-up from year to year. Parliament in its constituent capacity, therefore, decided to introduce two provisions; one for appointment of additional Judges to clear off the arrears and the other for the appointment of acting Judges in temporary vacancies and with that end in view, enacted the Constitution (Seventh Amendment) Act, 1956. This amending Act substituted the existing Art. 224 by a new Art. 224 which read as follows :

"Appointment of additional and acting Judges :

(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional judges of the Court for such period not exceeding two years as he may specify.

(2) When any judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent judge has resumed his office.

(3) No person appointed as an additional or acting judge of a High Court shall hold office after attaining the age of sixty-two years.

The existing Art. 224 was added as new Art. 224A after the new Art. 224. Cl. (1) of Art. 217 was also simultaneously amended with a view to making provision in regard to an acting or additional Judge. We have already set out the amended Cl. (1) of Art. 217 in an earlier part of the Judgment and we need not, therefore, reproduce it here once again.

36. The first question which arises for determination under Art. 224 Cl. (1) is as to when can an additional Judge be appointed by the President. This article confers power on the President to appoint an additional Judge, if by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that Court should be for the time being increased and in that event, he can appoint an additional Judge for such period not exceeding two years as he may specify. It must appear

to the President that either by reason of temporary increase in the business of the High Court or by reason of accumulation arrears of work in the High Court, it is necessary to increase the number of the Judges of that Court for the time being. The power to appoint an additional Judge cannot therefore be exercised by the President unless there is either temporary increase in the business of the High Court or there is accumulation of arrears of work in the High Court and even when one of these two conditions exists, it is necessary that the President must be further satisfied that it is necessary to make a temporary increase in the

number of Judges of that High Court. The words "for the time being" clearly indicate that the increase in the number of judges which the President may make by appointing additional Judges would be temporary with a view to dealing with the temporary increase in the business of the High Court or the arrears of work in the High Court. Article 224, Cl. (1) did not contemplate that the increase in the number of Judges should be for an indefinite duration. The object clearly was that additional Judge should be appointed for a short period in order to dispose of the temporary increase in the business of the High Court and/or to clear off the arrears of pending cases. There is sufficient indication in Cl. (1) of Art. 224 that the appointments of additional Judges were intended to be of short duration and Parliament expected that sufficient number of additional Judges would be appointed so as to dispose of the temporary increase in the work or the arrears of pending cases within a period of two years or thereabouts. That is why Cl. (1) of Article 224 provided that additional Judges may be appointed for a period not exceeding two years. The underlying idea was that there should be an adequate strength of permanent Judges in each High Court to deal with its normal institutions and so far as the temporary increase in the work or the arrears of pending cases were concerned, additional Judges appointed for a period not exceeding two years should assist in disposing of such work. This was the reason why the Law Commission in its Fourteenth Report stated in paras. 54 and 57 of Chap. 6 in Vol. 1 :

"54. The large increase in the volume of annual institutions which has been referred to earlier must now, we think, be taken as a permanent feature. This

position accordingly necessitates a thorough revision of existing ideas regarding the number of judges required for each High Court. The strength of the High Courts has been increased from time to time. In doing this, however, the post-Constitutional developments which have thrown a much heavier burden on the High Courts have, in our view, not been adequately taken into account. To expect the existing number of judges in the various High Courts to deal efficiently with the vastly increased volume of work is, in our opinion, to ask them to attempt the impossible. As pointed out to us by a senior counsel, if there is a congestion on the roads due to an increase in traffic, the remedy is not to blame the traffic but to widen the roads.

The first essential, therefore, is to see that the strength of every High Court is maintained at a level so as to be adequate to dispose of what may be called its normal institutions. The normal strength of a High Court must be fixed on the basis of the average annual institutions of all types of proceedings in a particular High Court during the last three years. This is essential in order to prevent what may be termed the current file of the Court falling into arrears and adding to the pile of old cases. The problem of clearing the arrears can be satisfactorily dealt with only after the normal strength of each Court has been brought up to the level required to cope with its normal institutions. We suggest that the required strength of the High Court of each State should be fixed in consultation with the Chief Justice of that State and the Chief Justice of India and the strength so fixed should be reviewed at an interval of two or three years. Such a review will be necessary not only by reason of changing conditions but because the implementation of our recommendations made elsewhere will lead to a quicker disposal of work in the subordinate Courts which, in its turn, will result in an increase in the work of the High Courts.

37. We are of the view that the provisions of Article 224 of the Constitution should be availed of and additional judges be appointed for the specific purpose of dealing with these arrears. The number of such additional judges required for each High Court for the purpose of dealing with the arrears will have to be fixed in consultation with the Chief Justice of India and the Chief Justice of the State High

Court after taking into consideration the arrears in the particular Court, their nature and the average disposal of that Court. The number of additional judges to be fixed for this purpose should be such as to enable the arrears to be cleared within a period of two years. The additional judges so appointed should, in our view, be utilised as far as possible exclusively for the purpose of disposing of arrears and not be diverted to the disposal of current work. Pari passu with the disposal of the arrears, the permanent strength of the High Court will have to be brought up to and maintained at the required level, care being taken to see that their normal disposal keeps pace with the new institutions and that they are not allowed to develop into arrears. The appointment of additional Judges for the exclusive purpose of dealing with the arrears is, in our view, called for in a large number of High Courts.

The sentence underlined* by us in para 57 clearly shows that according to the Law Commission also the intendment of Cl. (1) of Art. 224 was that sufficient number of additional Judges would be appointed "so as to enable the arrears to be cleared off within a period of two years." The same note was struck by P. N. Saprú when he said in the course of the Debates in Rajya Sabha during the discussion of the Constitution (Seventh Amendment) Bill: "It is necessary to have additional Judges for the disposal of arrears. These arrears, I hope, represent a temporary situation.... once these arrears have been cleared off, it will be possible for us to fix or to determine the permanent strength of our Courts with some degree of assurance." Now it is obvious that if additional Judges were appointed according to the true intendment of Cl. (1) of Art. 224, they would be temporary Judges appointed for a short duration to clear off the arrears and once the arrears are cleared off, which was expected by Parliament to be achieved within not more than two years they would, on the expiration of their term, go back to the Bar or to the District Judicial Service. Their tenure being for a short period limited by the time expected to be taken in clearing off the arrears — such time, in any event, being hopefully not more than two years — they would know that, on the expiration of their term, they would

*Underlining not found in copy. — Ed.

have to go back. They would have no right to be appointed or even to be considered for appointment as permanent Judges, because when they accepted appointment as additional Judges under Cl. (1) of Art. 224, they would have known that they were appointed only as temporary Judges for a short period in order to clear off the arrears.

37. But what happened in practice was that the true intendment and purpose of Cl. (1) of Art. 224 was never carried into effect. The Government did not increase the strength of permanent Judges in different High Courts adequately so as to be able to cope with the normal institutions. Though the Law Commission had recommended in its Fourteenth Report that the normal strength of a High Court must be fixed on the basis of average annual institution of all types of proceedings in the High Court during the last three years, this recommendation was not heeded with the result that even the current institutions in many of the High Courts could not be disposed of by the inadequate number of permanent Judges and they started adding to the existing arrears. Of course, it was not only the Government which was responsible for not increasing adequately the strength of permanent Judges but the Chief Justices of many High Courts were also remiss in looking after the interests of their High Courts, inasmuch they too did not ask the Government for increase in the strength of permanent Judges. Wherever the fault may lie and it is not necessary for the purpose of these writ petitions to fix the blame, the consequence was that the arrears in the High Courts started growing menacingly from year to year. The requisite number of additional Judges was also not appointed by the Government though Cl. (1) of Art. 224 clearly contemplated that sufficient number of additional Judges would be appointed in order to clear off the arrears within a period of about two years. The old arrears therefore continued to exist and new arrears were added out of the current file of cases which remained undisposed of by the existing strength of Judges. The strength of additional Judges was not fixed realistically and a much lesser number of additional Judges than required for the purpose of clearing off the arrears within a period of about two years were appointed in the different

High Courts from time to time with the result that the arrears continued to increase and the need for additional Judges continued to subsist. The unfortunate consequence was that the additional Judgeship became a gateway for entering the cadre of permanent Judges. Whenever a person was appointed as a Judge in a High Court, he would be first appointed as an additional Judge and only when a vacancy occurred in the post of a permanent Judge, he would be confirmed as a permanent Judge in that vacancy in accordance with the seniority amongst the additional Judges. The practice therefore grew up of a person being first appointed as an additional Judge and then being confirmed as a permanent Judge in the same High Court. The Union of India at the instance of the petitioners filed before us a statement showing that in almost all cases barring a negligible few, every person was appointed first as an additional Judge in the High Court and then confirmed as a permanent Judge in the same High Court as soon as a vacancy in the post of a permanent Judge became available to him. The entire object and purpose of the introduction of Cl. (1) of Art. 224 was perverted and additional Judges were appointed under this Article not as temporary Judges for a short period who would go back on the expiration of their term as soon as the arrears are cleared off, but as Judges whose tenure, though limited to a period not exceeding two years at the time of each appointment as an additional Judge, would be renewed from time to time until a berth was found for them in the cadre of permanent Judges. By and large, every person entered the High Court judiciary as an additional Judge in the clear expectation that as soon as a vacancy in the post of a permanent Judge became available to him in the High Court he would be confirmed as a permanent Judge and if no such vacancy became available to him until the expiration of his term of office, he would be re-appointed as an additional Judge for a further term in the same High Court. Therefore, far from being aware that on the expiration of their term, they would have to go back because they were appointed only as temporary Judges for a short period in order to clear off the arrears — which would have been the position if Cl. (1) of Art. 224 had been implemented according to its true intend-

ment and purpose — the additional Judges entered the High Court judiciary with a legitimate expectation that they would not have to go back on the expiration of their term but they would be either reappointed as additional Judges for a further term or if in the meanwhile, a vacancy in the post of a permanent Judge became available, they would be confirmed as permanent Judges. This expectation which was generated in the minds of additional Judges by reason of the peculiar manner in which Cl. (1) of Art. 224 was operated, cannot now be ignored by the Government and the Government cannot be permitted to say that when the term of an additional Judge expires, the Government can drop him at its sweet will. By reason of the expectation raised in his mind through a practice followed for almost over a quarter of a century, an additional Judge is entitled to be considered for appointment as an additional Judge for a further term on the expiration of his original term and if in the meanwhile, a vacancy in the post of a permanent Judge becomes available to him on the basis of seniority amongst additional Judges, he has a right to be considered for appointment as a permanent Judge in his high Court.

38. It is clear on a plain reading of Art. 217, Cl. (1) that when an additional Judge is to be appointed, the procedure set out in that article is to be followed. Cl. (1) of Art. 217 provides that "Every Judge" of a High Court shall be appointed after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. The expression "Every Judge" must on a plain natural construction include not only a permanent Judge but also an additional Judge. It is significant to note that whenever the Constitution Makers intended to make a reference to a permanent Judge, they did so in clear and explicit term as in Cl. (2) of Art. 224. Moreover, there is inherent evidence in Article 217 Cl. (1) itself which shows that the expression "Every Judge" is intended to take in an additional Judge as well. Cl. (1) of Art. 217 says that "Every Judge shall hold office in case of an additional Judge..... as provided in Art. 224 which clearly suggest that the case of an additional Judge is covered by the opening words "Every Judge". We may also consider what would be the consequence of construing the word "Every Judge" as

meaning only a permanent Judge. On that construction, Cl. (1) of Art. 217 will not apply in relation to appointment of an additional Judge and it would be open to the Central Government under Article 224, Cl. (1) to appoint an additional Judge without consulting any of the constitutional functionary specified in Cl. (1) of Art. 217. This could never have been intended by the Constitution Makers, who made such elaborate provisions in the Constitution for safeguarding the independence of the judiciary. We must therefore, hold that no additional Judge can be appointed without complying with the requirement of cl. (1) of Art. 217.

39. Now, when the term of an additional Judge expires he ceases to be a Judge and therefore, if he is to continue as a Judge, he must be either reappointed as an additional Judge or appointed as a permanent Judge. In either case, cl. (1) of Art. 217 would operate and no reappointment as an additional Judge or appointment as a permanent Judge can be made without going through the procedure set out in Art. 217 cl. (1). Of course, an additional Judge has a right to be considered for such reappointment or appointment as the case may be, and the Central Government cannot be heard to say that the additional Judge need not be considered. The additional Judge cannot just be dropped without consideration. The name of the additional Judge would have to go through the procedure of cl. (1) Art. 217 and after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, the Central Government would have to decide whether or not to reappoint him as an additional Judge or to appoint him as a permanent Judge. If the procedure for appointment of a Judge followed as a result of a practice memorandum issued by the Central Government is that the proposal for appointment of a Judge may ordinarily originate from the Chief Justice of the High Court and may then be sent to the Governor of the State and thereafter to the Chief Justice of India through the Justice Ministry for their respective opinions before a decision can be taken by the Central Government whether or not to appoint the person proposed, the name of the additional Judge, must be sent-up by the Chief Justice of the High Court with his recommendation whether he should be reappointed as an additional Judge or appointed as a permanent Judge or not and it must go up to the Central Government with the opin-

ions of the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, so that the Central Government may, after considering such opinions, make-up its mind on the question of reappointment or appointment as the case may be. But this is the only right possessed by the Additional Judge. The additional Judge is not entitled to contend that he must automatically and without any further consideration be appointed as an additional Judge for a further term or as a permanent Judge. He has to go through the process of cl. (1) of Art. 217 and to concede to him the right to be appointed either as an additional Judge for a further term or as a permanent Judge would be to fly in the face of Art. 217 cl. (1). If the additional Judge is entitled to be appointed without anything more, why should the process of consultation be gone through in regard to his appointment? Would consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court not be reduced to a farce? It would be a mockery of consultation with such high constitutional dignitaries. There can, therefore, be no doubt that an additional Judge is not entitled as a matter of right to be appointed as an additional Judge for a further term on the expiration of his original term or as a permanent Judge. The only right he has to be considered for such appointment and this right also belongs to him not because cl. (1) of Art. 224 confers such right upon him, but because of the peculiar manner in which cl. (1) of Art. 224 has been operated all these years,

40. But the question then arises what are the factors which can legitimately be taken into account by the Central Government in deciding whether or not to reappoint an additional Judge for a further term or to appoint him as a permanent Judge. The argument of the petitioners was that an additional Judge is not on probation. He is as much a Judge as a permanent Judge with the same jurisdiction and the same powers and to treat him as if he were on probation would not only detract from his status and dignity, but also affect his independence by making his continuance as a Judge dependent on the good opinion of the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India. We find it difficult to accept this argument in the face of the clear and unambiguous

language of cl. (1) of Art. 217. There are no limitations in the language of cl. (1) of Art. 217 as to what factors shall be considered and what factors shall not be, but having regard to the object and purpose of that provision namely, appointment of a High Court Judge, it is obvious that fitness and suitability, physical, intellectual and moral, would be the governing considerations to be taken into account in deciding the question of appointment. Now, when, on the expiration of the term of an additional Judge, the Central Government is again called upon to consider whether or not he should be reappointed as an additional Judge or appointed as a permanent Judge, the Central Government would have to apply its mind to the question whether such additional Judge possesses the requisite fitness and suitability for being reappointed or appointed as the case may be. Public interest requires that only such person should be appointed as a Judge who is physically, intellectually and morally fit and suitable to be appointed as a Judge and it would be contrary to public weal to appoint a person, who does not possess the requisite fitness and suitability. The Central Government would therefore be under a constitutional obligation to consider whether the additional Judge, whose term has expired, is fit and suitable to be reappointed as an additional Judge or appointed as a permanent Judge. How can cl. (1) of Art. 217 or Art. 224 be so interpreted as to require the Central Government to reappoint an additional Judge for a further term or to appoint him as permanent Judge, even if at the time of such reappointment or appointment as the case may be, he is physically, intellectually or morally unfit or unsuitable to be appointed as a Judge. Of course, at the time when the question of reappointment of an additional Judge for a further term or his appointment as a permanent Judge comes up before the Central Government for consideration, the additional Judge would have two weighty circumstances in his favour; one, that he has experience as a Judge for one term and the other, that it would not be desirable to send an additional Judge back to the Bar. But even with these weighty circumstances in his favour, he would have to satisfy the test of fitness and suitability, physical, intellectual and moral, before the Central Government can, consistently with its constitutional obligation and in public interest, decide

to reappoint him as an additional Judge or appoint him as a permanent Judge. It is true that the fitness and suitability of the additional Judge must have been considered by the Central Government at the time of his original appointment, but when the question again comes up for consideration on the expiration of his term, the Central Government has to consider afresh, in the light of the material then available, as to whether he possesses the requisite fitness and suitability for being appointed as a Judge. It would not be right to say that merely because the fitness and suitability of the additional Judge is required to be considered again for the purpose of deciding whether he should be reappointed for a further term or appointed as a permanent Judge, it would amount to treating him as if he were on probation. An additional Judge is certainly not on probation in the sense that his service cannot be terminated before the expiration of his term, unlike a probationer who can be sent out any time during the period of probation. It would also not be open to the Chief Justice of the High Court or the Governor of the State or the Chief Justice of India to sit in judgment over the quality of the work turned out by the additional Judge during his term, because that would be essentially an appellate function which can be discharged only by the court entitled to hear appeals from the decisions of the additional Judge. But every other consideration which bears on the physical, intellectual and moral fitness and suitability of the additional Judge can and must be considered and if the Central Government finds, after consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India that the additional Judge is not fit and suitable for being appointed as a Judge, the Central Government may decide not to appoint him as an additional Judge for a further term or as a permanent Judge. So long as the case of the additional Judge is considered by the Central Government for reappointment or appointment as the case may be, the decision of the Central Government cannot be questioned except on the ground that it was reached without full and effective consultation with the Chief Justice of the High Court, the Governor of the State

and the Chief Justice of India or that was based on irrelevant considerations.

41. There was also one other argument advanced by the learned Attorney General and it was that where an additional Judge is not appointed for a further term or as a permanent Judge, he cannot challenge the decision of the Central Government not to appoint him, because Cl. (1) of Art. 217 prescribes the procedure to be followed only where an appointment is made and it has no application where an appointment is not made. This argument is, in our opinion, without force and must be rejected. An additional Judge, as we have pointed out, has a right to be considered for appointment as an additional Judge for a further term or in case there is a vacancy in a permanent post, then for appointment as a permanent Judge, and he must therefore, be considered by the Government for such reappointment or appointment as the case may be, and a decision must be taken in regard to him after consultation with Chief Justice of the High Court, the Governor of the State and the Chief Justice of India, and if it is found that there was no consultation with any of these three constitutional functionaries before the decision was taken by the Central Government not to appoint him or the decision of the Central Government is based on irrelevant grounds, it would not be, consideration by the Central Government as required by Cl. (1) of Art. 217 and he would, therefore, be entitled to challenge the decision of the Central Government which is based on what may be called 'non-consideration in law' and to require the Central Government to reconsider his case in accordance with Cl. (1) of Art. 217. This consequence would follow only because an Additional Judge has a right to be considered for appointment as an additional Judge for a further term or as a permanent Judge. No person, who is proposed for initial appointment as a Judge would be entitled to complain against the decision of the Central Government not to appoint him, because he would have no right to be considered for appointment as a Judge.

42. We must also deal with the argument of the petitioners that so long as there is a post of a permanent Judge

vacant, no appointment of an additional Judge can be made under Cl. (1) of Article 224. It is clear from the language of Cl. (1) of Art. 224 that it is only where permanent Judges of a High Court are unable to cope with the current institutions and the increased business or the arrears of pending cases and it is found necessary for the purpose of disposing of the increased business or the arrears of pending cases to increase the strength of the Judges of the High Court for the time being that additional Judges can be appointed. Clause (1) of Article 224 contemplates appointment of additional Judges to augment the strength of the existing Judges. It must therefore follow logically that there must be full strength of existing Judges before additional Judges can be appointed and so long as any post of existing Judges is not filled up, there can be no question of appointing additional Judges to augment their strength. When there is a vacancy in the post of a permanent Judge, it must first be filled up before any additional Judge can be appointed under Cl. (1) of Art. 224. It is therefore, necessary that the Central Government must periodically review the strength of permanent Judges in each High Court so that there is a proper and adequate strength for the purpose of dealing with the normal institutions. Since there are large arrears pending almost in every High Court and it is not humanly possible to dispose of these arrears within a measurable distance of time even by appointment of additional Judges, we think it necessary that instead of appointing additional Judges for the purpose of disposing of the arrears, it would be desirable to increase the strength of permanent Judges because the arrears have come to stay and we do not think it is possible to wipe them out for a long period of time. We are glad that towards the close of the arguments Mr. Mridul submitted to us a statement on behalf of the Central Government assuring us that:

"The Union Government has decided to increase the number of posts of permanent Judges in the various High Courts keeping in view the load of work, the guidelines prescribed and other relevant considerations. In fact in 1980 itself, on the basis of institution, disposal and arrears of cases and the

guidelines prescribed, the Governments of seven States where the problem was more acute, had been addressed to consider augmentation of the Judge strengths of their High Courts. It has been decided that where necessary the guidelines prescribed will be suitably relaxed by taking into account local circumstances, the trend of litigation and any other special or relevant factors that may need consideration. The Union Government will take up the matter with the various State Governments so that after consulting the Chief Justices of the High Courts, they expeditiously send proposals for the conversion of a substantial number of posts of Additional Judges into those of Permanent Judges."

We hope and trust that the Central Government will soon take the necessary steps to increase realistically the strength of permanent Judges in each High Court.

43. One last argument now remains, when an additional Judge is appointed, what should be the term for which his appointment is made. Clause (1) of Art. 224 provides that an additional Judge may be appointed for a period not exceeding two years. That is the outside limit prescribed by Art. 224 Cl. (1) and it was therefore, contended by the learned Attorney General that appointment of an additional Judge can be made for any term, howsoever short it be, so long as it does not exceed two years. The appointments of O. N. Vohra, S. N. Kumar and S. B. Wad for three months and the appointments of some other additional Judges for six months were thus defended by the learned Attorney General as being within the scope and ambit of Cl. (1) of Article 224. We cannot accept this argument. It is no doubt true that Cl. (1) of (the) Article fixes the outer limit for the term for which an additional Judge may be appointed, but that has been done because there may be cases where the temporary increase in the business or the arrears of pending cases are so small that it may be possible to dispose of them by appointing additional Judges for a term less than two years. If the temporary increase in the business or the arrears of pending cases can be disposed of within a shorter time, why should additional Judges be appointed for the full period of two years. That is

why Parliament provided that an additional Judge may be appointed for a term not exceeding two years. But when arrears of pending cases are so large that it would not be possible to dispose them of even within a period of ten years — and when we say ten years, we are making a very conservative estimate — what justification there can be for appointing additional Judges for a period of less than two years. That would be plainly outside the scope of the power conferred under Cl. (1) of Art. 224. When the arrears of pending cases are such that they cannot possibly be disposed of within a period of less than two years, additional Judges must be appointed for a term of two years and no less. Mr. Mridul informed us towards the close of the arguments that the Union Government had decided that ordinarily further appointment of additional Judge will not be made for a period of less than one year, but we cannot regard this statement as being fully in compliance with the constitutional requirement. The term for which an additional Judge is appointed must not be less than two years, unless the temporary increase in business or the arrears of pending cases are so small that they can reasonably be disposed of within a shorter period, which, of course, today is only an idle dream in most of the High Courts. We may also point out that an additional Judge cannot be appointed for a period of three months or six months in order to enable the Chief Justice of India or the Central Government to consider whether the additional Judge should be appointed for a further term or as a permanent Judge. That is a matter on which the Chief Justice of India must come to his opinion well in time and the Government of India must also reach its decision sufficiently in advance so that the additional Judge would know quite sometime before his term is due to expire whether he is going to be appointed for a further term or is going to be discontinued. There is no power in the Central Government to appoint an additional Judge for a short term in order to enable either the Chief Justice of India or the Central Government to make enquiries with a view to satisfying itself whether the additional Judge is fit and suitable for being appointed as an additional Judge or as a perma-

nent Judge. We are, therefore, of the view that the Chief Justice of India acted under a misconception of the true constitutional position when he recommended the appointment of O. N. Vohra, S. N. Kumar and S. B. Wad for a period of six months and the Central Government was also in error in appointing them only for a period of three months.

Circular Letter of the Law Minister:

44. We must then turn to consider the question whether the circular letter issued by the Law Minister was unconstitutional and void. Now obviously the circular letter could be assailed as unconstitutional and void only if it could be shown to be in violation of some constitutional or legal provision. There was admittedly no provision of law, at least none could be pointed out by the learned counsel appearing on behalf of the petitioners, which could be said to have infringed by the issuance of the circular letter, but the argument was that the circular letter offended against the provisions of Cl. (1) of Art. 217 and Cl. (1) of Art. 222. We shall presently examine this argument but before we do so, it would be worthwhile first to analyse the terms of the circular letter in order to determine what is it that the circular letter seeks to achieve which is constitutionally objectionable or impermissible. The learned counsel appearing on behalf of the petitioners contended that the circular letter must be construed objectively with reference to the language used in that letter and no extrinsic aid, such as a statement subsequently made by the Law Minister in the Lok Sabha, should be invoked for the purpose of arriving at its true interpretation. The decision of this Court in *Commr. of Police v. Gordhandas Bhanji*, 1952 SCR 135: (AIR 1952 SC 16) was referred to in this connection and strong reliance was placed on the following observations made by this Court, namely, "Public orders made by public authorities are meant to have public effect and are intended to affect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself." This principle of interpretation is indisputably a valid principle and no exception can be taken against it, but we do not think it can have any application in the pre-

sent case, because the circular letter addressed by the Law Minister is not in the nature of a public order made by a public authority. The Law Minister is undoubtedly a member of the Cabinet and it is reasonable to assume that in issuing the circular letter he was acting on behalf of the Central Government but the circular letter does not appear to have been issued by the Law Minister in the exercise of any constitutional or legal power. The circular letter has no constitutional or legal sanction behind it and non-compliance with the request contained in it would not proprio vigore entail any adverse consequence to the additional Judge or to the person recommended for initial appointment, for not complying with such request. It may be that because an additional Judge does not give his consent to be appointed as a permanent Judge in another High Court, he may not be appointed as a permanent Judge in his own High Court and may be discontinued as an additional Judge on the expiration of his term, though this is not within the intendment of the circular letter and is clearly impermissible but in that event it would be his non-appointment as a permanent Judge or discontinuance as an additional Judge which would, if at all, give him a cause of action and not the circular letter asking for such consent. The circular letter is a document without any legal force and does not by itself of its own force, create or alter any legal relationship or arrangement or produce any legal consequence or effect. It is no more than a letter addressed to the Chief Minister of each State asking him to obtain the consent of the additional Judges as also of those recommended or to be recommended for initial appointment, for being appointed as Judges in a High Court outside the State. It would therefore seem that the principle of interpretation enunciated by this Court in *Gordhandas Bhanji's case* (AIR 1952 SC 16) (supra) cannot apply in the construction of the circular letter. We must construe the circular letter from a commonsense point of view having regard to the clarification, if any, given by the author of the circular letter, namely, the Law Minister.

45. The circular letter has been reproduced by us in extenso in an earlier part of the judgment while stating the

facts giving rise to the writ petitions. The first paragraph of the circular letter begins by saying that it has repeatedly been suggested to the Government over the years "by several bodies and forums including the States Re-organisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated." The learned counsel appearing on behalf of the petitioners criticised this statement by observing that since the names of the "several bodies and forums" referred to in this statement were not specifically mentioned, it was not possible to deal with their credentials or to examine the validity of the reasons on which their conclusion was based. But Mr. Mridul appearing on behalf of the Law Minister convincingly dealt with this criticism and referred in detail to various bodies and forums which had from time to time expressed the view that one third of the Judges of every High Court should as far as possible be from outside the State in which that High Court is situated. The earliest point of time when this view was expressed by a high powered body was in the year 1955, when the States Re-organisation Commission in its report recommended that "at least one-third of the number of Judges in the High Court of a State should consist of persons who are recruited from outside that State" and this recommendation was guided by the consideration that "the principal organs of State should be so constituted as to inspire confidence and to help in arresting parochial trends". Then the Law Commission in its Fourteenth Report presented in 1958 expressed the same view: "The recent creation of various zones in the country and the efforts to treat the States forming part of these zones as one unit for various purposes would, we hope, lead to the States forming part of each zone to be the recruiting ground for appointments to the High Court from the members of the Bar in these States. It is hoped that in this manner the expectation of the States Reorganisation Commission

that at least one-third of the High Court Judges would be persons drawn from outside the State will be fulfilled." There was also a discussion on this proposal, namely, whether one-third of the number of Judges in each High Court should be from outside the State, at the Chief Justices Conference held in March, 1965 and out of 15 Chief Justices of High Courts who attended the Conference, 8 were against the proposal, 6 were in favour and the remaining Chief Justice also supported the proposal, but with this qualification that the one-third number of Judges should be worked out by initial appointment. Chief Justice Subba Rao also in his letter dated 6th Oct., 1966, expressed the view that it would be better to bring Judges from outside at the time of initial appointment. Then came the Report of the Study Team of the Administrative Reforms Commission submitted in 1967 and this Report also examined the question of appointment of Judges in High Courts and came to the view that the recommendation of the States Reorganisation Commission should be implemented so that as far as possible one-third of the number of Judges in a High Court are from outside. The Study Team observed that a serious effort to implement this recommendation "will make its own contribution to efficiency, independence and national integration." The same question once again came up for consideration before the Law Commission in the year 1978 and the Law Commission sent out a questionnaire to various individuals and associations for the purpose of eliciting their views inter alia in regard to the suggestion that there should be a convention according to which one-third of the judges in each High Court should be from another State. Mr. S. V. Gupte, who was then Attorney General of India and who is known for bold and courageous expression of his views, stated in answer to the questionnaire that he was wholly in favour of having one-third of the number of Judges in each High Court from outside the State "as that alone may perhaps secure some kind of freedom from bias on grounds of caste and class consideration or any close association with local people." The Bar Council of India also in its reply to the Questionnaire supported the proposal of one-third Judges in a High Court being

from outside the State. It is interesting to note and this completely establishes the bona fides of the Law Minister in issuing the circular letter that even as far back as 26th Feb., 1979, when the political party to which the Law Minister belongs was not in power, the Law Minister stated clearly and unequivocally that he agreed with the view expressed by the Law Commission that one-third of the Judges in each High Court must be from outside the State, because this would achieve better national integration in the field of judiciary. Whilst expressing this view, it is significant to note that the Law Minister made it clear that he would not support transfer of a High Court Judge "if it is based on extraneous considerations". Then followed the Eightieth Report of the Law Commission presided over by Mr. Justice H. R. Khanna. This Report was submitted to the Government of India in Aug., 1973, and in this Report, the Law Commission expressed its agreement with the recommendation made by the earlier Law Commission in its Fourteenth Report, namely, that "there should be a convention according to which one-third of the Judges in each High Court should be from another State" and added that this should normally be done through the process of initial appointments and not by transfers. The Law Commission gave the following reasons for taking this view:

"Evolving such a convention would in our opinion, not only help in the process of national integration but would also improve the functioning of various High Courts. It would secure on the Bench of each High Court the presence of a number of Judges who would not be swayed by local considerations or affected by issues which may rouse local passions and emotions. As observed by us in one of our earlier Reports, one of the essential things for the due administration of justice is not only the capacity of the Judges to bring a dispassionate approach to cases handled by them but also to inspire a feeling in all concerned that dispassionate approach would underlie their decision, quite often, cases which arouse strong emotional sentiments and regional feelings come up before courts of law. To handle such cases, we need Judges who not

only remain unaffected by local sentiments and regional feelings, but also appear to be so. None would be better suited for this purpose than Judges hailing from other States. It is a common feeling amongst old lawyers that apart from cases with political overtones, the English Judges showed a sense of great fairness and brought a dispassionate approach in the disposal of judicial cases handled by them. We in India are in the fortunate position of having a vast country. There can, therefore, be no difficulty in having a certain percentage of Judges who hail from other States. The advantages gained by having persons from other States as Judges would be much greater compared with any disadvantage which might result therefrom."

This question was also discussed at the meetings of the Consultative Committee of Parliament for the Law Ministry held on 7th June, 1980, 24th July 1980 and 17th December, 1980, and the unanimous view taken by the members of the Consultative Committee belonging to different political parties was that at least one-third of the Judges in a High Court should be from outside the State. The Chief Justice of India also in a communication addressed to the Law Minister in March, 1978, expressed his view favouring outside appointments to High Courts and in a letter addressed by him to the Law Minister on 18th March, 1981, he opined that "it is high time that at least a few of the new appointments to every High Court were made from outside the State." He also observed in a communication addressed in April, 1981, that "he had publicly proclaimed his opinion more than once that at least one-third of the new appointments should be from amongst persons from outside the particular States." The National Seminar on Judicial Appointments and Transfers convened by the Bar Council of India in Ahmedabad from 17th to 19th October, 1980 also yielded the same consensus view, namely:

"The ideal of having one-third of High Court Judges from outside the State helps promotion of national integration and the preservation of a unified judicial system. However, it is desirable that this composition of the High Court should be accomplished by way of ini-

tial appointments rather than by transfers. Furthermore, in implementation of this formula care must be taken to preserve the legitimate representation of States and to maintain the sanctioned strength to each State."

It will thus be seen that, barring perhaps the Associations of Bombay Lawyers, all high powered bodies, forums and associations, which have anything to do with judicial system, have consistently over the years taken the view that one-third of the number of Judges in each High Court should be from outside the State. The unanimity of view has been so complete and overwhelming that it is impossible to contend that the policy of having one-third of the Judges in every High Court from outside the State, which the Law Minister is trying to implement by issuing the circular letter, is ill-conceived or mala fide or subversive of the independence of the judiciary. So long as the policy is evolved by the Government after consultation with the Chief Justice of India and it is not otherwise unconstitutional, the Court cannot pronounce upon the wisdom of the policy or strike it down because it does not appeal to the court. Here the policy of having one-third of the number of Judges in each High Court from outside the State has been adopted after consultation with the Chief Justice of India and, in fact, it has his complete approval and the Law Minister did not therefore act unconstitutionally or illegally in relying upon this policy in the first paragraph of the circular letter.

46. The circular letter after referring to the suggestion made by several bodies and forums that one-third of the Judges of the High Court should, as far as possible, be from outside the State, proceeded to add: "Somehow no start could be made in the past in this direction." The learned counsel appearing on behalf of the petitioners assailed the correctness of this statement and contended that an attempt was made during the emergency to transfer permanent Judges of one High Court to another and the transfers were sought to be defended by the Government of India on the same plea of national integration and removal of narrow parochial tendencies and therefore it was not correct on the part of the Law Minister to state that

no start could be made in the past for implementing the policy of having one-third Judges of the High Court from outside the State. Now it is difficult to appreciate how this statement in the circular letter could be branded as incorrect for the reason that the transfers effected during the emergency were sought to be defended on the plea of national integration and removal of narrow parochial tendencies. In the first place, what the circular letter seeks to do is to obtain the consent of the additional Judges, not for transfer to some other High Court, but for appointment as permanent Judges in another High Court, whereas what took place during the emergency were transfers of High Court Judges from one High Court to another. Secondly, it is true that the transfers of High Court Judges made during the emergency were sought to be defended by the Government of India on the plea of national integration and removal of narrow parochial tendencies, but this defence was found by the Court in *Union of India v. Sankalchand Sheth* (1978) 1 SCR 423: (AIR 1977 SC 2328) to be false. Chandrachud, J., as he then was, observed in his judgment in that case: "I would only like to add that the record of this case does not bear out the claim that any one of the 16 High Court Judges was transferred in order to further the cause of national integration. Far from it." What was held by the Court was that the transfers of High Court Judges during the emergency were made not for the purpose of furthering the cause of national integration but by way of punishment. The Law Minister was therefore right in stating in the first para of the circular letter that no start has been made in the past in the direction of having one-third Judges in a High Court from outside the State and that is why he was taking the initiative in the matter.

47. Coming to the merits of the challenge against the validity of the circular letter, the principal contention advanced on behalf of the petitioners was that the circular letter required the additional Judges as also those whose names were recommended or might in future be recommended for initial appointment, to give their consent for being appointed as Judges outside the State and obtaining of such consent in advance would reduce the consultation

with the Chief Justice of India, the Chief Justice of the High Court in which the additional Judge or the prospective Judge is to be appointed and the Governor of the State illusory and an empty formality and this would be violative of Article 217 clause (1) which provides that the appointment of a Judge of a High Court can be made only after consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India. This contention is also, in our opinion, without force and must be rejected. It is clear from the language of clause (1) of Article 217 that the appointment of a Judge of a High Court can be made by the President only after consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India and, according to the interpretation placed by us, consultation within the meaning of this Article means full and effective consultations with each of the three constitutional functionaries after placing all relevant material before them. Now, if a person, who is an additional Judge in the High Court in one State or who is practising as a lawyer in that State is to be appointed as a Judge in another State, then obviously his willingness to be so appointed would be a highly relevant factor and that would have to be ascertained and placed before the three constitutional functionaries who are required to be consulted before an appointment can be made. It is obvious that the President cannot appoint a person to be a Judge of a High Court without first ascertaining his willingness to be appointed as a Judge in that High Court and some one has to make an inquiry in that behalf in order to ascertain his willingness. It is only if the person concerned is willing to be appointed as a Judge in that High Court that the question would arise of processing his name and consulting the three constitutional functionaries in regard to the appointment of such person. This inquiry has to be made before the process of consultation can start and the Law Minister therefore by addressing the circular letter requested the Chief Minister of each State to make this inquiry. It is true that Law Minister did not state in so many terms in the circular letter that the Chief Minister may make this inquiry through the Chief

Justice of the High Court but that was clearly implicit in the circular letter, because a copy of the circular letter was also sent to the Chief Justice of each High Court with the endorsement "for necessary action" and moreover it must be presumed that the necessary inquiry would be made by the Chief Minister only through the Chief Justice of the High Court. The Chief Minister would not be expected to contact directly the additional Judges or the persons recommended for initial appointment, for the purpose of ascertaining whether they are willing to be appointed as Judges in any other High Court. Since the Chief Justice of the High Court is the head of the judiciary in the State, the Chief Minister would invariably route his inquiry through the Chief Justice of the High Court and request the Chief Justice of the High Court to ascertain whether any of the additional Judges or persons recommended for initial appointment are willing to be appointed to a High Court outside the State. This inquiry could have been made by the Law Minister by writing directly to the Chief Justice of each High Court but, instead of doing so, the Law Minister chose to address his inquiry to the Chief Minister of each State, presumably because he thought that it would be more appropriate for him to make this inquiry through the Chief Minister of the State rather than by direct communication with the Chief Justice of the High Court. The Law Minister had to make this inquiry because without information as to whether an additional Judge or a person recommended for initial appointment was willing to be appointed as a Judge in another High Court, his name could not be processed for appointment as a Judge in that High Court. This was the first step required to be taken after the willingness of the additional Judge or person recommended for initial appointment, to be appointed as a Judge in another High Court was ascertained that the Law Minister could place the proposal for appointment of such person as a Judge for the consideration of the Chief Justice of that High Court, the Governor of the State in which that High Court is situated and the Chief Justice of India. It would then be for the Chief Justice of that High Court to consider whether the person proposed for appointment is fit

to be appointed in his High Court and whether he would recommend him for such appointment. On this point, however, a serious objection was raised on behalf of the petitioners and a question was posed as to how the Chief Justice of a High Court can make any recommendation in regard to a person proposed to be appointed as a Judge in his High Court unless he knows such person and has seen his work either at the Bar or in the High Court or district court and is therefore in a position to assess his suitability for being appointed as a Judge. The argument was that the Chief Justice of the High Court in which the appointment is proposed to be made has a constitutional duty to give his opinion in regard to the suitability of the person proposed to be appointed and suitability would naturally include competence, character and integrity and how can the Chief Justice give an honest opinion in regard to the suitability of such person when he does not know him at all and has not even had an opportunity of seeing his work. We do not think this argument is well founded; the difficulty pointed out on behalf of the petitioners is more imaginary than real. The Chief Justice of the High Court where the appointment is proposed to be made need not blindly and unquestioningly accept the proposal made by the Law Minister. The Chief Justice of the High Court can make his own inquiries in regard to the suitability of the person proposed for appointment either through the Chief Justice of the High Court where such person is working as an Additional Judge or District Judge or practising as a lawyer or through other sources such as the Advocate General of that State. The Chief Justice of the High Court can also enquire from the Governor of the State where the person proposed to be appointed is working as an additional Judge or district Judge or practising as a lawyer and find out what are his antecedents and whether he possesses character and integrity. The social philosophy of the person proposed to be appointed as also his attitudes and habits of mind can also be ascertained by the Chief Justice of the High Court by making inquiries from the Chief Justice of the High Court where such person is working as an additional

Judge or district Judge or practising as a lawyer as also from the Governor of that State and diverse other sources. It is not at all difficult for the Chief Justice of the High Court where an appointment is proposed to be made to gather the requisite information about the person proposed to be appointed so as to enable him to make up his mind in regard to the suitability of such person for appointment as a Judge. May we ask what happens when a person is recommended for appointment as a Judge in a High Court by the Chief Justice of India? There have been quite a number of instances where this has happened. There have been cases where the Chief Justice of India has recommended members of the Supreme Court Bar for appointment as Judges in different High Courts and equally there have been cases where members of the Income-tax Tribunal as also persons working in the legal department of the Government of India have been recommended by the Chief Justice of India for appointment as High Court Judges. In such cases, the Chief Justice of the High Court where the appointment is proposed to be made, would naturally gather the requisite information about the person proposed to be appointed from the Chief Justice of India and other sources available to him and decide whether such person is suitable for being appointed as a Judge in his High Court. He may agree with the recommendation of the Chief Justice of India or he may disagree with it. In fact, there have been cases, though very few, where the Chief Justice of the High Court has declined to accept the person proposed by the Chief Justice of India for appointment as a Judge in his High Court. Merely because a recommendation emanates from the Chief Justice of India, it does not mean that consultation with the Chief Justice of the High Court where the person concerned is proposed to be appointed, would be reduced to a mockery. The proposal for appointment of a person as a Judge may be initiated by the Central Government or by any of the three constitutional functionaries required to be consulted and from whomsoever the proposal emanates, the other constitutional functionaries are required to be consulted in regard to it on the basis of full and identical material. When the Chief Justice of the High Court is informed that a particular person is willing to be appointed as a Judge in his High Court and the proposal to appoint him as a Judge may therefore be considered, the Chief Justice of the High Court can ask the Central Government or the Chief Justice of India, whosoever has made the proposal, to place before him all the relevant material in regard to the person proposed to be appointed and also gather the necessary material from the Chief Justice of the other High Court as also from other sources available to him and then decide whether to recommend such person or not. So also the Governor of the State where the appointment is proposed to be made, can make the necessary inquiries and after considering all relevant material decide what attitude it should adopt in regard to the proposed appointment. The Chief Justice of India also would have a very important role to play in the process of consultation. Before giving his opinion in regard to the proposed appointment, the Chief Justice of India may enquire directly from the person proposed to be appointed whether he is really willing to be appointed as a Judge in another High Court and whether the consent given by him is genuine and free. The person proposed to be appointed may also point out to the Chief Justice of India his problems and difficulties in accepting appointment in the other High Court and the Chief Justice of India will consider all this material before he gives his opinion to the President. The Chief Justice of India will also have to consider whether the proposed appointment is bona fide and in public interest or it is being made only with a view to favouring the person concerned so that by appointment in another High Court, he may get some benefit which he would not get in the High Court of his own State. The Chief Justice of India may in such a case refuse to agree to the proposed appointment even though the person proposed to be appointed has consented to it. These and many other relevant considerations will have to be taken into account by the Chief Justice of India before he gives his opinion to the President in regard to the proposed appointment. We therefore fail to see how the obtaining of the consent of the person proposed

for appointment, in advance for being appointed as a Judge in another High Court can possibly have the effect of reducing consultation with the Chief Justice of India to a mockery or making it ineffective so as to be violative of clause (1) of Article 217.

48. The next contention urged on behalf of the petitioners was that the circular letter held out a veiled threat to the additional Judges that if they do not consent to their appointment as Judges in a High Court other than their own, they may not be appointed as permanent Judges at all and may be dropped on the expiration of their term of office. The petitioners relied on the use of the word "obtain" in the circular letter and submitted that the use of this word conveyed a sense of compelled obedience with an implied threat that failure to give consent may entail adverse consequences. Whether such adverse consequences actually flowed or not was not material, contended the petitioners, but what was disturbing was that there was an implied threat of such adverse consequences and that was subversive of the independence of the judiciary. Moreover, consent obtained under such threat of adverse consequences could not be regarded as valid consent in law because consent to be valid must be free and must not be induced by threat, coercion or duress. Now we fail to see how from the mere use of the word 'obtain' in the circular letter, this entire edifice of an argument that there was an implied threat to the additional Judges that if they do not give their consent for being appointed as Judges in another High Court, they would be visited with adverse consequences, can be built up. The word "obtain" is a transitive verb and it is obvious that when the Chief Minister of each State was asked by the Law Minister by issuing the circular letter to obtain the consent of the additional Judges for being appointed as permanent Judges in another High Court, what was meant was that the Chief Minister should obtain the consent of each additional Judge if he was willing to give such consent. It is clear as a matter of plain grammar that one person can obtain something from another provided that other is willing to give it. The use of the word ob-

tain cannot possibly be construed to mean that the person from whom the consent is to be obtained must be coerced into giving it. To read the word 'obtain' in the circular letter as meaning that the Chief Minister was expected to coerce the additional Judges into giving their consent or as conveying an implied threat to the additional Judges that if they do not give their consent they might be dropped as additional Judges on the expiration of their term, would, in our opinion, be nothing short of torturing out of the language used in the circular letter, a meaning which the language does not bear and which could not possibly have been intended by the Law Minister.

49. The petitioners also sought to bolster up their case that the circular letter held out a veiled threat to the additional Judges by relying on the statement contained in the circular letter that the giving of consent by additional Judges would not necessarily involve any commitment on the part of the Central Government to appoint them as permanent Judges. But we do not see how this statement can be regarded as a veiled threat that if an additional Judge does not give his consent for being appointed as a Judge in another High Court, he may not be appointed as a permanent Judge at all and may be discontinued on the expiration of his term of office. We do not think it is possible to read any such sinister implication in this statement contained in the circular letter. This statement merely reiterated the legal position, too well-settled to admit of any doubt or debate, that merely because a person has given his consent to be appointed as a Judge in a High Court, it does not mean that he would necessarily be appointed as a Judge. He may not be appointed at all, if after consultation with the three constitutional functionaries as provided in Article 217 clause (1), it is decided not to appoint him. Even if it is decided to appoint him, he may not be appointed as a Judge in the High Court of his choice because the Chief Justice of that High Court or the Governor of that State or the Chief Justice of India may object to his appointment in that High Court. He must not therefore remain under the impression that merely because he has

given his consent for being appointed as a Judge outside his State and expressed his preference as regards the High Courts where he would like to be appointed, he would necessarily be appointed as a Judge and in the High Court of his choice. Far from this being a threat to the additional Judges, it was a clear intimation to them that they should not be under any wrong impression that giving of consent would ensure them appointment as a permanent Judge and in the High Court of their choice. Whether to appoint an additional Judge as a permanent Judge or to continue him as an additional Judge for a further term or to discontinue him on the expiration of his term would be decided in accordance with the procedure laid down in clause (1) of Article 217 and giving of consent would not be a factor tilting the balance in favour of the additional Judge giving such consent. We are also not impressed by the argument urged on behalf of the petitioners that the omission to state in the circular letter that if an additional Judge does not give his consent to be appointed in any other High Court, it would not be held against him in considering his appointment as a permanent Judge, conveyed an implied threat that failure to give such consent would be held against the additional Judge and he might be discontinued as an additional Judge on that account. It is difficult to spell out any such implied threat on a plain reading of the circular letter. On the contrary it is significant to note that the circular letter did not state, as it well might have, if such was the intention of the Law Minister, that if consent is not given by an additional Judge for being appointed as a permanent Judge in another High Court, he would run the risk of being discontinued as an additional Judge on the expiration of his term. It would be quite open to an additional Judge under the circular letter to say that he is not willing to be appointed in any other High Court except his own and even so, when his term as an additional Judge expires, he could still be considered for appointment as an additional Judge for a further term or as a permanent Judge in his own High Court, there being nothing in the circular letter against it and the procedure set out in clause (1) of Art. 217

would then be followed. An additional Judge, as we have already pointed out above, is entitled to be considered for appointment as an additional Judge for a further term or as a permanent Judge in his own High Court and such appointment cannot be refused to him on the ground he has not given his consent for being appointed as a permanent Judge in another High Court. Such a ground for discontinuing an additional Judge on the expiration of his term would be a wholly irrelevant ground and we do not think it could ever have been intended by the Law Minister consistently with the constitutional requirement that an additional Judge who does not give his consent for being appointed as a permanent Judge outside his High Court should on that account be discontinued as an additional Judge on the expiration of his term. It would not be right to read the circular letter with a suspicious eye as if it was designed to cow down the additional Judges into submission by holding out an implied threat to them. There are, in fact, quite a few Judges who have not given their consent to be appointed as permanent Judges in another High Court and no adverse consequence has ensued to them. We do not think that our additional Judges are made of such weak stuff that they would submit to any supposed threats by the Executive and give their consent to be appointed as permanent Judges in another High Court out of fear that they might be discontinued as additional Judges if they do not give such consent.

50. There was also one other contention advanced on behalf of the petitioners, namely, that to require a person whose name is to be recommended for initial appointment as a Judge to give his consent for being appointed as a Judge in another High Court would be to introduce an irrelevant qualification for the appointment of a Judge. The argument was that to obtain such consent from a person whose name is to be recommended for appointment would be to introduce a requirement for appointing a Judge which is not prescribed by the Constitution and the obtaining of such consent would therefore be unconstitutional. It is, with the greatest respect to the learned counsel appearing on behalf of the petitioners, extremely

difficult for us to appreciate this argument. When the name of a person is being considered for appointment as a Judge because he is regarded as suitable for such appointment, we fail to see why he cannot be asked whether he is willing to be appointed as a Judge in another High Court. It is for him to decide whether or not to give his consent for such appointment. He may very well say that he is not agreeable to be appointed as a Judge in any High Court other than his own, but if, in the exercise of his own volition, he gives his consent for being appointed as a Judge in another High Court, it is difficult to see how it can ever be contended that by obtaining such consent, an irrelevant qualification for appointment of a Judge has been introduced. It is not as if a person who does not give his consent for being appointed as a Judge in another High Court would necessarily be refused appointment in his own High Court. It is significant to note that, in fact, even after the date of the circular letter, quite a few new appointments have been made in different High Courts of persons either practising as lawyers in those High Courts or working as District Judges under those High Courts.

51. The last contention urged on behalf of the petitioners was that the circular letter was really an attempt on the part of the Government to transfer Judges from one High Court to another by circumventing the decision of this Court in *Sankalchand Sheth's case* (AIR 1977 SC 2328) (supra). This contention urged on behalf of the petitioners is wholly unfounded and no amount of legal casuistry or ingenuity can sustain it. It is difficult to appreciate how the circular letter can at all be interpreted as an attempt to bring about transfer of Judges from one High Court to another. The circular letter deals with two categories of persons; one is the category of persons who are recommended or may in future be recommended for initial appointment as Judges and the other is the category of additional Judges who are appointed for a period of two years or less. So far as the first category of persons is concerned, it is impossible to contend and with all his ingenuity even Mr. Seervai appearing on behalf of the petitioners could not

argue, that when a person who is recommended or proposed to be recommended for initial appointment as a Judge is asked whether he is willing to be appointed as a Judge in another High Court, any transfer is involved in such process. When such person is not a sitting Judge in any High Court and is appointed for the first time in another High Court, it is difficult to see how he can be said to be transferred. The transfer contemplated in Art. 222 Cl. (1) is not a mere act of physical locomotion or transfer of residence from one place to another, but it is an act by which a Judge in one High Court is transferred as a Judge of another High Court. Equally there is no transfer involved where an additional Judge is, on the expiration of his term, appointed as an additional Judge in another High Court or is appointed as a permanent Judge in any other High Court. It is no doubt true that by reason of his appointment as an additional Judge or permanent Judge in another High Court he has physically to go to that High Court, but it is not while being a Judge of one High Court that he goes over as a Judge of the other High Court. His appointment as an additional Judge of one High Court comes to an end and he is appointed afresh as an additional or permanent Judge in another High Court. It is by virtue of a fresh appointment that he becomes a Judge, whether additional or permanent, of another High Court and he is not transferred from one High Court to another within the meaning of Cl. (1) of Art. 222. If the contention of the petitioners were correct, it would not be necessary, while appointing an additional or permanent Judge in another High Court, to follow the procedure set out in Cl. (1) of Art. 217 and to consult the Chief Justice of the latter High Court and the Governor of that State as required by that article and it would be possible to appoint such person as an additional or permanent Judge in another High Court after consulting only the Chief Justice of India under Cl. (1) of Art. 222. This proposition has only to be stated in order to be rejected; it would clearly amount to circumventing the provisions of Cl. (1) of Art. 217. Take for example a case where a person who is an additional Judge in a High Court for a period of

two years is, on the expiration of his term of two years, appointed as a permanent Judge in another High Court. Can such appointment of a permanent Judge be made in the other High Court without consulting the Chief Justice of that High Court and the Governor of that State under Cl. (1) of Art. 217? There is in such a case no transfer at all; it is a case of fresh appointment made in the other High Court and that can be done only after going through the procedure set out in Cl. (1) of Art. 217.

52. Mr. Seervai, appearing on behalf of the petitioners however relied strongly on a speech made by the Law Minister in the Lok Sabha on 16th April, 1981, where at columns 271 and 274 of the Lok Sabha Debates, the Law Minister himself had used the expression 'transfer' while speaking about the circular letter. The learned counsel contended that the use of the expression 'transfer' by the Law Minister himself supported his argument that what the circular letter sought to do was to transfer Judges from one High Court to another. This contention is in our opinion, wholly unsustainable and it is no better than relying on a broken reed. It is undoubtedly true that in columns 271 and 274, the Law Minister used the expression 'transfer' or 'transferred' while referring to the circular letter, but one cannot fasten upon a stray use of a loose expression for the purpose of determining what is the true effect of the circular letter. The speech of the Law Minister has to be read as a whole and if it is so read, it is clear that at more than one place, the Law Minister made it clear that what was contemplated by the circular letter was 'not a case of transfer but a case of an appointment under Art. 217' vide Col. 273. The Law Minister also reiterated in Col. 223 that "in so far as additional Judges are concerned, the circular letter seeks to obtain their consent to their appointment as permanent Judges to High Courts outside and these would be appointments under Art. 217". Then again in Col. 270, the Law Minister clarified that the "appointment of an additional Judge as a permanent Judge could also be termed as an initial appointment." The expression 'transfer' or 'transferred' in columns 271 and 274 was obviously used in a loose sense meaning physical locomotion. It must be remembered that this

expression happened to be used by the Law Minister in an ex-tempore speech made on the floor of the House and not in a document or letter prepared after much care and deliberation. No undue reliance can therefore be placed on behalf of the petitioners on the use of the expression 'transfer' or 'transferred' in the speech of the Law Minister. Mr. Seervai also relied strongly on the circumstance that three associations of lawyers in Bombay had all taken the view that the circular letter contemplated transfer of additional Judges and sought their consent to such transfer. But this circumstance has very little relevance in the interpretation of the circular letter for it is not for the lawyers practising in a particular High Court to construe the circular letter but for this Court to determine what is the true meaning of that document. We are clearly of the view — in fact we find it impossible to take a different view — that what was contemplated by the circular letter was not transfer of additional Judge from one High Court to another and it did not therefore, have to satisfy the requirements of Cl. (1) of Art. 222.

53. But quite apart from this consideration, even if the view be taken that what the circular letter sought to achieve was transfer of additional Judges from one High Court to another, it is difficult to see how by obtaining consent of the additional Judges in advance, the Law Minister would be circumventing the majority decision in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra). The majority view in Sankalchand Sheth's case (supra) was that a Judge can be transferred from one High Court to another without his consent, but the transfer must be after full and effective consultation with the Chief Justice of India and it must not be by way of punishment but must be in public interest. Therefore, obviously it would be of no help to the Law Minister to obtain the consent of an additional Judge in advance to be appointed as a permanent Judge in any other High Court because despite such consent, the additional Judge cannot be appointed as a permanent Judge in another High Court without full and effective consultation with the Chief Justice of India and according to the majority decision in Sankal-

chand Sheth's case (supra), the opinion given by the Chief Justice of India would be entitled to the greatest weight and any departure from it would have to be justified by the Central Government on strong and cogent grounds. In such a case, even where the consent of the additional Judge has been obtained in advance, the Chief Justice of India would have to consider whether it is in public interest to appoint the additional Judge as a permanent Judge in another High Court and the consent obtained in advance would not pre-empt the consultative exercise with the Chief Justice of India. The advance consent obtained from the additional Judge would have no meaning so far as the Chief Justice of India is concerned, because irrespective whether the additional Judge has given his consent or not, the Chief Justice of India would have to consider whether it would be in public interest to allow the additional Judge to be appointed as a permanent Judge in the other High Court. Therefore, even on the assumption that the appointment of an additional Judge as a permanent Judge in another High Court amounts to transfer, which of course we emphatically repudiate, it is difficult to see how the circular letter can be construed as an attempt to circumvent the majority decision in Sankalchand Sheth's case (supra).

54. We do not therefore find any constitutional or legal infirmity or any abuse or misuse of authority on the part of the Law Minister in issuing the circular letter. The circular letter does not violate the provisions of Cl. (1) of Art. 217 or Cl. (1) of Art. 222 nor does it offend against any other constitutional or legal provision and the challenge against the validity of the circular letter must, therefore, fail. We may, however, while affirming the validity of the circular letter, make it clear that since an additional Judge has a right to be considered for appointment as an additional Judge for a further term on the expiration of his original term, and in case of a vacancy in permanent post, for appointment as a permanent Judge in his own High Court, he cannot be discontinued as an additional Judge on the ground that he has not given his consent for being appointed as a permanent Judge in any other High Court.

Such a ground for discontinuing an additional Judge would be a wholly irrelevant ground and if, on the expiration of his original term, an additional Judge is discontinued on any such ground, the decision of the President discontinuing him would be unconstitutional and void and the Union of India would be liable to be directed to reconsider his case on the basis of relevant considerations after excluding the irrelevant ground.

Disclosure of documents: Privilege.

55. We now come to a very important question which was agitated before us at great length and which exercised our minds considerably before we could reach a decision. The question related to the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the non-appointment of O. N. Vohra and S. N. Kumar as additional Judges. The learned counsel for the petitioners and S. N. Kumar argued before us with great passion and vehemence that these documents were relevant to the inquiry before the Court and they should be directed to be disclosed by the Union of India. This claim of the petitioners and S. N. Kumar for disclosure was resisted by the Solicitor General of India on behalf of the Union of India and Mr. Mridul on behalf of the Law Minister. They contended that so far as O. N. Vohra was concerned his case stood on an entirely different footing from that of S. N. Kumar since, unlike S. N. Kumar who allied himself with the petitioners and actively participated in the arguments almost as if he was petitioner, O. N. Vohra though made a party respondent to the writ petition of V. M. Tarkunde did not appear and participate in the proceedings or seek any relief from the Court in regard to his continuance as an additional Judge. Mr. Mridul on behalf of the Law Minister informed us that in fact O. N. Vohra had started practice in the Delhi High Court and his case could not be considered by us when he himself did not want any relief. So far as the case of S. N. Kumar was concerned the learned Solicitor General on behalf of the Union of India conceded that the documents of which disclosure was sought on behalf of the petitioners and

S. N. Kumar were undoubtedly relevant to the issues arising before the Court, but contended — and in this contention he was supported by Mr. Mridul on behalf of the Law Minister — that they were privileged against disclosure for a twofold reason. One was that they formed part of the advice tendered by the Council of Ministers to the President and hence by reason of Art. 74 cl. (2) of the Constitution the Court was precluded from ordering their disclosure and looking into them and the other was that they were protected against disclosure under S. 123 of the Indian Evidence Act since their disclosure would injure public interest. We propose to consider these rival arguments in the order in which we have set them out, first in regard to O. N. Vohra and then in regard to S. N. Kumar.

56. So far as O. N. Vohra is concerned, it is apparent that though he was joined as a party respondent to the writ petition filed by V. M. Tarkunde, he did not choose to appear and take part in the proceedings. He did not even file an appearance, presumably because he was not interested in wresting back the office of an additional Judge through a judicial writ. He adopted a commendable attitude consistent with the dignity of the High office which he had the privilege to hold for over two years and scorned to be a party to any litigative adventure for getting back the office of a High Court Judge. He took the view that the office of a High Court Judge is no mean office for which one may canvass, lobby or fight but it is a high position which can only be offered and which one should regard as an honour to be invited to fill and if for any reason, justifiable or not, the Government chooses not to offer it to the deserving person, it may result in detriment to public interest for which the Government may have to account to the people through their elected representatives, but the person concerned should not litigate his claim to this high office. That would lower the dignity of the office by making it the subject matter of litigative controversy. It was presumably for this reason that O. N. Vohra did not appear in the writ petition or seek any relief from the Court in regard to his continuance as

an additional Judge. In fact, we are told, O. N. Vohra has already started practice in the Delhi High Court. Now if O. N. Vohra has not come forward to seek any relief from the Court and is not claiming that he should be deemed to have been appointed a permanent Judge or that he should be reappointed as an additional Judge for a further term, it is difficult to see how the Court can be called upon to examine his case for the purpose of determining whether he was wrongly discontinued as an additional Judge. We have taken a broad and liberal view in regard to locus standi and held that any public spirited advocate acting bona fide and not for private gain or personal profit or political motivation or any other oblique consideration, may file a writ petition in the High Court challenging an unconstitutional or illegal action of the Government or any other constitutional authority prejudicially affecting the administration of justice and in such writ petition he may claim relief not for himself personally but for those who are the direct victims of such unconstitutional or illegal action, because granting such relief to them would repair the injury caused to administration of justice. But the persons for whom the relief is sought must be ready to accept it; they must appear and make it known that they are claiming such relief; it cannot be thrust upon them unless they wish it. If, in the present case, O. N. Vohra does not seek to go back as an additional Judge through judicial intervention, the petitioners cannot contend that he must still be continued as an additional Judge irrespective of his inclination. The relief sought by the petitioners being primarily for the benefit of O. N. Vohra, it is for O. N. Vohra to decide whether he would have it and if he does not want it, it would be a fruitless exercise for the Court to determine whether the decision not to appoint him as an additional Judge was unconstitutional and he should have been appointed as an additional Judge for a further term. The Court does not decide issues in the abstract. It undertakes determination of a controversy provided it is necessary in order to give relief to a party and if no relief can be given because none is sought, the Court cannot take upon itself a theoretical exercise merely for the pur-

pose of deciding academic issues, howsoever important they may be. The Court cannot embark upon an inquiry whether there was any misuse or abuse of power in a particular case, unless relief is sought by the person who is said to have been wronged by such misuse or abuse of power. The Court cannot take upon itself the role of a commission of inquiry — a knight errant roaming at will with a view to destroying evil wherever it is found. It was for this reason that we held that the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to non-appointment of O. N. Vohra was not relevant to the issues arising for determination in the writ petition and the Union of India could not be required to disclose it.

57. That takes us to the case of S. N. Kumar which stands on a totally different footing, because S. N. Kumar has appeared in the writ petition, filed an affidavit supporting the writ petition and contested, bitterly and vehemently, the decision of the Central Government not to continue him as an additional Judge for a further term. Since S. N. Kumar has claimed relief from the Court in regard to his continuance as an additional Judge, an issue is squarely joined between the petitioners and S. N. Kumar on the one hand and the Union of India on the other which requires to be determined for the purpose of deciding whether relief as claimed in the writ petition can be granted to S. N. Kumar. Now, as we have already pointed out while discussing the scope and ambit of Art. 217, there are only two grounds on which the decision of the Central Government not to continue an additional Judge for a further term can be assailed and they are, firstly, that there has been no full and effective consultation between the Central Government and the constitutional authorities required to be consulted under that Article and secondly, that the decision of the Central Government is based on irrelevant grounds. It was on both these grounds that the petitioners and S. N. Kumar impugned the decision of the Central Government not to appoint S. N. Kumar as an additional Judge for a further term and there can be no doubt that the correspondence exchanged

between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India would be relevant qua both these grounds. The learned Solicitor General on behalf of the Union of India and Mr. Mridul on behalf of the Law Minister, with the usual candour and frankness always shown by them, did not dispute the relevance of these documents to the issues arising in the writ petition in regard to S. N. Kumar, but contended that they were protected against disclosure under Art. 74 cl. (2) of the Constitution as also Sec. 123 of the Indian Evidence Act. This contention raised an extremely important question in the area of public law particularly in the context of the open society which we are trying to evolve as part of the democratic structure and it caused great concern to us, for it involved a clash between two competing aspects of public interest, but ultimately after inspecting these documents for ourselves and giving our most anxious thought to this highly debatable question, we decided to reject the claim for protection against disclosure and directed that these documents be disclosed by the Union of India. We now proceed to give our reasons for this decision taken by us by a majority of six against one.

58. The first ground on which protection against disclosure was claimed on behalf of the Union of India and the Law Minister was based on Art. 74 cl. (2) of the Constitution. It is clear from the constitutional scheme that under our Constitution the President is a constitutional Head and is bound to act on the aid and advice of the Council of Ministers. This was the position even before the amendment of cl. (1) of Art. 74 by the Constitution (42nd Amendment) Act 1976, but the position has been made absolutely explicit by the amendment and Article 74 cl. (1) as amended now reads as under:—

“There shall be a Council of Ministers with the Prime Minister at the Head to aid and advise the President who shall, in the exercise of his functions act in accordance with such advice.”

What was judicially interpreted even under the unamended Art. 74 cl. (1) has now been given Parliamentary recognition by the constitutional amendment. There can therefore be no doubt

that the decision of the President under Art. 224 read with Art. 217 not to appoint an additional Judge for a further term is really a decision of the Council of Ministers and the reasons which have weighed with the Council of Ministers in taking such decision would necessarily be part of the advice tendered by the Council of Ministers to the President. Now cl. (2) of Art. 74 provides:

"The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court."

The Court cannot, having regard to this constitutional provision, embark upon an inquiry as to whether any and if so what advice was tendered by the Council of Ministers to the President and since the reasons which have prevailed with the Council of Ministers in taking a particular decision not to continue an additional Judge for a further term would form part of the advice tendered to the President, they would be beyond the ken of judicial inquiry. But the Government may in a given case choose to disclose these reasons or it may be possible to gather them from other circumstances, in which event the Court would be entitled to examine whether they bear any reasonable nexus with the question of appointment of a High Court Judge or they are constitutionally or illegally prohibited or extraneous or irrelevant. But if these reasons are not disclosed by the Government and it is otherwise not possible to discover them, it would be impossible for the Court to decide whether the decision of the Central Government not to appoint an additional Judge for a further term is based on irrelevant grounds. There would however not be much difficulty by and large in cases of this kind to gather what are reasons which have prevailed with the Central Government in taking the decision not to continue an additional Judge. Article 217 requires that there must be full and effective consultation between the President, that is, the Central Government on the one hand and the Chief Justice of the High Court, the Governor, that is, the State Government and the Chief Justice of India on the other and the "full and identical facts" on which the decision of the Central Government is based must be placed before the Chief Justice

of the High Court, the State Government and the Chief Justice of India. The reasons which the Central Government is inclined to take into account for reaching a particular decision have therefore necessarily to be communicated to the Chief Justice of the High Court, the State Government and the Chief Justice of India and in the circumstances, it should ordinarily be possible for the Court to gather from such communication, the reasons which have persuaded the Central Government to take its decision. Of course there may be cases where there are several reasons discussed between the Central Government and the three constitutional authorities and some of these reasons may be relevant, while some others may be irrelevant and without inquiring into the advice given by the Council of Ministers to President, it may not be possible to determine as to what are the reasons, relevant or irrelevant, which have weighed with the Central Government in taking its decision and in such a case, the Court may not be able to pronounce whether the decision of the Central Government is based on irrelevant grounds. But ordinarily the correspondence exchanged between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India would throw light on the question as to what are the reasons which have impelled the Central Government to take any particular decision regarding the continuance of an additional Judge. This correspondence would also show whether the "full and detailed facts" on which the decision of the Central Government is based were placed before the Chief Justice of the High Court, the State Government and the Chief Justice of India before they gave their opinion in the course of the consultative process. Of course if the communication between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India has not taken place by correspondence but has been the subject matter of only oral talk or discussion, it would become impossible for the Court to discover the reasons which have weighed with the Central Government in taking the decision not to continue the additional Judge for a further term, unless of course the

Central Government chooses to disclose such reasons and it would also become extremely difficult for the Court to decide whether the "full and detailed facts" on which the decision of the Central Government is based were placed before the other three constitutional authorities and there was full and effective consultation as required by Art. 217. The Court would then have to depend only on such affidavits as may be filed before it and the task of the Court to ascertain the truth would be rendered extremely delicate and difficult, as it has been in the writ petitions challenging the transfer of Mr. Justice K. B. N. Singh, Chief Justice of Patna High Court. It is not at all desirable that when the Chief Justice of the High Court or the Chief Justice of India has to communicate officially with the State Government or the Central Government in regard to a matter where he is discharging a constitutional function, such communication should be only by way of oral talk or discussion unrecorded in writing. We think it absolutely essential that such communication must, as far as possible, be in writing, whether by way of a note or by way of correspondence. The process of consultation, whether under Art. 217 or under Article 222, must be evidenced in writing so that if at any point of time a dispute arises as to whether consultation had in fact taken place or what was the nature and content of such consultation, there must be documentary evidence to resolve such dispute and an ugly situation should not arise where the word of one constitutional authority should be pitted against the word of another and the Court should be called upon to decide which of them is telling the truth. Oral talk or discussion may certainly take place between the Central Government and any other constitutional authority required to be consulted but it must be recorded immediately either in a note or in correspondence. Besides eliminating future dispute or controversy, the practice of having written communication or record of oral discussion ensures greater care and deliberation in expression of views and considerably reduces the possibility of improper or unjustified recommendations or unholy confabulations or conspiracies, which might be hidden under the veil of secrecy if

there were no written record. Moreover, such a practice would tend to promote openness in society which is the hall-mark of a democratic polity. It would indeed be highly regrettable if, instead of following this healthy practice of having a written record of consultation, the Central Government or the Chief Justice of the High Court or the Chief Justice of India were to carry on the consultation process either on the telephone or by personal discussion without rendering it. But we find that fortunately in the present case, unlike K. B. N. Singh's case which falls for determination in the second batch of writ petitions, there was correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the continuance of S. N. Kumar and the question is whether this correspondence forms part of the advice tendered by the Council of Ministers to the President so to be protected against disclosure by reason of cl. (2) of Art. 74.

59. The argument of the learned Solicitor General was this correspondence did not form part of the advice tendered by the Council of Ministers to the President and he sought to support this argument by adopting the following process of reasoning. He said that the Council of Ministers cannot advise the President to appoint or not to appoint an additional Judge for a further term without consulting the Chief Justice of the High Court and the Chief Justice of India. It is only after consulting them that appropriate advice can be tendered by the Council of Ministers to the President. When advice is tendered by the Council of Ministers to the President, it is open to the President under the Proviso to cl. (1) of Art. 74 not to immediately accept such advice but to require the Council of Ministers to reconsider the advice generally or otherwise. If in a given case the President finds that advice has been given by the Council of Ministers without consulting either the Chief Justice of the High Court or the Chief Justice of India or both or that there has been no full and effective consultation with them as required by the Constitution, he may, and indeed he must, send the case back to the Council of Ministers and require them to re-

consider the advice after carrying out full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India. Now how can the President satisfy himself in regard to the fulfilment of the constitutional requirement of consultation with the Chief Justice of the High Court and the Chief Justice of India, unless the views expressed by the two Chief Justices are placed before him along with the advice tendered by the Council of Ministers. The exercise of the power of the President to appoint or not to appoint an additional Judge is so integrally connected with the constitutional requirement of full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India that at no stage can it be delinked from the views expressed by them on consultation and it would not be possible for the President to exercise this executive power in accordance with the constitution unless the views of the two Chief Justices are placed before him. On the basis of this reasoning and as a logical consequence of it, argued the learned Solicitor General, the views of the Chief Justice of Delhi and the Chief Justice of India obtained on consultation must be regarded as forming part of the advice tendered by the Council of Ministers to the President. The learned Solicitor General sought to draw support for his argument from the decision of a Constitution Bench of this Court in the *State of Punjab v. Sodhi Sukhdev Singh* (1961) 2 SCR 371: (AIR 1961 SC 493). We shall presently refer to this decision but before we do so, let us examine the argument of the learned Solicitor General on principle.

60. There can be no doubt that the advice tendered by the Council of Ministers to the President is protected against judicial scrutiny by reason of cl. (2) of Art. 74. But can it be said that the views expressed by the Chief Justice of the High Court and the Chief Justice of India on consultation form part of the advice. The advice is given by the Council of Ministers after consultation with the Chief Justice of the High Court and the Chief Justice of India. The two Chief Justices are consulted on "full and identical facts" and their views are obtained and it is after considering those views that the Coun-

cil of Ministers arrives at its decision and tenders its advice to the President. The views expressed by the two Chief Justices precede the formation of the advice and merely because they are referred to in the advice which is ultimately tendered by the Council of Ministers, they do not necessarily become part of the advice. What is protected against disclosure under cl. (2) of Art. 74 is only the advice tendered by the Council of Ministers. The reasons which have weighed with the Council of Ministers in giving the advice would certainly form part of the advice, as held by this Court in *State of Rajasthan v. Union of India* (1978) 1 SCR 1: (AIR 1977 SC 1361). Vide the observations of Beg C. J. at p. 46 (of SCR): (at p. 1392 of AIR). Chandrachud J. (as he then was) at page 91 (of SCR): (at p. 1420 of AIR) Fazal Ali, J. at pp. 120 and 121 (of SCR): (at pp. 1440, 1441 of AIR) where all the three learned Judges took the view that by reason cl. (2) of Art. 74 the Court would be barred from inquiring into the grounds which might weigh with the Council of Ministers in advising the President to issue a proclamation under Art. 356, because the grounds would form part of the advice tendered by the Council of Ministers. But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form the part of advice. The point we are making may be illustrated by taking the analogy of a judgment given by a Court of Law. The judgment would undoubtedly be based on the evidence led before the Court and it would refer to such evidence and discuss it but on that account can it be said that the evidence forms part of the Judgment? The judgment would consist only of the decision and the reasons in support of it and the evidence on which the reasoning and the decision are based would not be part of the judgment. Similarly the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the

exclusionary rule enacted in cl. (2) of Art. 74.

61. We may now refer to the decision of the Constitution Bench of this Court in the State of Punjab v. Sodhi Sukhdev Singh (AIR 1961 SC 493) (supra) on which the greatest reliance was placed by the learned Solicitor General in support of his plea based on cl. (2) of Art. 74. The respondent who was the District and Sessions Judge in the erstwhile state of Pepsu was removed from service by an order dated 7th April, 1953 passed by the President who was then in charge of the Administration of the State. The respondent made a representation against the Order of removal which was considered by the Council of Ministers of the State as in the meantime the President's rule had come to an end and the Council of Ministers expressed its views in a Resolution passed on 28th Sept. 1955. But before taking any action it invited the Report of the Public Service Commission. On receipt of the Report of the Public Service Commission the Council of Ministers considered the matter again and ultimately on 11th Aug. 1956 it reached the final conclusion against the respondent and in accordance with the conclusion, the order was passed to the effect that the respondent must be re-employed on some suitable post. The respondent thereupon instituted a suit against the successor State of Punjab for a declaration that his removal from service was illegal and in that suit he filed an application for the production of certain documents which included inter alia the proceedings of the Council of Ministers dated 28th Sept. 1955 and 11th Aug. 1956 and the Report of the Public Service Commission. The State objected to the production of these documents and ultimately the matter came before this Court. Gajendragadkar, J. (as he then was) speaking on behalf of the majority of the Court upheld the claim of privilege put forward on behalf of the State and so far as the Report of the Public Service Commission was concerned, the learned Judge held that it was protected against disclosure both under cl. (3) of Art. 163 and Sec. 123 of the Indian Evidence Act. We are at present concerned only with the claim for protection under cl. (3) of Art. 163 because that is an Article which corresponds to cl. (2) of

Art. 74 in so far as advice by the Council of Ministers to the Governor is concerned. The learned Judge speaking on behalf of the majority, accorded protection to the report of the Public Service Commission under cl. (3) of Article 163 on the ground that it formed part of the advice tendered by the Council of Ministers to the Rajpramukh. This view taken by the majority does appear *prima facie* to support the contention of the learned Solicitor General, but we do not think we can uphold the claim for protection put forward by the learned Solicitor General by adopting a process of analogical reasoning from the majority view in this decision. In the first place, we do not know what were the circumstances in which the majority Judges came to regard the report of the Public Service Commission as forming part of the advice tendered to the Rajpramukh. There is no reasoning in the judgment of the learned Judge showing as to why the majority held that the report of the Public Service Commission fell within the terms of cl. (3) of Art. 163. The learned Judge has merely set out his *ipse dixit*, without any reasons at all, saying in just one sentence, "The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers." It is elementary that what is binding on the court in a subsequent case is not the conclusion arrived at in a previous decision but the ratio of that decision, for it is the ratio which binds as a precedent and not the conclusion. Secondly, we may point out that we find it difficult to accept the view taken by the majority in this case. We are unable to appreciate how the report of the Public Service Commission which merely formed the material on the basis of which the Council of Ministers came to its decision as recorded in the proceedings dated 11th Aug. 1956 could be said to form part of the advice tendered by the Council of Ministers to the Rajpramukh. We do not think the learned Solicitor General can invoke the aid of this decision in support of his claim for protection under cl. (2) of Art. 74.

62. That takes us to the next question whether the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India is protected from dis-

closure under any other provision of law. We do not have in India any common law protection under the label of "Crown Privilege" as it was known a decade ago and now called "Public interest immunity" as there is in England and the only provision of law under which such immunity can be claimed is S. 123 of the Indian Evidence Act and, therefore, it is this provision which we must now turn to consider. But, before we do so, we would like to indicate the socio-political background in the context of which this section has to be interpreted. It is true that this section was enacted in the second half of the last century but its meaning and content cannot remain static. The interpretation of every statutory provision must keep pace with changing concepts and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirements of the fast changing society which is undergoing rapid social and economic transformation. The language of a statutory provision is not a static vehicle of ideas and concepts and as ideas and concepts change, as they are bound to do in a country like ours with the establishment of a democratic structure based on egalitarian values and aggressive developmental strategies, so must the meaning and content of the statutory provision undergo a change. It is elementary that law does not operate in a vacuum. It is not an antique to be taken down, dusted, admired and put back on the shelf, but rather it is a powerful instrument fashioned by society for the purpose of adjusting conflicts and tensions which arise by reason of clash between conflicting interests. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivery of justice. We need not therefore be obsessed with the fact

that S. 123 is a statutory provision of old vintage or that it has been interpreted in a particular manner some two decades ago. It is not as if it has once spoken and then turned into muted silence. It is an instrument which can speak again and in a different voice in the content of a different milieu. Let us therefore try to understand what voice this statutory provision speaks today in a democratic society wedded to the basic values enshrined in the Constitution.

63. Now it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy. "Knowledge" said James Madison, "will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it is but a prologue to a farce or tragedy or perhaps both." The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world.

64. The demand for openness in the government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rulers and, once the vote is cast, then retiring in passivity and not taking any interest in the government. Today it is common ground that democracy has a more

positive content and its orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government—an attitude and habit of mind. But this important role people can fulfil in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government.

65. There is also in every democracy a certain amount of public suspicion and distrust of government, varying of course from time to time according to its performance, which prompts people to insist upon maximum exposure of its functioning. It is axiomatic that every action of the government must be actuated by public interest but even so we find cases, though not many, where governmental action is taken not for public good but for personal gain or other extraneous considerations. Sometimes governmental action is influenced by political and other motivations and pressures and at times, there are also instances of misuse or abuse of authority on the part of the executive. Now, if secrecy were to be observed in the functioning of government and the processes of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open government with means of information available to the public, there would be greater exposure of the functioning of government and it would help to assure the people a better and more efficient administration. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration. It has been truly said that an open government is clean government and a powerful safeguard against political and administrative aberration and inefficiency.

66. The Franks Committee of the United Kingdom also observed to the same effect while pleading for an open

government. It said in its report at p. 12:

"A totalitarian government finds it easy to maintain secrecy. It does not come into the open until it chooses to declare its settled intentions and demand support for them. A democratic government, however, though it must compete with these other types of organisation, has a task which is complicated by its obligations to the people. It needs the trust of the governed. It cannot use the plea of secrecy to hide from the people its basic aims. On the contrary it must explain these aims: it must provide the justification for them and give the facts both for and against a selected course of action. Now must such information be provided only at one level and through one means of communication? A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper functions requires, or which turns information services into propaganda agencies, will lose the trust of the people. It will be countered by ill-informed and destructive criticism. Its critics will try to break down all barriers erected to preserve secrecy, and they will disclose all that they can, by whatever means, discover. As a result matters will be revealed when they ought to remain secret in the interests of the nation."

So also we find observations in the same strain by Mathew, J. in *State of Uttar Pradesh v. Raj Narain*, (1975) 3 SCR 333 at p. 360 : (AIR 1975 SC 865 at p. 884).

"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It

is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption."

The need for an open government where there is access to information in regard to the functioning of government has been emphasised and the arguments in support of it have been ably and succinctly summarised in the following passage from the book of Dr. S. R. Maheshwari on "Open Government in India" at pages 95 and 96 :

"Administrative India puts the greatest weight on keeping happening within its corridors secret, thereby denying the citizens access to information about them.

Such orientations produce deep contradictions in the larger socio-political system of the land which itself is in a state requiring nourishment and care. As the latter is still relatively new and in its infancy, its growth processes inevitably get retarded for want of information about the Government, which means from the Government. Over-concealment of governmental information creates a communication gap between the governors and the governed, and its persistence beyond a point is apt to create an alienated citizenry. This makes democracy itself weak and insecure. Besides, secrecy renders administrative accountability unenforceable in an effective way and thus induces administrative behaviour which is apt to degenerate into arbitrariness and absolutism. This is not all.

The Government, today, is called upon to make policies on an ever increasing range of subjects, and many of these policies must necessarily impinge on the lives of the citizens. It may sometimes happen that the data made available to the policymakers is of a selective nature, and even the policymakers and their advisers may deliberately suppress certain view points and favour others. Such bureaucratic habits get encouragement in an environment of secrecy; and openness in governmental work is possibly the only effective corrective to it, also raising, in the process, the quality of decision making. Besides, openness has an educational role inasmuch as citizens are

enabled to acquire a fuller view of the pros and cons of matters of major importance, which naturally helps in building informed public opinion, no less than goodwill for the Government."

This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19 (1) (a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest. It is in the context of this background that we must proceed to interpret S. 123 of the Indian Evidence Act.

67. We might begin by reproducing S. 123 which reads as follows :

"Section 123 : Evidence as to affairs of State — No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

It is also necessary for arriving at a proper interpretation of S. 123 to refer to S. 162 which says:

"Section 162. Production of documents — A witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.

The court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents — If for such a purpose it is necessary to cause

any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence and if the interpreter disobeys such directions, he shall be held to have committed an offence under Sec. 166 of the Indian Penal Code, 1860 (45 of 1860)."

These two sections came up for consideration for the first time before this Court in *State of Punjab v. Sodhi Sukhdev Singh* (AIR 1961 SC 493) (supra). Gajendragadkar, J. (as he then was), speaking on behalf of himself, Sinha, C. J. and Wanchoo, J. pointed out that the principle behind the exclusionary rule enacted in S. 123 is that a document should not be allowed to be produced in court if such production would cause injury to public interest and where a conflict arises between public interest in non-disclosure and private interest in disclosure, the latter must yield to the former. The learned Judge emphasized that though S. 123 does not expressly refer to injury to public interest, that principle is obviously implicit in it and indeed it is the sole foundation and proceeded to add that even though administration of justice is a matter of very high public importance, if there is a real "conflict between public interest and the interest of an individual in a pending case, it may reluctantly have to be conceded that the interest of the individual cannot prevail over the public interest." Now we agree with the learned Judge that public interest lies at the foundation of the claim for protection against disclosure enacted in S. 123 and it seeks to prevent production of a document where such production would cause public injury but we do not think the learned Judge was right in observing that the interest which comes into conflict with the claim for non-disclosure is the private interest of the litigant in disclosure. It is rather the public interest in fair administration of justice that comes into clash with the public interest sought to be protected by non-disclosure and the court is called upon to balance these two aspects of public interest and decide which aspect predominates. We shall have to discuss this problem of balancing different aspect of public interest a little later, but in the meanwhile let us continue

with the examination of the decision in *Sukhdev Singh's case* (supra). Gajendragadkar, J. (as he then was) after pointing out that public interest was the sole foundation for the claim for protection under S. 123 proceeded to consider when a document can be said to be relating to "affairs of State" within the meaning of that section. The learned Judge observed that three different views are possible on this question. The first view is that documents relating to affairs of State are broadly divisible into two classes, one the disclosure of which will cause no injury to public interest and which may therefore be described as innocuous documents and the other the disclosure of which may cause injury to public interest and may therefore be described as noxious documents; it is the head of the department who decides to which class the document in respect of which the claim for protection against disclosure is made, belongs; if he comes to the conclusion that the document is innocuous, he will give permission for its production; if, however, he comes to the conclusion that the document is noxious, he will withhold such permission; in any case the court does not materially come into the picture. The second view is that documents relating to affairs of State should be confined only to the class of noxious documents and when a question arises, it is for the court to determine the character of the document and if necessary, to enquire whether its disclosure would lead to injury to public interest. The third view which does not accept either of the two extreme positions would be that the court can determine the character of the document and if it comes to the conclusion that the document belongs to the noxious class, it may leave it to the head of the department to decide whether its production should be permitted or not, for it is not the policy of S. 123 that in the case of every noxious document, the head of the department must always withhold permission. The learned Judge then proceeded to consider which of the three views represents the correct legal position and for that purpose, turned to examine S. 162 and after discussing the true import of that section and holding that where an objection to the disclosure of a document is raised under S. 123 on the ground that it relates to affairs of State, the

court cannot inspect the document for the purpose of deciding the objection, the learned Judge accepted the third view as correct and summarised his conclusion in the following words:

"Thus our conclusion is that reading Ss. 123 and 162 together the court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affairs of State under S. 123 or not."

In this enquiry the court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State, it should leave it to the head of the department to decide whether he should permit its production or not."

The learned Judge thus took the view in no uncertain terms that documents relating to affairs of State are documents belonging to the noxious class, that is, documents which by reason of their contents or the class to which they belong, are such that disclosure may cause injury to public interest. The learned Judge agreed that it is for the court to determine whether a particular document in respect of which the claim for non-disclosure is made is a document relating to affairs of the State or in other words, it is a document falling within the noxious class, but introduced a serious impediment in the way of the court making such determination by holding that the court cannot for this purpose inspect the document or hold "an enquiry into the possible injury to public interest which may result from the disclosure of the document." Now, if the court has no power to inspect the document, it is difficult to understand how the court can find, without conducting an enquiry as regards the possible effect of the disclosure of the document upon public interest, that the document is one relating to affairs of State, as *ex hypothesi*

a document can be said to relate to affairs of State only if its disclosure will cause injury to public interest. It might be that there are certain classes of documents which are of such a character that even without inspecting them or conducting an enquiry, it might be possible to say that by virtue of their character, their disclosure would be injurious to public interest and therefore they are documents relating to affairs of State. But, there might be other documents which do not fall within this description and yet whose disclosure might be injurious to public interest and in case of such documents it would not be possible for the court without inspecting them or at any rate without holding an enquiry, to determine whether their disclosure would be injurious to public interest and they should therefore be classified as documents relating to affairs of State. Even so, according to Gajendragadkar, J. and the other learned Judges, the court can and must determine whether such documents relate to affairs of State without inspecting them and without even holding an enquiry into the possible injury to public interest which might result from their disclosure. The view taken by Gajendragadkar, J. and the other learned Judges in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493) (*supra*) thus runs into an inconsistency and creates an illogical situation.

68. There is also another infirmity from which the view taken in *Sodhi Sukhdev Singh's case* (*supra*) suffers. Gajendragadkar, J. speaking on behalf of himself and the other learned Judges observed that when an objection against the disclosure of a document is raised under S. 123, the court must first determine the character of the document and if it comes to the conclusion that the document relates to affairs of State, it should leave it to the Head of the department to decide whether he should permit its production or not. Now even according to Gajendragadkar, J. and the other learned Judges, a document can be said to relate to affairs of State only if it is a document of such a character that its disclosure will injure public interest and therefore the court would have to reach the conclusion that the disclosure of the document will be injurious to public interest before it can find that the document relates to affairs of State. If that be so,

it is difficult to understand, after the court has enquired into the objection and come to the conclusion that disclosure of the document would be injurious to public interest, what purpose would be served by reserving to the head of the department the power to permit its disclosure, because the question to be decided by him would practically be the same, namely, whether disclosure of the document would be injurious to public interest—a question already decided by the court. In other words, if injury to public interest is the foundation of this immunity from disclosure, when once the court has inquired into the question and found that the disclosure of the document will injure public interest and therefore it is a document relating to affairs of State, it would in most cases be a futile exercise for the head of the department to consider and decide whether its disclosure should be permitted as he would be making an enquiry into the identical question. There may be a few rare cases where in regard to a document which by reason of the class to which it belongs may be regarded as relating to affairs of State, the head of the department may be able to take the view that though it belongs to the noxious class, its disclosure would not be injurious to public interest and therefore allow it to be disclosed. But, by and large, once the court has found that the document is of such a character that its disclosure will cause injury to public interest, it would be futile to leave it to the head of the department to decide whether he should permit its production or not. We are therefore unable to accept the decision in *Sodhi Singh's case* (AIR 1961 SC 493) (supra) as laying down the correct law on this point. The court would allow the objection if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest in the administration of justice in the particular case before it overrides all other aspects of public interest, it will overrule the objection and order disclosure of the document. The basic question to which the court would

therefore have to address itself for the purpose of deciding the validity of the objection would be whether the document relates to affairs of State or in other words, it is of such a character that its disclosure would be against the interest of the State or the public service and if so, whether the public interest in its non-disclosure is so strong that it must prevail over the public interest in the administration of justice and on that account, it should not be allowed to be disclosed. The final decision in regard to the validity of an objection against disclosure raised under S. 123 would always be with the court by reason of S. 162.

69. Now an objection against the disclosure of a document on the ground that it relates to affairs of State may be made before the court either because it would be against the interest of the State or the public service to disclose its contents or because it belongs to a class of document which in the public interest ought not to be disclosed, whether or not it would be harmful to disclose the contents of the particular document. Where immunity from disclosure is claimed on the ground that disclosure of the contents of the document would be injurious to the interest of the State or the public service it would not be difficult to decide the claim because it would almost invariably be supported by an affidavit made either by the Minister or by the head of the department and if the Minister or the head of the department asserts that to disclose the contents of the document "would or might do to the nation or the public service a grave injury, the court will be slow to question his opinion or to allow any interest, even that of justice, to prevail over it" unless there can be shown to exist some factor suggesting either lack of good faith or an error of judgment or an error of law on the part of the minister or the head of the department. But, even in such cases it is now well-settled that the court is not bound by the statement made by the minister or the head of the department in the affidavit and it retains the power to balance the injury to the State or the public service against the risk of injustice, before reaching its decision. Vide observations of Lord Scarman in *Burma Oil v. Bank of England*.

(1979) 3 All ER 700 at p. 732. But the claim in the present case to withhold disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India in regard to continuance of S. N. Kumar is not based on the ground that the contents of these particular documents are such that their disclosure would harm the national interest or the interest of public service. The claim put forward by the learned Solicitor General on behalf of the Union of India is that these documents are entitled to immunity from disclosure because they belong to a class of documents which it would be against national interest or the interest of the judiciary to disclose. It is settled law, and it was so clearly recognised in *Raj Narain's case* (AIR 1975 SC 865) (supra) that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognises that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and dispatches from ambassadors abroad (vide: *Conway v. Rimmer*, 1968 AC 910 at pp. 952, 973, 979, 987 and 993 and *Reg v. Lewes J. K. Ex parte Home Secy.*, 1973 AC 388 at p. 412). Papers brought into existence for the purpose of preparing a submission to cabinet (vide *Commonwealth Lanyon Property Ltd. v. Commonwealth*, 129 LR 650) and indeed any documents which relate to the framing of government policy at a high level (vide: *Re Grosvenor Hotel, London*). It would seem that according to the decision in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493) (supra) this class may also extend to "notes and minutes

made by the respective officers on the relevant files, information expressed or reports made and gist of official decisions reached" in the course of determination of questions of policy. Lord Reid in *Conway v. Rimmer* (supra) at page 952 proceeded also to include in this class "all documents concerned with policy-making within departments including, it may be minutes and the like by quite junior officials and correspondence with outside bodies". It is not necessary for us for the purpose of this case to consider what documents legitimately belong to this class so as to be entitled to immunity from disclosure, irrespective of what they contain. But, it does appear that cabinet papers, minutes of discussions of heads of departments and high level documents relating to the inner working of the government machine or concerned with the framing of government policies belong to this class which in the public interest must be regarded as protected against disclosure.

70. Now, one reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. This reason based on the need for frankness and candour, though suggested by some Judges, has not found universal acceptance. In *Conway v. Rimmer* (1968 AC 910) (supra) Lord Reid dismissed the "candour argument" summarily at page 952 and Lord Upjohn pointed out at page 993 that immunity of this class of documents against disclosure has nothing whatever to do with candour or uninhibited freedom of expression, for it is not possible to believe "that any minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies, of some colleague, by the thought that his observation might one day see the light of day." Lord Morris of Borth-Y-Gest also said in the same case at page 957:

"in many decided cases there have been references to a suggestion that, if

there were knowledge that certain documents (for example reports) might in some circumstances be seen by eyes for which they were never intended, the result would be that in the making of similar documents in the future candour would be lacking. Here is a suggestion of doubtful validity. Would the knowledge that there was a remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated." Lord Radcliffe also remarked in *Glasgow Corporation v. Central Land Board*, 1956 SC (HL) 1 at p. 20 that he would have supposed Crown servants to be "made of sterner stuff", a view shared by Harman L. J. in the *Grosvenor Hotel* case at page 1255. Lord Salmon too rejected the "candour theory" in *Reg v. Lewes Justices; Ex parte Secretary of State for Home Deptt.* (1973 AC 388) (supra) at p. 413 by referring to it as "the old fallacy" that "any official in the government service would be inhibited from writing frankly and possibly at all unless he could be sure that nothing which he wrote could ever be exposed to the light of day". The candour argument has also not prevailed with Judges and jurists in the United States and it is interesting to note what Raoul Berger while speaking about the immunity claimed by President Nixon against the demand for disclosure of the Watergate Tapes, says in his book "Executive Privilege": A Constitutional Myth" at page 264 :

"Candid interchange" is yet another pretext for doubtful secrecy. It will not explain Mr. Nixon's claim of blanket immunity for members of his White House staff on the basis of mere membership without more; it will not justify Kleindienst's assertion of immunity from congressional inquiry for two and one-half million federal employees. It is merely another testimonial to the greedy expansiveness of power, the costs of which patently outweigh its benefits. As the latest branch in a line of illegitimate succession, it illustrates the excess bred by the claim of executive privilege."

We agree with these learned Judges that the need for candour and frankness cannot justify granting of complete immunity against disclosure of documents of this class, but as pointed out by Gibbs A. C. J. in *Sankey v. Whitlam* (supra), it would not be altogether unreal to suppose "that in some matters at least communications between ministers and servants of the Crown may be more frank and candid if these concerned believe that they are protected from disclosure" because not all Crown servants can be expected to be made of "sterner stuff". The need for candour and frankness must therefore certainly be regarded as a factor to be taken into account in determining whether, on balance, the public interest lies in favour of disclosure or against it (vide: the observations of Lord Denning in *Neilson v. Loughgarre*, (1981) 1 All ER at p. 835.

71. There was also one other reason suggested by Lord Reid in *Conway v. Rimmer* (1968 AC 910) (supra) for according protection against disclosure of documents belonging to this case: "To my mind", said the learned Law Lord: "the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind." But this reason does not commend itself to us. The object of granting immunity to documents of this kind is to ensure the proper working of the government and not to protect the ministers and other government servants from criticism however intemperate and unfairly based. Moreover, this reason can have little validity in a democratic society which believes in an open government. It is only through exposure of its functioning that a democratic government can hope to win the trust of the people. If full information is made available to the people and every action of the government is bona fide and actuated only by public interest, there need be no fear of "ill-informed or captious public or political criticism". But at the same time it must be conceded-

ed that even in a democracy, government at a high level cannot function without some degree of secrecy. No minister or senior public servant can effectively discharge the responsibility of his office if every document prepared to enable policies to be formulated was liable to be made public. It is therefore in the interest of the State and necessary for the proper functioning of the public service that some protection be afforded by law to documents belonging to this class. What is the measure of this protection is a matter which we shall immediately proceed to discuss.

72. We have already pointed out that whenever an objection to the disclosure of a document under S. 123 is raised, two questions fall for the determination of the court, namely, whether the document relates to affairs of State and whether its disclosure would, in the particular case before the court, be injurious to public interest. The court in reaching its decision on these two questions has to balance two competing aspects of public interest, because the document being one relating to affairs of State, its disclosure would cause some injury to the interest of the State or the proper functioning of the public service and on the other hand if it is not disclosed, the non-disclosure would thwart the administration of justice by keeping back from the court a material document. There are two aspects of public interest clashing with each other out of which the court has to decide which predominates. The approach to this problem is admirably set out in a passage from the judgment of Lord Reid in *Conway v. Rimmer* (1968 AC 910) (supra)

"It is universally recognised that there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over

it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question, would put the interest of the State in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved."

The court has to balance the detriment to the public interest on the administrative or executive side which would result from the disclosure of the document against the detriment to the public interest on the judicial side which would result from non-disclosure of the document though relevant to the proceeding. Vide the observations of Lord Pearson in *Reg. v. Lewes JJ. Ex parte Home Secy.* (1973 AC 388) (supra) at page 406 of the report. The court has to decide which aspect of the public interest predominates or in other words, whether the public interest which requires that the document should not be produced, outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence. The court has thus to perform a balancing exercise and after weighing the one competing aspect of public interest against the other, decide where the balance lies. If the court comes to the conclusion that, on the balance, the disclosure of the document would cause greater injury to public interest than its non-disclosure, the court would uphold the objection and not allow the document to be disclosed but if, on the other hand, the court finds that the balance between competing public interests lies the other way, the court would order the disclosure of the document. This balancing between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class. Even in *Conway v. Rimmer* at p. 952, Lord Reid recognised an exception that cabinet minutes and the like can be disclosed when they have become only of historical interest, and in *Lanyon Pvt. Ltd. v. Commonwealth*

(129 Commonwealth LR 650) (supra) Menzies J. agreed that there might be "very special circumstances" in which such documents might be examined. Lord Scarman also pointed out in the course of his speech in *Burmah Oil v. Bank of England* (1979-3 All ER 700) (supra) that he did not accept "that there are any classes of documents which, however harmless their content and however strong the requirement of justice, may never be disclosed until they are only of historical interest". The learned Law Lord said and we are quoting here his exact words since they admirably express our own approach to the subject :

"But, is the secrecy of the inner workings of the government machine so vital a public interest that it must prevail over even the most imperative demands of justice? If the contents of a document concern the national safety, affect diplomatic relations or relate to some state secret of high importance, I can understand an affirmative answer. But if they do not (and it is not claimed in this case that they do), what is so important about secret government that it must be protected even at the price of injustice in our courts?"

The reasons given for protection the secrecy of government at the level of policy making are two. The first is the need for candour in the advice offered to Ministers; the second is that disclosure 'would create or fan ill-informed or captious public or political criticism.' Lord Reid in *Conway v. Rimmer* thought the second 'the most important reason'. Indeed, he was inclined to discount the candour argument.

I think both reasons are factors legitimately to be put into the balance which has to be struck between the public interest in the proper functioning of the public service (i.e. the executive arm of the government) and the public interest in the administration of justice. Sometimes the public service reasons will be decisive of the issue; but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be disclosed."

The same view was expressed by Gibbs A. C. J. in *Sankey v. Whitlam* (supra).

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where the learned acting Chief Justice said :

"I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with special care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it will not treat all such documents as entitled to the same measure of protection — the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned."

There is nothing sacrosanct about the immunity which is granted to documents because they belong to a certain class. Class immunity is not absolute or inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which class immunity is founded is that it would be contrary to public interest to disclose documents belonging to that class, because such disclosure would impair the proper functioning of the public service and this aspect of public interest which requires that justice shall not be denied to any one by withholding relevant evidence. This is a balancing task which has to be performed by the Court in all cases.

73. What should be the technology and methodology of this balancing task is a matter which we shall presently examine. But, before we do so, it is necessary to point out that class immunity is not confined merely to that class of documents in respect of which non-disclosure is really necessary for the proper functioning of the public service, though mostly it is in respect of documents falling within this class that the claim for class immunity is usually made. There is also another class of documents which has always been recognised by the Court as entitled to the same immunity

and that class consists of documents evidencing the sources from which the police obtain information. Now we agree with the learned counsel on behalf of the petitioners that this immunity should not be lightly extended to any other class of documents, but, at the same time, boundaries cannot be regarded as immutably fixed. The principle is that whenever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from disclosure. If a new class comes into existence to which this principle applies, then that class would enjoy the same immunity. This is the basis on which in *Reg. v. Lewes, JJ. Ex parte Home Secy.*, (1973 AC 388) (supra) the House of Lords extended this immunity to a new class of documents, namely, all such documents as were supplied to the Gaming Board and related to the "character, reputation and financial standing..... of the applicant". Lord Reid pointed out in that case that the claim for protection made on behalf of the Gaming Board was not based on the contents of the particular letter of which disclosure was sought by the appellant, but it was "based on the fact that the Board cannot adequately perform their statutory duty unless they can preserve the confidentiality of all communications to them regarding the character, reputation or antecedents of applicants for their consent". The learned Law Lord posited the question for consideration in the following words: "Here the question is whether the withholding of this class of documents is really necessary to enable the Board adequately to perform its statutory duties" and proceeded to hold that "if there is not to be very serious danger of the Board being deprived of information essential for the proper performance of their task, there must be a general rule that they are not bound to produce any document which gives information to them about any applicant". Lord Morris of Borth-Y-Gest also observed to the same effect at p. 405 of the Report:

"However honourable and public spirited a person might be, he would undoubtedly feel somewhat inhibited in the future if he found that as a result of his last response to a request for information he had himself become a defendant or an accused. The test, however, is not in personal terms. It rests upon a consideration of the necessities of the public service arising out of the rather special

duties and functions imposed and recognised by Parliament."

The House of Lords accordingly held that "on balance the public interest clearly requires that documents of this kind should not be disclosed" and thus upheld the claim of immunity in respect of the letter which gave information to the Gaming Board about the character, reputation and antecedents of the appellant. The question is whether immunity of this kind — what we have described as class immunity — should be extended to the class of documents consisting of correspondence exchanged between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court and the Chief Justice of India in regard to appointment or non-appointment of a High Court or Supreme Court Judge.

74. Now we may conveniently at this stage consider the question as to how a claim for immunity against disclosure should be raised under S. 123. It is necessary to repeat and re-emphasize that this claim of immunity can be justifiably made only, if it is felt that the disclosure of the document would be injurious to public interest. Where the State is a party to an action in which disclosure of a document is sought by the opposite party, it is possible that the decision to withhold the document may be influenced by the apprehension that such disclosure may adversely affect the head of the department or the department itself or the minister or even the Government or that it may provoke public criticism or censure in the legislature or in the press, but it is essential that such considerations should be totally kept out in reaching the decision whether or not to disclose the document. So also the effect of the document on the ultimate course of the litigation whether its disclosure would hurt the State in its defence — should have no relevance in making a claim for immunity against disclosure. The sole and only consideration must be whether the disclosure of the document would be detrimental to public interest in the particular case before the Court. It has therefore been held since long before *Conway v. Rimmer* (1968 AC 910) (supra) was decided in England and since the decision in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493) (supra) in India that a claim for immunity against disclosure should be made by the minister who is the political head of the depart-

ment concerned or failing him, by the secretary of the department and the claim should always be made in the form of an affidavit. Where the affidavit is made by the secretary, the Court may in an appropriate case require an affidavit of the minister concerned. The affidavit should show that the document in question has been carefully read and considered and the person making the affidavit has formed the view that the document should not be disclosed either because of its actual contents or because of the class of documents to which it belong. If in a given case no affidavit is filed or the affidavit filed is defective, the Court may give an opportunity to the State to file a proper affidavit. The reason is that the immunity against disclosure claimed under S. 123 is not a privilege which can be waived by the State. It is an immunity which is granted in order to protect public interest and therefore even if the State has not filed an affidavit or the affidavit filed is not satisfactory, the court cannot abdicate its duty of deciding whether the disclosure of the document in question would be injurious to public interest and the document should not therefore be allowed to be disclosed. That is why in England this immunity is no longer described as "Crown Privilege" but is called "public interest immunity". This aspect of the immunity was emphasized by Lord Reid in *Reg v. Lewes Ex parte Home Secretary* (1973 AC 388) (supra) where the learned Law Lord observed that the expression 'Crown Privilege' is wrong and may be misleading and there is no question of any privilege in the ordinary sense of the word, as the real question is whether the public interest requires that the document shall not be produced. Lord Simon of Glaisdale also pointed out in the same case; "Crown privilege is a misnomer and apt to be misleading. It refers to the rule that certain evidence is inadmissible on the ground that its adduction would be contrary to the public interest it is not a privilege which may be waived by the Crown or by anyone else". It is therefore clear that if a document is entitled to immunity against disclosure, it cannot be adduced in evidence by either party and even if neither of the parties claims such immunity, the Judge himself must take the objection for the rule that the public interest must not be put in jeopardy by the disclosure of a document which would injure it, is one upon which the court

should, if necessary, insist, even though no objection has been taken by any party or by any government department. In *Conway v. Rimmer* (1968 AC 910) (supra) Lord Reid said that it is the duty of the Court to prevent the disclosure of a document without the intervention of any minister, "if possible serious injury to the national interest is readily apparent". In *Reg v. Lewes Ex parte Home Secy.*, (1973 AC 388) (supra) Lord Simon of Glaisdale pointed out that even a litigant or a witness may draw the attention of the Court to the nature of the document with a view to its being excluded. Since the immunity is founded on public interest, it is necessary that the court should have the power and the duty to prevent the disclosure of a document when it would be injurious to public interest to disclose it, even if the proper procedure for objection by or on behalf of the minister or the secretary has not been followed. The Court must intervene *proprio motu* if it appears that the public interest requires the document to be protected from disclosure.

75. This being the correct legal position, it is immaterial whether in the present case appropriate affidavit claiming immunity was filed on behalf of the Union of India. The learned Attorney General sought to tender on an affidavit sworn by Burney, the then Secretary to the Home and Judiciary Department claiming immunity against disclosure in respect of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India in regard to the non-appointment of S. N. Kumar but since the affidavit was sworn on 7-9-1981 and yet not tendered until 16-9-1981 even though the arguments had begun long back, we expressed our displeasure at the delay in filing the affidavit whereupon the learned Attorney General stated that he would not rely upon the affidavit. Thereafter when the learned counsel for S. N. Kumar sought answers to certain queries in regard to this correspondence, the learned Attorney General filed an affidavit sworn by T. N. Chaturvedi, Secretary to the Home and Judiciary Department claiming protection against disclosure of this correspondence, strong objection was taken to the filing of this affidavit by the learned counsel on behalf of the petitioners and S. N. Kumar on the ground that the learned Attorney General having made a statement that he would not rely upon previous affidavit, it was not competent and

in any event not proper for the Union of India to file the affidavit of T. N. Chaturvedi which was almost in the same terms as the previous affidavit. But we overruled this objection, because, as would be clear from what we have discussed above, even if no affidavit were filed earlier on behalf of the Union of India claiming immunity against disclosure, the Union of India could always file an affidavit claiming such immunity at any stage before the claim for immunity was considered and decided by the court and once the claim for immunity was raised the court could also on its own direct the Union of India to file a proper affidavit, if no such affidavit were already filed. We therefore took the affidavit of T. N. Chaturvedi on file and allowed the Union of India to rely upon it. We may point out that even if this affidavit had not been filed, the Court would still have had to consider on the basis of the other material before it including the nature of the correspondence whether its disclosure would be injurious to public interest and hence it should not be allowed to be disclosed.

76. We may also point out that we were invited to inspect for ourselves the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India for the purpose of deciding whether that correspondence was entitled to immunity against disclosure. Now the view taken in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493) was that where an objection is raised against the disclosure of a document under S. 123, the Court has no power to inspect the document under S. 162 for the purpose of deciding the objection. But with the greatest respect to the learned Judges who decided that case, we do not think this view is correct and in fact subsequent decisions of this Court seem to be against it. So far as English Law is concerned it is now well-settled as a result of the decision of the House of Lords in *Conway v. Rimmer* (1968 AC 910) (supra) that there is a residual power in the Court to inspect the document. If the Court finds it necessary to do so for the purpose of deciding whether on balance the disclosure of the document would cause greater injury to public interest than its non-disclosure. Vide *Conway v. Rimmer* (supra) at pages 953, 979, 981 and 993. This residual power of the Court to inspect the document has also been

recognised in Australian Law by the decision of the High Court of Australia in *Sankey v. Whitlam* (21 Aus. L.R. 505). We do not see any reason why under Indian Law the Court should be denied this residual power to inspect the document. It is true that under S. 162 the Court cannot inspect the document if it relates to affairs of State, but this bar comes into operation only if the document is established to be one relating to affairs of State. If, however, there is any doubt whether the document does relate to affairs of State, the residual power which vests in the Court to inspect the document for the purpose of determining whether the disclosure of the document would be injurious to public interest and the document is therefore one relating to affairs of State, is not excluded by S. 162. This Court in fact held in no uncertain terms in *Raj Narain's case* (AIR 1975 SC 865) (supra) where an objection against the disclosure of the Blue Book was taken on behalf of the State under S. 123, that if the Court was not satisfied with the affidavit objecting to the disclosure of the document, the Court may inspect the document. Ray, C. J. observed at two places while dealing with the objection against the disclosure of the Blue Book under S. 123 that "If the Court would yet like to satisfy itself, the Court may see the document. This will be the inspection of the document by the Court," and "If the Court in spite of the affidavit wishes to inspect the document, the Court may do so." Mathew, J. also pointed out that in *Amarchand Butail v. Union of India* AIR 1964 SC 1658 this Court inspected the document in order to see whether it related to affairs of State. There can therefore, be no doubt that even where a claim for immunity against disclosure of a document is made under Section 123, the Court may in an appropriate case inspect the document in order to satisfy itself whether its disclosure would, in the particular case before it, be injurious to public interest and the claim for immunity must therefore be upheld. Of course this power of inspection is a power to be sparingly exercised, only if the Court is in doubt, after considering the affidavit, if any, filed by the minister or the secretary, the issues in the case and the relevance of the document whose disclosure is sought. Since, in the present case, the affidavit of T. N. Chaturvedi claiming immunity against disclosure was

made at a late stage of the proceedings and the claim for immunity was in respect of a new class of documents which has so far not come up for judicial consideration and we were in doubt, even after considering the affidavit, whether the correspondence whose disclosure was sought on behalf of the petitioners and S. N. Kumar was of such a character that its disclosure would, on an overall view after weighing the two aspects of public interest referred to above, be injurious to public interest, we inspected the correspondence for ourselves for the purpose of deciding whether or not it should be ordered to be disclosed.

77. Now as we have already pointed out above, it is for the court to decide the claim for immunity against disclosure made under S. 123 by weighing the competing aspects of public interest and deciding which, in the particular case before the court, predominates. The court is not bound by the affidavit made by the minister or the secretary because the minister or the secretary would be concerned primarily and almost exclusively with the assertion of the public interest which would be injured by the disclosure of the document and he would have very little concern, if at all, with the public interest in the fair administration of justice and in fact he would not be in a position to appreciate and assess the relative importance of the two competing public interest so as to be able to judge as to which in the particular case before the Court should be allowed to prevent. What should be the relative weight to be attached to each aspect of public interest is a question which the court would be best qualified to decide and not the minister or the secretary. That is why in *Conway v. Rimmer* (1968 AC 910) (supra) Lord Reid, while rejecting the notion that a minister's claim of immunity was conclusive, pointed out at page 943 that the minister who withholds production of a document has no duty to consider the degree of public interest involved in a particular case in frustrating the due administration of justice, it not mattering to the minister at all whether the result of withholding the document would merely be to deprive a litigant of some evidence on a minor issue in a case of little importance or on the other hand, to make it impossible to do justice in a case of the greatest importance. The court

would of course consider the affidavit made by the minister or the secretary and give it due weight and importance, but ultimately it is the court which will have to determine which aspect of public interest must prevail and whether the claim for immunity against disclosure should be upheld or not. This was most felicitously expressed by Lord Radcliffe in the Scottish appeal of *Glasgow Corporation v. Central Land Board* (1956 SC (HL) 1) (supra) where the learned Law Lord said:

"The power reserved to the court is therefore a power to order production even though the public interest is to some extent affected prejudicially. This amounts to a recognition that more than one aspect of the public interest may have to be surveyed in reviewing the question whether a document which would be available to a party in a civil suit between private parties is not to be available to the party engaged in a suit with the Crown. The interests of government, for which the Minister should speak with full authority, do not exhaust the public interest. Another aspect of that interest is seen in the need that impartial justice should be done in the Courts of law, not least between citizen and Crown, and that a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty public reason. It does not seem to me unreasonable to expect that the court would be better qualified than minister to measure the importance of such principles in application to the particular case that is before it.

Mathew, J. also observed to the same effect in his concurring opinion in *Raj Narain's case* (AIR 1975 SC 865 at p. 883) (supra):

"The claim of the executive to exclude evidence is more likely to operate to subserve a partial interest, viewed exclusively from a narrow departmental angle. It is impossible for it to see or give equal weight to another matter, namely, that justice should be done and seen to be done. When there are more aspects of public interest to be considered, the court will, with reference to the pending litigation, be in a better position to decide where the weight of public interest predominates".

The court will therefore have to put in the scales against the injury to public interest which may be caused by the

disclosure of the document, the likely injury to the cause of injustice by non-disclosure and both will have to be assessed and weighed and it will have to be determined on which side the balance tilts.

78. Now obviously the weight of the likely injury to the cause of justice will vary according to the nature of the proceeding in which the disclosure is sought, the relevance of the document and the degree of likelihood that the document will be of importance in the litigation. The particular nature of the proceeding and the importance of the document in the determination of the issues arising in it are vital considerations to be taken into account in determining what are the relevant aspects of public interest, which are to be weighed and what is the outcome of that weighing process. Perhaps the most striking example of the way in which the nature of the case will bear upon the judicial process of weighing aspects of public interest is afforded by the well recognised rule that where a document is necessary to support the defence of an accused person whose liberty is at stake in a criminal trial, it must be disclosed whatever be the nature of the document, because, as observed by Lord Simon of Glaisdale in *D. V. National Society for the Prevention of Cruelty to Children* (1977) 2 WLR 201 (207) "the public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest" which might be injured by the disclosure of the document. Lord Keith also emphasized the necessity of taking the particular nature of the proceeding into account in the balancing process, when he said in *Glasgow Corporation v. Central Land Board* (1956 SC (HL) 1) (supra) that "everything must depend on the particular circumstances of the case. It is impossible to lay down broad and general rules." So also in *Sankey v. Whitlam* (supra) the High Court of Australia pointed out that the character of the proceeding in which the claim for immunity against disclosure is raised and the importance of the document in the determination of the issues arising in the proceeding are of extreme relevance in deciding which way the balance of public interest lies. There, the question was whether in a proceeding alleging offences against Mr. Whitlam, a former Prime Minister and others, certain papers and documents which were relevant to

the issues arising in the proceeding were entitled to public interest immunity so as to be protected against disclosure. The High Court of Australia negatived the claim for immunity and in the course of his judgment, Stephen, J. laid the greatest stress on the character of the proceeding and pointed out its triple significance in the determination of the claim:

"First, it makes it very likely that, for the prosecution to be successful, its evidence must include documents of a class hitherto regarded as undoubtedly the subject of Crown privilege. But then to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices. Those in whom resides the power ultimately to decide whether or not to claim privilege will in fact be exercising a far more potent power by a decision to claim privilege dismissal of the charge will be well-nigh ensured. Secondly, and assuming for the moment that there should prove to be any substance in the present charges, their character must raise doubts about the reasons customarily given as justifying a claim to Crown privilege for classes of documents, being the reasons in fact relied upon in this case. Those reasons, the need to safeguard the proper functioning of the executive arm of government and of the public service, seem curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges; inappropriate because what is charged is itself the grossly improper functioning of that very arm of government and of the public service which assists it. Thirdly, the high offices which were occupied by those charged and the nature of the conspiracies sought to be attributed to them in those offices must make it a matter of more than usual public interest that in the disposition of the charges the course of justice be in no way unnecessarily impeded. For such charges to have remained pending and unresolved for as long as they have is bad enough; if they are now to be met with a claim to Crown privilege, invoked for the protection of the proper functioning of the executive government, some high degree of public interest for non-disclosure should be shown before the privilege should be accorded."

The nature of the proceeding in which the claim for immunity arose was regarded as an important factor influencing the decision of the Court in rejecting the claim and ordering production of the documents. It would thus seem clear that in the weighing process which the court has to perform in order to decide which of the two aspects of public interest should be given predominance, the character of the proceeding, the issues arising in it and the likely effect of the documents on the determination of the issues must form vital considerations, for they would affect the relative weight to be given to each of the respective aspects of public interest when placed in the scales.

79. Bearing these observations in mind, we must now proceed to examine the claim for immunity against disclosure in respect of the correspondence between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India in regard to non-appointment of S. N. Kumar. It was a class immunity which was claimed in respect of this correspondence and the protected class was said to consist of correspondence between the Law Minister or other high level functionary of the Central Government the Chief Justice of the High Court, the Chief Minister or the Law Minister of the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or a Supreme Court Judge or transfer of a High Court Judge and the notings made by these constitutional functionaries in that behalf. The argument was that the documents belonging to this class are immune from disclosure, irrespective of their contents, because it is in national interest and also necessary for maintaining the dignity of the judiciary and preserving the confidence of the people in the integrity of the judicial process that documents belonging to this class should be withheld from disclosure. Now there are a few prefatory remarks we would like to make before embarking upon an examination of this argument. In the first place, it is necessary to bear in mind that the burden of establishing a claim for class immunity is very heavy on the person making the claim. Lord Reid pointed out in *Reg. v. Lewes Justices, Ex Parte Home Secy.* (1973 AC 388) (supra) that the speeches in *Conway v. Rimmer* (1968 AC 910) (supra) made it clear that there is a heavy

burden of proof on any authority which makes a claim for class immunity. The claim for class immunity is an extraordinary claim because it is based not upon the contents of the document in question but upon its membership of a class whatever be its contents and therefore the court should be very slow in upholding such a broad claim which is contradictory, if not destructive, of the concept of open government. Secondly, it is true, as pointed out earlier, that classes of documents to which the immunity may be accorded are not closed and in the life of a fast changing society rapidly growing and developing under the impact of vast scientific and technological advances new class or classes of documents may come into existence to which the immunity may have to be granted in public interest, but that should only be as a highly exceptional measure. It is only under the severest compulsion of the requirement of public interest that the court may extend the immunity to any other class or classes of documents and in the context of our commitment to an open government with the concomitant right of the citizen to know what is happening in the government, the court should be reluctant to expand the classes of documents to which immunity may be granted. The court must on the contrary move in the direction of attenuating the protected class or classes of documents, because by and large secrecy is the badge of an authoritarian government. We may point out once again, though it be at the cost of repetition, that even in regard to documents belonging to the class which has been judicially recognised as entitled to immunity, the law must now be taken to be well-settled that the immunity is not absolute. The public interest in non-disclosure of a document belonging to this class may in an appropriate case yield to the public interest that in the administration of justice, the court should have the fullest possible access to every relevant document and in that event, the document would be liable to be disclosed even though it belongs to the protected class. The executive cannot by merely invoking the scriptural formula of class immunity defeat the cause of justice by withholding a document which is essential to do justice between the parties, for otherwise the doctrine of class immunity would become a frightful weapon in the hands of the executive for burying its mistakes, covering up its

inefficiencies and sometimes even hiding its corruption. Every claim for immunity in respect of a document, whatever be the ground on which the immunity is claimed and whatever be the nature of the document, must stand scrutiny of the court with reference to one and only one test, namely, what does public interest require — disclosure or non-disclosure. The doctrine of class immunity is therefore no longer impregnable; it does not any more deny judicial scrutiny, it is no more a mantra to which the court pays obeisance. Whenever class immunity is claimed in respect of a document, the Court has to weigh in the scales the one aspect of public interest which requires that the document should not be disclosed against the other that the court in performing its functions should not be denied access to relevant document and decide which way the balance lies. And this exercise has to be performed in the context of the democratic ideal of an open government.

80. If we approach the problem before us in the light of these observations, it will be clear that the class of documents consisting of the correspondence exchanged between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or Supreme Court Judge or the transfer of a High Court Judge and the notes made by these constitutional functionaries in that behalf cannot be regarded as a protected class entitled to immunity against disclosure. It is undoubtedly true that appointment or non-appointment of a High Court Judge or a Supreme Court Judge and transfer of a High Court Judge are extremely important matters affecting the quality and efficiency of the judicial institution and it is therefore absolutely essential that the various constitutional functionaries concerned with these matters should be able to freely and frankly express their views in regard to these matters. But we do not think that the candour and frankness of these constitutional functionaries in expressing their views would be affected if they felt that the correspondence exchanged between them would be liable to be disclosed in a subsequent judicial proceeding. The constitutional functionaries concerned in this exercise are holders of

high constitutional offices such as the Chief Justice of a High Court and the Chief Justice of India and it would not be fair to them to say that they are made of such weak stuff that they would hesitate to express their views with complete candour and frankness if they apprehend subsequent disclosure. We have no doubt that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would not be deterred from performing their constitutional duty of expressing their views boldly and fearlessly even if they were told that the correspondence containing their views might subsequently be disclosed. If, to quote the words of Lord Pearce in *Conway v. Rimmer* (1968 AC 910) (supra) "there are countless teachers at schools and universities, countless employers of labour, who write candid reports, unworried by the outside chance of disclosure" here is no reason to suspect that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would flinch and falter in expressing their frank and sincere views when performing their constitutional duty. We have already dealt with the argument based on the need for candour and frankness and we must reject it in its application to the case of holders of high constitutional offices like the Chief Justice of a High Court and the Chief Justice of India. Be it noted — and of this we have no doubt — that our Chief Justices and Judges are made of sterner stuff; they have inherited a long and ancient tradition of independence and impartiality; they are by training and experience as also by their oath of office dedicated to the cause of justice administered without fear or favour, affection or ill-will and in fact there is no power on earth which can deflect them from the path of rectitude. They are, to quote the words from the famous verse from *Manasollasa* राजदेव विपजिता and विशोभा यत्र वजितः and we find it difficult to believe that they would not act as Judges but as weak kneed and effete individuals afraid to express their views lest they might come to be known to others and provoke criticism. The Chief Justice of a High Court and the Chief Justice of India would undoubtedly expect confidentiality while expressing their views but that is no ground for upholding a claim for class immunity in respect of the correspondence exchanged be-

tween them and the Central Government or the State Government. Confidentiality is not a head of privilege and the need for confidentiality of high level communications without more cannot sustain a claim for immunity against disclosure. *Vide: Science Research Council v. Nasse* (1979) 3 All ER 673 and particularly the observations of Lord Scarman at pp. 697 and 698. Even if a document be confidential, it must be produced, notwithstanding its confidentiality, if it is necessary for fairly disposing of the case, unless it can be shown that its disclosure would otherwise be injurious to public interest.

81. Now we fail to see how in cases of this kind where non-appointment of an additional Judge for a further term or transfer of a High Court Judge is challenged, the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them, could at all be said to be injurious to public interest. We have already pointed out above that so far as non-appointment of an additional Judge for a further term is concerned, the only two grounds on which the decision not to appoint can be assailed are: firstly, that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India before reaching the decision and secondly, that the decision is mala fide or based on irrelevant considerations. Now obviously these two grounds cannot be made good by a petitioner unless the correspondence between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them are disclosed, for they alone would furnish the relevant evidence showing whether these two grounds are satisfied or not. These documents would show or at least shed light on the question whether there was full and effective consultation between the Central Government on the one hand and the Chief Justice of the High Court, the State Government and the Chief Justice of India on the other, because, as already pointed out by us, such consultation would ordinarily be in writing—as it ought to be—and they would also, in cases where such consultation has taken place, indicate the reasons which have weighed with the Central Government in reaching its decision.

Apart from these documents, there would be no other documentary evidence available to the petitioner to establish that there was no full and effective consultation or that the decision of the Central Government was based on irrelevant considerations and if an affidavit is made by an appropriate authority of the Central Government or by the Chief Justice of the High Court or by the Chief Justice of India stating that every relevant aspect of the question was discussed and there was full and effective consultation, it would be well-nigh impossible for the petitioner to successfully challenge the decision of the Central Government. It is only through these documents that the petitioner can, if at all, hope to show that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India or that the decision of the Central Government was mala fide or based on irrelevant grounds and therefore, to accord immunity against disclosure to these documents would be tantamount to summarily throwing out the challenge against the discontinuance of the additional Judge. It would have the effect of placing the Union of India, whose decision is challenged, in an unassailable — almost invincible position where it can, by claiming class immunity in respect of these documents, ensure the rejection of the writ petition. The harm that would be caused to the public interest in justice by the non-disclosure of these documents would in the circumstances far outweigh the injury which may possibly be caused by their disclosure, because the non-disclosure would almost inevitably result in the dismissal of the writ petition and consequent denial of justice even though the claim of the petitioner may be true and just. Moreover, it may be noted that the discontinuance of an additional Judge by the Central Government is a serious matter and if such discontinuance is mala fide or based on irrelevant grounds, it would tend to affect the independence of the judiciary and it is therefore necessary in order to maintain public confidence in the independent functioning of the judiciary that the people should know whether the constitutional requirements were complied with before the decision was taken not to continue the additional Judge and whether any oblique motivations or irrelevant considerations influenced the Central Government in

reaching that decision. The charge against the Central Government in the first group of present writ petitions was that there was no full and effective consultation with the Chief Justice of India before the decision was reached by the Central Government in regard to S. N. Kumar and in any event, the decision of the Central Government was actuated by oblique or improper motives. This was a serious charge against the Central Government and there can be no doubt that it would be very much in public interest that the necessary documents throwing light on the truth or otherwise of this charge should be disclosed, so that the full facts may be known to the public and the doubts raised and entertained about the influence of extraneous factors in the case of S. N. Kumar should be resolved and removed. It is significant to note that had there not been disclosure of these documents, a certain doubt or misgiving would have continued to prevail in the public mind that the decision to discontinue S. N. Kumar as an additional Judge was taken by the Central Government without full and effective consultation of the Chief Justice of India and that this decision was motivated by oblique or irrelevant considerations. But, as we shall presently point out these documents when disclosed helped to clear this doubt and remove this misgiving by explaining to the people what were the true facts behind the decision to discontinue S. N. Kumar as an additional Judge. Furthermore, it may be noted that when the charge against the Central Government is that it has discontinued S. N. Kumar as an additional Judge for oblique or improper reasons and thereby sought to interfere with the independence of the judiciary, it would be singularly inappropriate to exclude these documents which constitute the only evidence, if at all for establishing this charge, by saying that the disclosure of these documents would impair the efficient functioning of the judicial institution. The interest of the wider community in getting to the bottom of this charge is so great that it cannot be allowed to be impeded by a mere rule of evidence. Nor can the decision to admit or exclude be safely left to the Central Government which is itself charged with wrongful or improper conduct.

82. These self-same reasons must apply equally in negating the claim for immunity in respect of the correspon-

dence between the Law Minister and the Chief Justice of India and the relevant notings made by them in regard to the transfer of a High Court Judge including the Chief Justice of a High Court. These documents are extremely material for deciding whether there was full and effective consultation with the Chief Justice of India before effecting the transfer and the transfer was made in public interest, both of which are, according to the view taken by us, justiciable issues and the non-disclosure of these documents would seriously handicap the petitioner in showing that there was no full and effective consultation with the Chief Justice of India or that the transfer was by way of punishment and not in public interest. It would become almost impossible for the petitioner, without the aid of these documents, to establish his case, even if it be true. Moreover, the transfer of a High Court Judge or Chief Justice of a High Court is a very serious matter and if made arbitrarily or capriciously or by way of punishment or without public interest motivation, it would erode the independence of the judiciary which is a basic feature of the Constitution and therefore when such a charge is made, it is in public interest that it should be fully investigated and all relevant documents should be produced before the Court so that the full facts may come before the people, who in a democracy are the ultimate arbiters. It would be plainly contrary to public interest to allow the inquiry into such a charge to be balked or frustrated by a claim for immunity in respect of documents essential to the inquiry. It is also important to note that when the transfer of a High Court Judge or Chief Justice of a High Court is challenged, the burden of showing that there was full and effective consultation with the Chief Justice of India and the transfer was effected in Public interest is on the Union of India and it cannot withhold the relevant documents in its possession on a plea of immunity and expect to discharge this burden by a mere statement in an affidavit. Besides, if the reason for excluding these documents is to safeguard the proper functioning of the higher organs of the State including the judiciary, then that reason is wholly inappropriate where what is charged is the grossly improper functioning of those very organs. It is therefore obvious that, in a proceeding where the transfer of a High Court Judge or Chief Justice of a

High Court is challenged, no immunity can be claimed in respect of the correspondence exchanged between the Law Minister and the Chief Justice of India and the notings made by them, since, on the balance, the non-disclosure of these documents would cause greater injury to public interest than what may be caused by their disclosure.

83. But, quite apart from these considerations, we do not understand how the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of the High Court the State Government and the Chief Justice of India and the relevant notes made by them in regard to non-appointment of an additional Judge for a further term or transfer of High Court Judge can be detrimental to public interest. It was argued by the learned Solicitor General on behalf of the Union of India that if the Chief Justice of the High Court and the Chief Justice of India differ in their views in regard to the suitability of an additional Judge for further appointment, the disclosure of their views would cause considerable embarrassment because the rival views might be publicly debated and there might be captious and un-informed criticism which might have the effect of undermining the prestige and dignity of one or the other Chief Justice and shaking the confidence of the people in the administration of justice. If the difference in the views expressed by the Chief Justice of the High Court and the Chief Justice of India becomes publicly known, contended the learned Solicitor General, it might create a difficult situation for the Chief Justice of the High Court vis-a-vis the Chief Justice of India and if despite the adverse opinion of the Chief Justice of the High Court, the additional Judge is continued for a further term, and the additional Judge knows that he has been so continued overruling the view of the Chief Justice of the High Court, it might lead to a certain amount of friction which would be detrimental to the proper functioning of the High Court. So also if an additional Judge is continued for a further term accepting the view expressed by the Chief Justice of the High Court and rejecting the opinion of the Chief Justice of India, it would again create a piquant situation because it would affect the image of the Chief Justice of India in the public eyes. Moreover, a feeling might be created in the mind of the public that a person who was regarded as unsuitable

for judicial appointment by one or the other of the two Chief Justices, has been appointed as a Judge and the litigants would be likely to have reservations about him and the confidence of the people in the administration of justice would be affected. The learned Solicitor General contended that for these reasons it would be injurious to public interest to disclose the correspondence exchanged between the Law Minister, the Chief Justice of the High Court and the Chief Justice of India.

84. We have given our most anxious thought to this argument urged by the learned Solicitor General, but we do not think we can accept it. We do not see any reason why, if the correspondence between the Law Minister, the Chief Justice of the High Court and the Chief Justice of India and the relevant notes made by them, in regard to discontinuance of an additional Judge are relevant to the issues arising in a judicial proceeding, they should not be disclosed. There might be difference of views between the Chief Justice of the High Court and the Chief Justice of India but so long as the views are held bona fide by the two Chief Justices, we do not see why they should be worried about the disclosure of their views? Why should they feel embarrassed by public discussion or debate of the views expressed by them when they have acted bona fide with the greatest care and circumspection and after mature deliberation. Do Judges sitting in a Division Bench not differ from each other in assessment of evidence and reach directly contrary conclusions on questions of fact? Do they not express their judicial opinions boldly and fearlessly leaving it to the jurists to decide which of the two differing opinions is correct? If two Judges do not feel any embarrassment in coming to different findings of fact which may be contrary to each other, why should two Chief Justices feel embarrassed if the opinions given by them in regard to the suitability of an additional Judge for further appointment differ and such differing opinions are made known to the public. Not only tolerance but acceptance of bona fide difference of opinion is a part of judicial discipline and we find it difficult to believe that the disclosure of their differing opinions might create a strain in the relationship between the Chief Justice of the High Court and the Chief Justice of India. We have no doubt that the Chief Justice of the High Court would come to

his own independent opinion on the material before him and he would not surrender his judgment to the Chief Justice of India, merely because the Chief Justice of India happens to be head of the judiciary having a large voice in the appointment of Judges on the Supreme Court Bench. Equally we are confident that merely because the Chief Justice of the High Court has come to a different opinion and is not prepared to change that opinion despite the persuasion of the Chief Justice of India, no offence would be taken by the Chief Justice of India and he would not harbour any feeling of resentment against the Chief Justice of the High Court. Both the Chief Justices have trained judicial minds and both of them would have the humility to recognise that they can be mistaken in their opinions. We do not therefore see any real possibility of estrangement or even embarrassment for the two Chief Justices, if their differing views in regard to the suitability of an additional Judge for further appointment are disclosed. We also find it difficult to agree that if the differing views of the two Chief Justices become known to the outside world, the public discussion and debate that might ensue might have the effect of lowering the dignity and prestige of one or the other of the two Chief Justices. When the differing views of the two Chief Justices are made public as a result of disclosure, there would certainly be public discussion and debate in regard to those views with some criticizing one view and some criticizing the other, but that cannot be helped in a democracy where the right of free speech and expression is a guaranteed right and if the views have been expressed by the two Chief Justices with proper care and deliberation and a full sense of responsibility in discharge of a constitutional duty, there is no reason why the two Chief Justices should worry about public criticism. We fail to see how such public criticism could have the effect of undermining the prestige and dignity of one or the other Chief Justice. So long as the two Chief Justices have acted honestly and bona fide with full consciousness of the heavy responsibility that rests upon them in matters of this kind, we do not think that any amount of public criticism can affect their prestige and dignity. But if either of the two Chief Justices has acted carelessly or improperly or irresponsibly or out of oblique motive, his view would certainly be subjected to

public criticism and censure and that might show him in poor light and bring him down in the esteem of the people, but that will be the price which he will have to pay for his remissness in discharge of his constitutional duty. No Chief Justice or Judge should be allowed to hide his improper or irresponsible action under the cloak of secrecy. If any Chief Justice or Judge has behaved improperly or irresponsibly or in a manner not befitting the high office he holds, there is no reason why his action should not be exposed to public gaze. We believe in an open Government and openness in Government does not mean openness merely in the functioning of the executive arm of the State. The same openness must characterise the functioning of the judicial apparatus including judicial appointments and transfers. Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how Judges are selected and appointed or transferred and whether any and if so what, principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests, namely, the Chief Justice of the High Court, the Chief Minister of the State, the Law Minister of the Central Government and the Chief Justice of India in case of appointment or non-appointment of a High Court Judge and the Law Minister of the Central Government and the Chief Justice of India in case of appointment of a Supreme Court Judge or transfer of a High Court Judge. The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off. We do not see any reason why this process of appointment and transfer of Judges should be regarded as so sacrosanct that no one should be able to pry into it and it should be protected against disclosure at all events and in all circumstances. Where it becomes relevant in a judicial proceeding, why should the Court and the opposite party and through them the

people not know what are the reasons for which a particular appointment is made or a particular additional Judge is discontinued or a particular transfer is effected. We fail to see what harm can be caused by the disclosure of true facts when they become relevant in a judicial proceeding. In fact, the possibility of subsequent disclosure would act as an effective check against carelessness, impetuosity, arbitrariness or mala fides on the part of the Central Government, the Chief Justice of the High Court and the Chief Justice of India and ensure bona fide and correct approach, objective and dispassionate consideration, mature thought and deliberation and proper application of mind on their part in discharging their constitutional duty in regard to appointments and transfers of Judges. It is true that if the views expressed by the Chief Justice of the High Court and the Chief Justice of India in regard to the suitability of an additional Judge for further appointment become known to the public, they might reflect adversely on the competence, character or integrity of the additional Judge, but the additional Judge cannot legitimately complain about it, because it would be at his instance that the disclosure would be ordered and the views of the two Chief Justices made public. If the additional Judge is appointed for a further term either accepting the opinion expressed by the Chief Justice of the High Court in preference to that of the Chief Justice of India or vice versa, the question of disclosure of differing opinions of the two Chief Justices would not arise, because no one would know that the two Chief Justices were not agreed on continuing the additional Judge for a further term and therefore, ordinarily, there would be no challenge to the appointment of the additional Judge. It is only if the additional Judge is not continued for a further term that he or some one on his behalf may challenge the decision of the Central Government not to continue him and in that event, if he asks for disclosure of the relevant correspondence embodying the views of the two Chief Justices, and if such disclosure is ordered, he has only himself to thank for it and in any event, in such a case, there would be no harm done to public interest if the views expressed by the two Chief Justices become known to the public.

85. We are therefore of the view that, in the two groups of writ petitions which

are before us, the injury which would be caused to the public interest in administration of justice by non-disclosure of the correspondence between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India and the relevant notings made by them in regard to non-appointment of S. N. Kumar and the correspondence between the Law Minister and the Government of India and the relevant notings made by them in regard to transfer of the Chief Justice of Patna, far outweighs the injury which may, if at all, be caused to the public interest by their disclosure and hence these documents were liable to be disclosed in response to the demand of the learned counsel appearing on behalf of the petitioners and S. N. Kumar. These were the reasons for which we directed by our Order dated 16th Oct., 81 that these documents be disclosed to the petitioners and S. N. Kumar.

Facts of S. N. Kumar's Case : Whether full & Effective consultation.

86. That takes us to the next question as to whether there was full and effective consultation between the President which means the Central Government on the one hand and the Chief Justice of India on the other. Art. 217 provides that every Judge of the High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. We have already rejected the contention urged on behalf of the respondents that the requirement of consultation is necessary only where a person is being appointed a Judge of the High Court and not where a decision is taken not to appoint him. We have, of course, made it clear that where the name of a person is proposed for appointment as a Judge of the High Court for the first time, he, having no right to be considered for such appointment, is not entitled to insist that the proposal for his appointment, whether initiated by the Chief Justice of the High Court or the State Government or the Chief Justice of India, should be subjected to the process of consultation set out in Art. 217 and his name can be dropped without any such consultation. But, as pointed out by us in an earlier portion of the judgment, the position is different in case of an additional Judge, for though an additional Judge has no right, on the expiration of his term, to be appointed

an additional Judge for a further term or to be appointed a permanent Judge, he has still a right to be considered for such appointment and the Central Government has to decide whether or not to appoint him after consultation with the three constitutional functionaries mentioned in Art. 217. Here, in the present case, Shri S. N. Kumar was an additional Judge whose term expired on 6th June, 1981 and he was entitled to be considered for appointment as an additional Judge for a further term and the Central Government certainly could after considering his name, decide in the bona fide exercise of its power, not to appoint him, but that could be done only after consultation with the three constitutional functionaries specified in Art. 217 which included the Chief Justice of India. It therefore becomes necessary to consider whether the Central Government arrived at its decision not to appoint Shri S. N. Kumar as an additional Judge for a further term after consultation with the Chief Justice of India. We have already discussed the true nature and scope of consultation required under Art. 217 and pointed out that the consultation contemplated by that Article is full and effective consultation where the relevant facts bearing upon appointment or non-appointment are brought to the notice of the Central Government and the three constitutional functionaries required to be consulted and the opinion of each of the three constitutional functionaries is taken on identical material and then a decision is reached by the Central Government whether or not to appoint the person concerned as a Judge, whether additional or permanent. Now Art. 217 does not require that any particular procedure should be followed for full and effective consultation nor does it insist that the relevant facts on which the final decision of the Central Government is based should be conveyed to the other three constitutional functionaries in any particular manner or by the Central Government itself. What is necessary to ensure full and effective consultation within the meaning of Art. 217 is that the Central Government as well as each of the three constitutional functionaries required to be consulted "must have for its consideration full and identical facts which can at once constitute both the source and foundation of the final decision" and it is immaterial as to how such "full and identical facts" are conveyed by one authority to the

other. It is sufficient compliance with the constitutional requirement of Art. 217 if the self-same facts on which the final decision is taken by the Central Government are placed before each of the three constitutional functionaries required to be consulted and their opinion is taken on the basis of such facts. Whatever be the manner in which those facts are brought to their notice. Let us examine whether in the present case this constitutional requirement was satisfied before the decision was taken by the Central Government not to appoint S. N. Kumar as an additional Judge for a further term or to paraphrase it in the context of the controversy raised on behalf of the petitioners, whether the full and identical facts on which the decision was taken by the Central Government were placed before the Chief Justice of India.

87. The unfortunate drama leading to the non-appointment of S. N. Kumar as an additional Judge for a further term begins with the letter dated 19th February, 1981 addressed by the Chief Justice of Delhi to the Law Minister. This letter was written by the Chief Justice of Delhi to the Law Minister, because the term for which S. N. Kumar was originally appointed as an additional Judge was due to expire on 6th March, 1981. The Chief Justice of Delhi pointed out in this letter that the arrears pending in the Delhi High Court undoubtedly justified the appointment of additional Judges but he was not in a position to recommend the "extension for Justice Kumar" for an additional term for three reasons, namely, (1) There were serious complaints against S. N. Kumar both oral and in writing. These complaints had been received by him direct as well as through the Law Minister. He had examined these complaints and found that some of the complaints were not without basis; (2) S. N. Kumar had not been very helpful in disposing of cases; and (3) some responsible members of the Bar and some of the colleagues of the Chief Justice (whom he did not think it proper to name) had also expressed doubts about S. N. Kumar's integrity. The Chief Justice frankly stated that he had no investigating agency to conclusively find out whether the complaints against S. N. Kumar were genuine or not, but added that "all the same the complaints have been persistent." He pointed out that in the circumstances it was his painful duty,

not to recommend an extension for S. N. Kumar but added that the Law Minister might examine the matter at his end and take such steps as he thought proper. Now a suggestion was made by Mr. R. K. Garg, learned advocate appearing on behalf of S. N. Kumar that this letter was addressed by the Chief Justice of Delhi to the Law Minister pursuant to a conspiracy between the two to discontinue S. N. Kumar as an additional Judge. The suggestion was that the Chief Justice of Delhi had played into the hands of the Law Minister and written this letter recommending non-appointment of S. N. Kumar in order to oblige the Law Minister. We are afraid we cannot term this suggestion as anything but unfounded. There is absolutely not a tittle of evidence in support of such a suggestion. The charge of conspiracy is at all times a very serious charge and it must not be lightly made more particularly when it is directed against persons holding high offices. Here it is difficult to see any justification at all for levelling a charge of conspiracy against the Chief Justice of Delhi and the Law Minister. The Chief Justice of Delhi was appointed acting Chief Justice on 27th June, 1980 and he was confirmed as permanent Chief Justice with effect from 8th January, 1981 and therefore on the date of the letter, his position as Chief Justice was not at all in jeopardy and he was not dependent on the Central Government or the Law Minister for his office. There were also no disputes or differences between the Chief Justice of Delhi and S. N. Kumar prior to the date of the letter and no suggestion has been made on behalf of S. N. Kumar that the Chief Justice of Delhi had any animus or prejudice against him. Nothing had transpired between the Chief Justice of Delhi and S. N. Kumar which might have induced the Chief Justice of Delhi to make a false allegation or imputation against him. Nor was any reason suggested as to why the Law Minister should have gone out of his way to see that S. N. Kumar was not continued as an additional Judge. It would indeed be going too far to suggest without a shred of evidence that the Chief Justice of Delhi was so depraved as to yield to the pressure of the Law Minister and make a deliberately false imputation of lack of integrity against his colleague merely in order to oblige the Law Minister. It is impossible to conceive of any

earthly reason why the Chief Justice of Delhi should have gone to the length of condemning his colleague unless he had received complaints against him and he bona fide believed that some of those complaints were not without basis. The letter dated 19th February, 1981 in fact, contains inherent evidence to show that the Chief Justice of Delhi was acting bona fide in addressing that letter to the Law Minister. He pointed out in the letter that he had received complaints against S. N. Kumar both oral and in writing and on examining these complaints he had found that some of them were not without basis but he frankly stated that he had no investigative machinery at his disposal and it was therefore not possible for him to find conclusively whether these complaints were genuine or not. This was a correct and proper approach to be adopted by a careful and responsible Chief Justice who had heard complaints against his colleague some of which appeared to him not without basis but in respect of which he was not in a position to state definitely whether they were true or not. Since some of the complaints appeared to him not without basis and responsible members of the Bar and some of his colleagues had also complained to him against S. N. Kumar, he naturally thought that it would not be right for him to recommend continuance of S. N. Kumar as an additional Judge. But, at the same time, he made it clear that the Law Minister might examine the matter at his end and take such action as he thought fit. It is impossible to conclude from this letter that the Chief Justice of Delhi acted improperly or irresponsibly in not recommending the continuance of S. N. Kumar as an additional Judge. If what was stated by the Chief Justice of Delhi in this letter were true — and for the purpose of inquiry as to whether there was full and effective consultation, we must accept the facts as given in the letter as true for we are not concerned to inquire whether the facts on which the Chief Justice of Delhi based his opinion were true or not — the Chief Justice of Delhi could not be said to be unjustified in taking the view that S. N. Kumar should not be recommended for continuance as an additional Judge. While making his recommendation whether S. N. Kumar should be continued as an additional Judge or not, the Chief Justice of Delhi had to consider the fitness and suitability of S. N. Kumar at

the time and if there were complaints against S. N. Kumar, some of which he did not find to be without basis and doubts about the integrity of S. N. Kumar were expressed by responsible members of the Bar and some of his own colleagues, the Chief Justice of Delhi could not be said to have acted unreasonably in declining to recommend S. N. Kumar for an extension. It may be that on full and detailed investigation through an independent and efficient investigative machinery, the complaints and doubts against S. N. Kumar might have been found to be unjustified but such a course would have been neither practicable nor desirable. In the first place, as pointed by the Chief Justice of Delhi himself, he had no investigative machinery at his disposal and if he wanted the complaints and doubts against S. N. Kumar to be investigated, he would have had to ask the Central Government to carry out such investigation through the Central Bureau of Investigation or the Intelligence Bureau or some such investigating agency and that would have been clearly subversive of the independence of the judiciary. It would have been most improper for the Chief Justice of Delhi to ask the Central Government to investigate into complaints or doubts against a sitting Judge of his Court. This Court has in unhesitating terms condemned the adoption of such a course by the High Court in the case of subordinate judiciary and much more so would it be reprehensible in the case of a sitting Judge of a High Court. Moreover, leaving the investigation of complaints and doubts against a sitting Judge in the hands of an investigative agency under the Control of a Political Government would not be desirable because, apart from exposing the sitting Judge to unhealthy political pressures, it may not yield satisfactory result in all cases, because such an investigation would not have the benefit of the guidance of a mature and experienced person like the Chief Justice who has lived a whole lifetime in the Courts and who is closely and intimately connected with lawyers and Judges in the Court over which he presides. It would indeed be impossible for any one unfamiliar with the legal profession and the functioning of the Courts to judge the genuineness or veracity of the sources from which information might be obtained in regard to a sitting Judge. It must, therefore, necessarily be left to the Chief Justice of the

High Court to give his opinion in regard to the suitability of an additional Judge for further appointment on the basis of such information as he may gather by making his own inquiries. The Chief Justice of the High Court would have sufficient opportunities for judging the suitability of an additional Judge for further appointment, because the additional Judge would be working with him in the same Court and he would be in close contact with the members of the Bar and his own colleagues and if there is anything wrong with the functioning of the Court or the Judges, he would be best in a position to know about it. If an additional Judge does not enjoy good reputation for integrity, the Chief Justice of the High Court would ordinarily come to know about it. Of course, the possibility cannot be ruled out that the information received by the Chief Justice of the High Court may at times be motivated or prejudiced, because the additional Judge has offended some member of the Bar or decided some case against a litigant. These occupational hazards which beset the life of an additional Judge — in fact, even of a permanent Judge whether in the High Court or in the Supreme Court have unfortunately increased in recent times, because there has been a steady erosion of values and not only some interested politicians but also a few — and fortunately their tribe is still small — lawyers and members of the public are prone to make wild and reckless allegations against Judges and impute motives for the decisions given by them. It is not realised by many that very often the judgments given by the High Courts and the Supreme Court are value judgments, because there are conflicting values competing for recognition by the Judge and the choice made by the Judge is largely dictated by his social philosophy and it is not possible to emphatically assert that a particular view taken by one Judge is wrong and a different view taken by another Judge is right. The nature of the judicial process being what it is, it is inevitable that the view taken by a Judge, perfectly bona fide though it may be, may not accord with the expectations of a section or group of persons believing in a particular social or political philosophy, but that cannot be a ground affording justification for making imputation against the Judge or accusing him of lack of bona fides or charging him with surrender or

subservience to the executive or to any other interest. Those who indulge in such personal attacks against Judges for the decisions given by them do not realise what incalculable damage they are doing to the judicial institution by destroying the confidence of the public in the integrity and inviolability of administration of justice. Unfortunately, it is the easiest thing to make false, reckless and irresponsible allegations against Judges in regard to their honesty and integrity and in recent times the tendency has grown to make such allegations against Judges because they have decided the case in a particular manner either against a dissatisfied litigant or contrary to the view held by a group or section of politicians or lawyers or members of the public. The Judge against whom such allegations are made is defenceless because, having regard to the peculiar nature of the office held by him, he cannot enter the arena of conflict and raise or join a public controversy. This pernicious tendency of attributing motives to Judges has to be curbed, if the judicial institution is to survive as an effective instrument for maintenance of the rule of law in the country and this can happen only if politicians, lawyers and members of the public accept the judgments rendered by the Judges as bona fide expressions of their views and do not impute motives to Judges for the judgments given by them, even though they be adverse to the views held by them. But unfortunately, the situation being what it is, we must emphasise with all the strength and earnestness at our command that the Chief Justice of the High Court should exercise the greatest care and circumspection in judging the veracity of the information which he may receive from time to time in regard to the conduct or behaviour or integrity of an additional Judge of his Court. The Constitution has entrusted to him the task of giving his opinion in regard to the suitability of an Addl. Judge for further appointment and on the basis of the information received by him or gathered as a result of inquiries made by him, he has to decide wisely and with responsibility whether or not he should recommend the appointment of an additional Judge for a further term.

88. Now where the Chief Justice of the High Court is reasonably satisfied after the greatest care and circumspec-

tion exercised by him as the holder of a high constitutional office to whom the Constitution has assigned an important function and in whom it has reposed a sacred trust, that the additional Judge in regard to whose suitability he has to give opinion, does not enjoy good reputation for integrity, he obviously cannot recommend such additional Judge for further appointment. It is possible that the Chief Justice of the High Court may go wrong in a given case and arrive at an erroneous opinion in regard to the suitability of an additional Judge for appointment for a further term and that may result in injustice to the additional Judge who may suffer by reason of such erroneous opinion but that cannot be helped because ultimately some constitutional functionary has got to be entrusted with the task of assessing the suitability of the person to be appointed an additional Judge or a permanent Judge and no better person can be found for this purpose than the Chief Justice of the High Court. The Chief Justice of the High Court may err in his assessment as anyone else may, fallibility being the attribute of every human being. But that is a risk which has necessarily to be taken and it cannot be avoided howsoever perfect may be the mechanism which human ingenuity can evolve. It may happen that the Chief Justice of the High Court, not being aware that the additional Judge whose term is about to expire does not enjoy good reputation for integrity may recommend his name for appointment for a further term though he is clearly unsuitable for such appointment and equally it may happen that on the basis of the information available with him which information may be incorrect, the Chief Justice of the High Court may come to the opinion that the additional Judge whose suitability he is called upon to consider does not possess good reputation for integrity though in fact he is a person of sterling character and possesses a high degree of honesty and integrity. These errors are inevitable in every process of assessment and the Constitution has sought to minimise them by entrusting the task of assessment to a high dignitary like the Chief Justice of the High Court who would be expected to act with a high sense of responsibility and, who by reason of training and experience, would be able to sift the grain from the chaff

and arrive at a correct opinion on the material before him.

89. We might also at this stage refer to one contention seriously pressed on behalf of the petitioners, namely, that what would be material to consider for the purpose of assessing the suitability of an additional Judge for further appointment would be not whether the additional Judge enjoys good reputation for honesty and integrity but whether in fact he possesses honesty and integrity. The argument of the petitioners was that if the additional Judge has the hall-mark of honesty and integrity "he cannot be removed or dropped because unconfirmed reports say that he is lacking in honesty and integrity", for otherwise "the reputation of every Judge would be at the mercy of rumours, gossips and unconfirmed reports". We do not think this argument is well founded. In the first place, it must be remembered that when the Chief Justice of the High Court is called upon to give his opinion in regard to the suitability of an additional Judge for further appointment, he is not required to adjudicate upon various matters bearing upon his suitability and to come to a definitive finding or conclusion in regard to such matters. Where the complaint against an additional Judge is in regard to his integrity, the Chief Justice of the High Court is not expected to hold a judicial or quasi-judicial inquiry for the purpose of adjudicating whether the additional Judge is, in fact, lacking in honesty and integrity. Such an inquiry against a Judge whether additional or permanent would not be permissible except in a proceeding for his removal. What the Chief Justice of the High Court has to do is merely to assess the suitability of the additional Judge for further appointment and where lack of integrity is alleged against him, the assessment can only be on the basis of his reputation for integrity. The point we are making will become abundantly clear if we take the case of a member of the Bar or the senior most District Judge who is for the first time considered for appointment as an additional or permanent Judge. The integrity of the person under consideration would undoubtedly be a relevant factor to be taken into account, but in assessing such factor the Chief Justice of the High Court would not be expected to hold a judicial or quasi-judicial inquiry for the purpose of determining whether the person concern-

ed does, in fact, possess honesty and integrity or is lacking in these qualities. The Chief Justice of the High Court would have to proceed on the basis of the reputation for honesty and integrity enjoyed by the person under consideration and if, on the basis of the information gathered by him, the Chief Justice of the High Court comes to the view that such person does not enjoy good reputation for integrity, the Chief Justice of the High Court would be justified in not recommending such person for appointment. Where a question of honesty and integrity of a Judge is concerned, it is almost impossible to come to a conclusive determination whether he is lacking in integrity or not, because experience shows that most persons are not willing to speak if they know that they may be quoted and that in any event they are not prepared to testify in any judicial or quasi-judicial inquiry. It is therefore not enough in order to be able to recommend a person for appointment as a Judge to say that there is no proof of lack of integrity against him, because, if such were the test to be applied, there would be grave danger of persons lacking in integrity being appointed as Judges. The test which must be applied for the purpose of assessing the suitability of a person for appointment as a Judge must be whether the Chief Justice of the High Court or for the matter of that, any other constitutional authority concerned in the appointment, is satisfied about the integrity of person under consideration. If the person under consideration does not enjoy reputation for honesty and integrity, it would not be possible for the Chief Justice of the High Court to say that he is satisfied about the integrity of such person and in such an event, the Chief Justice of the High Court would be justified in not recommending such person for appointment; in fact, it would be his duty not to recommend such person. The public injury which may be caused by appointment of a Judge lacking in integrity would be infinitely more than the public injury which may result from non-appointment of a competent Judge possessing integrity. If therefore the Chief Justice of Delhi found on inquiries made by him that some of the complaints made against S. N. Kumar were not without basis and doubts about the integrity of S. N. Kumar were expressed by responsible members of the Bar as also by some of his own colleagues, the Chief

Justice of Delhi could not be said to be unjustified in writing the letter dated 19th February, 1981 declining to recommend S. N. Kumar for appointment as an additional Judge for a further term. We may once again repeat that this assessment of S. N. Kumar by the Chief Justice of Delhi may have been erroneous and, as we shall point out a little later, the Chief Justice of India took the view that it was erroneous, but on no account can lack of bona fides be attributed to the Chief Justice of Delhi. On the bona fide view taken by him, the Chief Justice of Delhi did what it was his plainest duty in the circumstances to do.

90. There was also one other argument urged on behalf of the petitioners which we might conveniently dispose of at this stage, since it is an argument closely allied to the one which we have just discussed and rejected. The petitioners contended that fair play and justice required that before an additional Judge is dropped on the ground that he is lacking in integrity or that he does not enjoy good reputation for integrity, he must have an opportunity of showing cause against such a serious imputation made against his honour and integrity. This contention is also in our opinion without merit and the answer to it is provided by what we have already discussed above. What the Chief Justice of the High Court is required to do is to give his opinion in regard to the suitability of the additional Judge for further appointment and he has therefore to consider various matters relevant to the question of appointment and give his opinion to the President. He does not hold a judicial or quasi-judicial inquiry into the honour and integrity of the additional Judge nor does he arrive at any conclusive finding or determination. He merely gives his personal opinion in regard to the suitability of the additional Judge in discharge of the constitutional duty laid upon him and there is therefore no question of any opportunity being afforded to the additional Judge before the Chief Justice of the High Court arrives at his opinion. When the Chief Justice of the High Court gives his opinion, it is a confidential communication which would not ordinarily be known to the public and in the case of S. N. Kumar too, but for the disclosure of documents vehemently pressed and passionately

sought not only by the counsel for the petitioners but also by the counsel for S. N. Kumar, the world would never have known that the Chief Justice of Delhi has given an adverse opinion against the continuance of S. N. Kumar on the ground that his integrity was doubtful. It is obvious that in cases of this kind where the Chief Justice of the High Court gives his personal opinion or assessment on consultation by the President, there is neither adjudication nor condemnation and hence there is no basis or justification for importing the requirement of fair play or natural justice.

91. When a copy of this letter dated 19th Feb., 1981 was received by the Chief Justice of India, he took the view that what was stated in the letter was "too vague to accept that Shri Kumar lacks integrity" and he therefore stated in a note dated 3rd Mar., 1981 submitted by him to the Central Government that he "would like to look carefully into the charges against Shri S. N. Kumar" and recommended extension of the term of S. N. Kumar by six months. The reason which prevailed with the Chief Justice of India in recommending extension of the term of S. N. Kumar for six months was twofold. In the first place, he felt that since he had recommended extension of the term of O. N. Vohra by six months and O. N. Vohra was senior to S. N. Kumar, the interests of propriety required that the term of S. N. Kumar should also be extended by six months and secondly, he desired to look carefully into the charges against S. N. Kumar before deciding whether to recommend his further appointment or not. Now having regard to the scope and purpose of Art. 224 which we have discussed in some detail in an earlier portion of this judgment, it is clear that the Chief Justice of India misconceived the true legal position when he recommended extension of S. N. Kumar for a period of six months in order to enable him to look carefully into the charges against S. N. Kumar. We have already pointed out that on a true interpretation of Art. 224 no short term appointment of an additional Judge can be made for the purpose of enabling the constitutional authorities to examine and decide whether the complaints or charges against the additional Judge are justified or not, so that if the complaints or charges are found to be not without basis, the constitutional authorities may advise the Central Government not to ap-

point the Additional Judge for a further term. We have held that such short term appointment being for a purpose other than that warranted by Art. 224, would be outside the scope and ambit of that Article. But even so the Chief Justice of India recommended, though constitutionally it was impermissible to do so, that the appointment of S. N. Kumar be extended for a further term of six months in order that he should in the meantime be able to examine carefully the charges against S. N. Kumar. The Law Minister thereupon submitted a note to the Prime Minister on 3rd March, 1981 pointing out that the letter of the Chief Justice of Delhi dated 19th Feb., 1981 made a serious complaint against the integrity of S. N. Kumar but he did not propose to go into the merits of the case at that stage since he was suggesting a short extension of three months for S. N. Kumar. But while so stating, he added that he strongly felt that in matters of this nature, "the views of the Chief Justice of the 'High Court' are paramount as it is in his association that the Judge concerned discharges his duties" yet "out of sheer reverence to the views of the Chief Justice of India" he proposed that the term of S. N. Kumar as additional Judge be extended for three months. Thus, while the Chief Justice of India recommended extension of the term of S. N. Kumar for six months, the Law Minister proposed an extension for only three months, presumably because he took the view that whatever inquiries are to be made in regard to the complaints and doubts against S. N. Kumar should be carried out as quickly as possible and the decision on such a sensitive issue as to whether an additional Judge should be continued or not should not be unduly delayed. The result was that S. N. Kumar was appointed as an additional Judge for a period of three months from 7th Mar., 1981.

92. The Law Minister thereafter addressed a letter dated 19th Mar., 1981 to the Chief Justice of Delhi drawing his attention to the observations made by the Chief Justice of India in regard to his earlier letter dated 19th Feb., 1981 and requesting him that in the light of those observations he should offer his "further comments on the question of continuance or otherwise" of S. N. Kumar. The Law Minister stated that since the term of

S. N. Kumar as an Additional Judge was expiring on 6th June, 1981, he would be grateful if the Chief Justice of Delhi could send his comments so as to reach him latest by 15th April, 1981. This communication addressed by the Law Minister to the Chief Justice of Delhi shows clearly beyond any doubt that the Law Minister was not party to any conspiracy for discontinuing S. N. Kumar as an additional Judge. Since the Chief Justice of India had observed that the letter dated 19th Feb., 1981 addressed by the Chief Justice of Delhi was too vague to form the basis of an opinion that S. N. Kumar was lacking in integrity, the Law Minister naturally asked the Chief Justice of Delhi to offer his further comments in answer to this remark of the Chief Justice of India. It appears that the Chief Justice of India also addressed a letter dated 14th Mar., 1981 to the Chief Justice of Delhi asking him, with reference to the observations made by him in his letter dated 19th Feb., 1981, to furnish "details and concrete facts in regard to the allegations against Justice Kumar". The Chief Justice of Delhi thereupon met the Chief Justice of India and had discussion with him on 26th March, 1981. There was considerable controversy between the parties as to what were precisely the facts which were discussed between the Chief Justice of Delhi and the Chief Justice of India at this meeting, but the subsequent correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India throws considerable light on this controversy and we must therefore proceed to examine it. It appears that subsequent to this meeting held on 26th Mar., 1981, the Chief Justice of Delhi addressed a letter dated 28th March, 1981 to the Chief Justice of India recording that since receipt of the letter of the Chief Justice of India dated 14th Mar., 1981, the Chief Justice of Delhi had an opportunity "to discuss this delicate matter" with the Chief Justice of India and observing, to quote the exact words used by Chief Justice of Delhi:

"There were three points mentioned in my D. O. 275-HCJ/PPS, dated 19th Feb., 1981, addressed to the Law Minister, a copy of which was forwarded to you. I had also mentioned in that letter that I have no investigating agency to conclusively find out whether the complaints are genuine or not. Understandably there will be some who would support the allega-

tions and there will be some who would refute them. Therefore it is natural that there may be variance between the views that may be expressed by different people. Indeed, my experience is that people are hesitant in speaking out frankly.

With regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us. About Justice Kumar not being very helpful in disposing of cases, I enclose a statement of disposal by Justice Kumar in 1980. Just by way of comparison I have also included the figures of disposal in the same period of my other two colleagues whose cases for reappointment are under consideration."

The Chief Justice of Delhi also addressed a letter dated 28th March, 1981 to the Law Minister pointing out that since receipt of the letter of the Chief Justice of India, he had an opportunity "to discuss the entire matter in detail with the Chief Justice of India" and that after this discussion he had addressed a letter dated 28th March, 1981 to the Chief Justice of India, a copy of which was being enclosed by him. The Chief Justice of Delhi then proceeded to add in this letter addressed to the Law Minister :

"Perhaps you will consider this to be sufficient "comments" on my part as desired by you in your letter under reply about the observations of the Chief Justice of India which you have quoted in your letter."

Now it is clear from this letter addressed by the Chief Justice of Delhi to the Law Minister that the Chief Justice of India asked the Chief Justice of Delhi to furnish him "Details and concrete facts in regard to the allegations against Justice Kumar" and in response to this request, the Chief Justice of Delhi met the Chief Justice of India on 26th Mar., 1981 and discussed "the entire matter in detail with the Chief Justice of India." Obviously all "the details and concrete facts" in regard to the allegations against S. N. Kumar which were required by the Chief Justice of India must have been discussed in detail between the Chief Justice of Delhi and the Chief Justice of India at this meeting held on 26th March, 1981. There is no reason to believe that any facts which were in the possession of the Chief Justice of Delhi in regard to the complaints and doubts against S. N. Kumar were not disclosed and discussed

by him with the Chief Justice of India. There is also inherent evidence in the letter dated 28th March, 1981 addressed by the Chief Justice of Delhi to the Chief Justice of India that the entire matter relating to the integrity of S. N. Kumar was discussed between the Chief Justice of Delhi and the Chief Justice of India. The Chief Justice of Delhi stated at the commencement of this letter that he had an opportunity to discuss "this delicate matter" with the Chief Justice of India. The reference to "this delicate matter" could not be to any matter other than that relating to the integrity of S. N. Kumar. Then the Chief Justice of Delhi proceeded to state that there were three points mentioned in his letter dated 19th Feb., 1981 and obviously there was no reason for him to refer to these three points in his letter dated 28th March, 1981 unless he had discussed these three points with the Chief Justice of India. It was with reference to the meeting which the Chief Justice of Delhi had with the Chief Justice of India that the Chief Justice of Delhi adverted to the three points in his letter to the Chief Justice of India. One of the three points was that serious complaints against S. N. Kumar had been received by him direct as well as through the Law Minister and some of these complaints were found to be not without basis and the second point was that some responsible members of the Bar as also some of his own colleagues had expressed doubts about the integrity of S. N. Kumar. These two points must have been discussed between the Chief Justice of Delhi and the Chief Justice of India, for otherwise there is no reason why the Chief Justice of India, and the Chief Justice of Delhi should have referred to them in his letter to the Chief Justice of India and if these two points were discussed, it is difficult to believe that the Chief Justice of Delhi should not have disclosed all the facts bearing upon these two points to the Chief Justice of India. The Chief Justice of Delhi emphatically reiterated in the last paragraph of his letter to the Chief Justice of India that the matter in regard to the complaints against the integrity of S. N. Kumar had already been discussed between them. Now, as stated in the letter of the Chief Justice of Delhi dated 19th February, 1981, complaints against the integrity of S. N. Kumar were received by the Chief Justice of Delhi direct as also through the Law Minister and doubts

against the integrity of S. N. Kumar had been expressed by responsible members of the Bar as also by some of the Judges of the Delhi High Court and therefore the inference is irresistible that when the matter in regard to the complaints against the integrity of S. N. Kumar was discussed, these facts must have been disclosed by the Chief Justice of Delhi to the Chief Justice of India. The Chief Justice of India had with him a copy of the letter dated 19th Feb., 1981 where reference was made to complaints against S. N. Kumar, said to have been received by the Chief Justice of Delhi and to doubts against the integrity of S. N. Kumar said to have been expressed by responsible members of the Bar and some of his own colleagues and it is impossible to believe that when the matter relating to the integrity of S. N. Kumar was discussed, the Chief Justice of India should not have asked the Chief Justice of Delhi to apprise him as to what were the complaints received against S. N. Kumar and who were the responsible members of the Bar and Judges who had expressed doubts against the integrity of S. N. Kumar. If the Chief Justice of Delhi refused to disclose these facts to the Chief Justice of India, we have no doubt that the Chief Justice of India would have remonstrated with the Chief Justice of Delhi for such refusal and expressed his displeasure about it to the Law Minister. There is no doubt in our mind that the Chief Justice of Delhi must have disclosed all the facts relating to the complaints and doubts expressed against the integrity of S. N. Kumar to the Chief Justice of India but, as is evident from a subsequent letter dated 22nd May, 1981 addressed by the Chief Justice of India to the Law Minister, the Chief Justice of India had already, prior to the date of the meeting, made his own inquiries in the matter and as a result of such inquiries he was not inclined to agree with the opinion given by the Chief Justice of Delhi and it is obvious therefore that he must have told the Chief Justice of Delhi that in the course of the inquiries made by him he had been told by persons that there was nothing against the integrity of S. N. Kumar and he was consequently unable to agree with the view expressed by the Chief Justice of Delhi. The Chief Justice of Delhi apparently remained unconvinced and that is why he stated in his letter to the Chief Justice of India that there was bound to

be variance between the views expressed by different persons in regard to the integrity of a Judge, since there would be some who would support the allegations of lack of integrity while there would be some others who would refute them. This was a courteous and respectful way of expressing disagreement with the Chief Justice of India. But, at the same time, the Chief Justice of Delhi politely, yet firmly pointed out to the Chief Justice of India, by way of answer to his view, that experience showed that "persons are hesitant in speaking out frankly" when the question relates to the integrity of a Judge, suggesting clearly that merely because persons questioned by the Chief Justice of India in the course of the inquiries made by him did not choose to say anything against the integrity of S. N. Kumar, it did not necessarily follow that the integrity of S. N. Kumar was above board. This letter addressed by the Chief Justice of Delhi to the Chief Justice of India clearly shows that there was full discussion between the Chief Justice of Delhi and the Chief Justice of India in regard to complaints and doubts against the integrity of S. N. Kumar but at the end of the discussion the Chief Justice of Delhi stuck to his opinion and that is why in the letter addressed by him to the Law Minister, he did not go back upon his refusal to recommend S. N. Kumar for further appointment and maintained his original recommendation not to continue S. N. Kumar for further term. The Chief Justice of Delhi expressed the hope that what he had stated in his letter to the Chief Justice of India would be considered sufficient comments on his part in regard to the observations of the Chief Justice of India quoted in the letter of the Law Minister dated 19th March, 1981. The criticism of the Chief Justice of India voiced in that letter was that what was stated by the Chief Justice of Delhi in his letter dated 19th February, 1981 was vague and the Chief Justice of Delhi therefore pointed out to the Law Minister that he had discussed the entire matter in detail with the Chief Justice of India and met his objection and hence there was no question of any vagueness and he therefore hoped that his reply would be sufficient answer to the observations of the Chief Justice of India. The effect and substance of what the Chief Justice of Delhi stated in his letter to the Law Minister was that he had cleared the charge of vagueness by discussing all the

facts in regard to the allegations against S. N. Kumar with the Chief Justice of India,

93. This was followed by a letter dated 15th April, 1981 addressed by the Law Minister to the Chief Justice of Delhi. We have already pointed out that since what was stated in the letter of the Chief Justice of Delhi dated 19th February, 1981 was vague, the Law Minister had, by his letter dated 19th March, 1981 requested the Chief Justice of Delhi to offer further comments in support of his recommendation against the discontinuance of S. N. Kumar. The only reply which the Law Minister got from the Chief Justice of Delhi was that the Chief Justice of Delhi had met and discussed the entire matter in detail with the Chief Justice of India and removed the objection based on vagueness by giving him "details and concrete facts" in regard to the allegations against S. N. Kumar. But the Law Minister was not informed as to what was discussed between the Chief Justice of Delhi and the Chief Justice of India and what were the "details and concrete facts" disclosed by him to the Chief Justice of India. It was obvious from the reply given by the Chief Justice of Delhi that despite the discussion with the Chief Justice of India he stuck to his original recommendation not to continue S. N. Kumar for a further term and the Law Minister therefore naturally enquired from him by his letter dated 15th April, 1981 as to what was the material which provided the basis on which he concluded that S. N. Kumar's reputation for integrity was not above board and recommended that he may not be continued. Ultimately, it was the Law Minister who had to take a decision on behalf of the Government of India as to whether S. N. Kumar should be continued or not and in order to be able to discharge this constitutional function fairly and honestly, it was necessary for the Law Minister to know what was the material on the basis of which the Chief Justice of Delhi had reached the opinion that S. N. Kumar did not enjoy good reputation for integrity and that he could not therefore be recommended for reappointment. The Law Minister obviously could not accept the opinion of the Chief Justice of Delhi blindly and unquestioningly because that would have amounted to abdication of his constitutional obligation and he therefore asked the Chief Justice of Delhi to furnish him the material on which the opin-

ion of the Chief Justice of Delhi was based. This letter addressed by the Law Minister to the Chief Justice of Delhi provides the clearest evidence that the Law Minister was not a party to any conspiracy to throw out S. N. Kumar as an additional Judge. The Law Minister if he was a party to any such conspiracy, would not have required the Chief Justice of Delhi to provide the material which formed the basis of his opinion and instead, he would have accepted the opinion of the Chief Justice of Delhi and after formally inviting the opinion of the Chief Justice of India, decided to discontinue S. N. Kumar. But, obviously, the Law Minister wanted to satisfy himself that there was material on the basis of which it could be said that the integrity of S. N. Kumar was doubtful, and that is why he did not regard it as sufficient that the Chief Justice of Delhi had discussed the matter with the Chief Justice of India but asked for the material which formed the basis of the opinion of the Chief Justice of Delhi so that the Central Government could come to its own decision whether or not to continue S. N. Kumar as an additional Judge. This action on the part of the Law Minister clearly establishes his bona fides in the matter of discontinuance of S. N. Kumar.

94. Now we come to a very important letter which formed the subject matter of bitter controversy between the parties. This was a letter dated 7th May, 1981 addressed by the Chief Justice of Delhi to the Law Minister in response to the request contained in the letter of the Law Minister dated 15th April, 1981. The Chief Justice of Delhi by his letter supplied to the Law Minister the material on which his opinion against the continuance of S. N. Kumar was based. This letter contained at the top the words "Secret (For personal attention only)". It contained in the second paragraph a prefatory statement by way of preamble to the facts set out in the subsequent paragraphs. This prefatory statement is extremely important and it may be set out in extenso in the following words:

"Hon'ble the Chief Justice of India had made certain observations with regard to my recommendation about Mr. Justice S. N. Kumar and the same were communicated to me by you for my comments in your D. O. No. 50/2/81-Jus., dated 19th March, 1981. The Chief Justice had also written to me a letter dated 14th

March, 1981 asking for "details and concrete facts in regard to the allegations against Justice Kumar." As I wrote to you in my D. O. No. 293-HCJ/PPS, dated 28th March, 1981. I discussed the matter with Hon'ble the Chief Justice and as desired by him, in reply to his letter, wrote my D. O. No. 292-HCJ/PPS dated March 28, 1981, a copy of which was forwarded to you. Accordingly, it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis for me to conclude that Justice Kumar's integrity was not above board, I give below some facts."

(Underlining is ours)

The Chief Justice of Delhi reiterated in this prefatory statement that pursuant to the letter dated 14th March, 1981 addressed by the Chief Justice of India asking for "details and concrete facts in regard to the allegations against Justice Kumar", he had met the Chief Justice of India and discussed the matter with him and the letter dated 28th March 1981 was written by him as desired by the Chief Justice of India and accordingly — for that reason — it was not only embarrassing but painful for him to write this letter but since the Law Minister desired to know what material provided the basis for him to conclude that the integrity of S. N. Kumar was not above board, he was proceeding to give some facts. It is clear from this prefatory statement that it was as per the desire of the Chief Justice of India that the letter dated 28th March, 1981 was addressed by the Chief Justice of Delhi in the terms in which he did. There is an undercurrent of suggestion here that the Chief Justice of India did not approve of the idea of the Chief Justice of Delhi setting out in a letter the facts discussed by him with the Chief Justice of India and perhaps that is why the Chief Justice of Delhi stated that it was both embarrassing and painful for him to write that letter setting out the facts on which his opinion was based. The Chief Justice of Delhi then proceeded to state the facts on the basis of which he had formed the view that S. N. Kumar did not enjoy good reputation for integrity. It is not necessary for us to refer to these facts in any detail but suffice it to state that several facts were set out by the Chief Justice of Delhi which made him conclude "that the reputation for integrity of Justice Kumar was not as should

be for a Judge of the High Court". The Chief Justice of Delhi pointed out that some time early in May, 1980 one of his colleagues had told him that he had information to the effect that "if a substantial amount was paid to Justice Kumar, suits brought by a particular party against an Insurance Company would be decided in favour of that party". The reference here was obviously to suits Nos. 1408, 1409 and 1417 of 1979 which were filed by Jain Sudh Vanaspati Limited and Jain Export Private Limited against the New Indian Insurance Company Limited. The Chief Justice of Delhi stated that even though original side of work was taken away from S. N. Kumar and he was put on the appellate side in the second half of the year, 1980, that is, after the summer vacation, S. N. Kumar did not release these three suits as also some other suits which were part-heard before him and continued to deal with them. In August, 1980, observed the Chief Justice of Delhi, the same colleague of his who had talked to him earlier as also another colleague mentioned to him that doubts were being expressed about the integrity of S. N. Kumar vis-a-vis these three cases and some others whereupon he "made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations". The Chief Justice of Delhi also found that besides the above mentioned three cases there were a number of other cases which had been retained by S. N. Kumar on his board despite his transfer to the appellate side and in some of these cases "the parties involved were rich and influential including some former Princes". The Chief Justice of Delhi was at that time acting Chief Justice and after his appointment as permanent Chief Justice early in January, 1981, he looked into this matter a little more closely and made further inquiries and found that some of the lawyers were non-committal but there were others who "asserted with some force that Justice Kumar's reputation was not above board". The Chief Justice of Delhi also talked to some other colleagues besides the two who had spoken to him and they also said that "unconfirmed reports have been circulated in the Bar which were not very complimentary to Justice Kumar". The Chief Justice of Delhi pointed out that these were the facts on the basis of which he had come to the opinion that S. N. Kumar did not enjoy good reputation for integ-

rity. Now it was sought to be argued by learned counsel appearing on behalf of S. N. Kumar that these facts were not true and the Chief Justice of Delhi was not justified in reaching an adverse opinion against S. N. Kumar on the basis of these facts. The learned counsel for S. N. Kumar submitted that it was a well established practice of the Delhi High Court that a part-heard matter always went with the Judge and was heard by him whether he was transferred from the original side to the appellate side or vice versa and S. N. Kumar did not therefore act improperly in taking up part-heard matters even after he was transferred to the appellate side and no inference of lack of integrity could therefore be drawn against him merely because he continued to take up the part-heard matters. We are afraid this argument which seeks to assail the credibility of the opinion expressed by the Chief Justice of Delhi cannot be entertained by us. It is not open to the Court to hold an inquiry and determine for itself the correctness of the opinion of any of the constitutional authorities required to be consulted by the President. The opinion given by any such constitutional authority may be mistaken or erroneous but the corrective for such mistake or error is to be found in the constitutional provision itself and it cannot be provided by judicial intervention. The Court cannot take evidence for the purpose of determining whether the facts on which the opinion of a constitutional authority required to be consulted is based are true or not or whether the opinion expressed by such constitutional authority is well-founded or not. That is a function entrusted by the Constitution to the President, that is, the Central Government and it is for the Central Government to judge whether the opinion expressed by the constitutional authority such as the Chief Justice of the High Court is well-founded or not and whether it should be accepted or rejected. The court cannot be invited to go into the question whether the facts on which the opinion of the Chief Justice of Delhi was based were correct or not and whether the opinion expressed by him was or was not justified. But all the same we may point out that, even on the record as it stands, the statement of S. N. Kumar in his affidavit in regard to the practice of the Delhi Court, does not seem to accord with what the Chief Justice of India, according to his letter dated 22nd May, 1981 appears

to have learnt as a result of the inquiry made by him, namely, that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases provided that a substantial amount of time has been already spent on them. It is not every part-heard case which travels with the Judge from the original to the appellate side and vice versa but only those part-heard cases on which a substantial amount of time has already been spent. It may be pointed out that there is nothing to show that the part-heard suits which continued to remain with S. N. Kumar were suits on which a considerable amount of time had already been spent. In fact, suits Nos. 1408, 1409 and 1417 of 1979 were not at all part-heard suits and much less could it be said that a considerable time had already been spent by S. N. Kumar on them and yet, according to the Chief Justice of Delhi, they continued to be dealt by S. N. Kumar. But, as we observed a little while ago, this is not a matter which can be investigated by the court and it must be left to the President, that is, the Central Government to decide what credibility or weight to attach to the opinion of the Chief Justice of Delhi. The Court is concerned merely to enquire whether there was, in fact, full and effective consultation with the Chief Justice of Delhi and the Chief Justice of India and not whether the opinion given by the Chief Justice of Delhi or the Chief Justice of India was correct or not. It is possible that the opinion expressed by the Chief Justice of Delhi in the present case was mistaken or erroneous, but that is not an issue which can be examined by the court. The Chief Justice of Delhi bona fide came to the view that S. N. Kumar did not enjoy good reputation for integrity and he frankly expressed this view to the Law Minister as he was bound to do, but from this it does not necessarily follow that S. N. Kumar was lacking in integrity. The possibility of a bona fide error on the part of the Chief Justice of Delhi can never be excluded.

95. There is also inherent evidence in the letter dated 7th May, 1981, to show that the Chief Justice of Delhi acted bona fide in giving his opinion to the Law Minister in regard to the integrity of S. N. Kumar. The Law Minister had by his letter dated 15th April, 1981 re-

questioned the Chief Justice of Delhi to send his comments on the complaint made by one Sabir Hussain, an advocate. The Chief Justice of Delhi after examining the relevant files in regard to this complaint intimated to the Law Minister by his letter dated 7th May, 1981 that the complaint related to a suit which was disposed of by S. N. Kumar and it was therefore a matter which could be commented upon only judicially. The Chief Justice of Delhi adopted a correct approach in regard to this complaint and did not betray any undue enthusiasm to condemn S. N. Kumar. If the Chief Justice of Delhi were actuated by any mala fides against S. N. Kumar, he would have immediately seized upon this complaint and tried to utilise it for the purpose of supporting his opinion against the integrity of S. N. Kumar. We may point out that the Chief Justice of Delhi was perfectly right in not sitting in judgment over the decision given by S. N. Kumar in Sabir Hussain's suit, for it is not open to the Chief Justice of a High Court to examine the judgments given by an additional Judge and pass upon the quality of those judgments for the purpose of deciding whether the additional Judge should be reappointed or not. This exercise is not open to the Chief Justice of the High Court or to the Chief Justice of India because the additional Judge is not on probation and that is why we are constrained to observe though the case of O. N. Vohra not being before us, it is not necessary for us to do so, that the Chief Justice of Delhi was not justified in wadding through the papers of Kissa Kursi Ka Case for the purpose of deciding whether O. N. Vohra should be reappointed as an additional Judge. If O. N. Vohra was in error in not disposing of any application in the case or in making a wrong order on such application, it was for this Court in appeal, in the exercise of its judicial power, to comment on the judicial performance of O. N. Vohra and it was not for the Chief Justice of Delhi to sit in judgment over it for the purpose of condemning O. N. Vohra.

96. We may point out that the Chief Justice of Delhi also referred in his letter dated 7th May, 1981 to the low disposals of S. N. Kumar as also to his unsatisfactory behaviour with the members of the Bar. But these allegations need not detain us because the discontinuance of S. N. Kumar as an Additional Judge by

the President was not based on these allegations but it was founded only on the opinion expressed by the Chief Justice of Delhi in regard to the integrity of S. N. Kumar.

97. Now we come to a most important part of the controversy between the parties. The letter dated 7th May, 1981 addressed by the Chief Justice of Delhi to the Law Minister carried at the top the remark, "Secret (for personal attention only)". Now before this letter was sent by the Chief Justice of Delhi to the Law Minister, he had informed the Law Minister to treat it as secret but at that time the Law Minister did not try to probe into the implications of this request. Later, however, when the Chief Justice of Delhi, with reference to the letter proposed to be written by him in regard to the continuance of O. N. Vohra, requested that that letter also should be kept secret for personal attention only, the Law Minister asked him as to what exactly he meant by the remark "Secret (for personal attention only)" in the letter dated 7th May, 1981. The Chief Justice of Delhi in reply intimated to the Law Minister that what he meant was that that letter should not be brought to the notice of the Chief Justice of India and for three very good reasons, namely:

1. For reasons stated in the opening portion of his letter dated 7th May, 1981.

2. He felt highly embarrassed and perplexed after he addressed the original letter dated 19-2-1981 about Shri S. N. Kumar as the contents of that letter came clearly to be known to Shri S. N. Kumar and certain of his colleagues on the bench as a result of which it embarrassed him in discharge of his duties and functions. He felt that the contents of his letter dated 7th May, 1981 would also get into the hands of Shri S. N. Kumar and certain of his other colleagues and he would thereby be put to greater embarrassment which might create problems for him in future in the discharge of his duties as Chief Justice.

3. He felt that the Chief Justice of India had already started wrongfully denigrating him for his letter of February '81 as some of his friends conveyed to him the feelings of the C.J.E. The Chief Justice of Delhi also informed the Law Minister that "he could not

afford to spoil his relations with the Chief Justice of India on the one hand and on the other could not desist from expressing without fear or favour what he felt of certain matters" and if he was "going to be suspect for discharging his functions fairly and conscientiously, then his functioning as the Chief Justice would never be smooth vis-a-vis Chief Justice of India." The Law Minister placed this conversation on record in a note made by him on 19th May, 1981 as also in a letter dated 29th May, 1981 addressed by him to the Chief Justice of Delhi. Pursuant to this request made by the Chief Justice of Delhi, the Law Minister did not place the letter dated 7th May 1981 before the Chief Justice of India.

98. Though the Chief Justice of India had stated in his note dated 3rd March, 1981 that he would like to go carefully into the charges against S. N. Kumar and he had a meeting with the Chief Justice of Delhi on 26th March, 1981 in that connection, he did not write to the Law Minister until the 3rd week of May 1981 giving his opinion in regard to the question whether S. N. Kumar should be continued or not. Meanwhile, the time fixed by this Court for the Union of India to decide whether S. N. Kumar should be reappointed for a further term as an additional Judge or should be appointed as a permanent Judge or otherwise, was expiring on 27th May 1981 and the Law Minister was therefore constrained to address a letter dated 21st May, 1981 reminding the Chief Justice of India that he had stated in his note dated 3rd March, 1981 that he desired to look carefully into the charges against S. N. Kumar and requesting him that if he had made any inquiries, the Law Minister "would be grateful to have the details" and also pressing him to give his "urgent advice in regard to the continuance or otherwise" of the term of S. N. Kumar. It appears that this letter was received by the Chief Justice of India when he was camping at Simla during the summer vacation and on receipt of this letter, the Chief Justice of India addressed a communication dated 22nd May 1981 to the Law Minister stating that he had made the most careful and extensive inquiries in regard to the allegations against the integrity of S. N. Kumar as also his

rate of disposals and he was satisfied that there was no substance in any of these allegations. The Chief Justice of India pointed out that it was a common practice in the Delhi High Court that even after the allocation of a Judge was changed from the original side to the appellate side and vice versa, he continued to take up the part-heard cases on which sufficient amount of time had already been spent and S. N. Kumar therefore did nothing out of the way or unusual in taking up part-heard cases after the allocation of his work was changed. The Chief Justice of India observed that, on inquiries made by him, he disagreed with the view taken by the Chief Justice of Delhi that S. N. Kumar was either slow in his disposals or his integrity was doubtful and stated that it was not possible for him to agree that the term of S. N. Kumar should not be extended for the reasons mentioned by the Chief Justice of Delhi. Not one member of the Bar or Bench, said the Chief Justice of India, doubted the integrity of S. N. Kumar and on the contrary, some of them stated that he was a man of unquestioned integrity. It seems that some Intelligence Bureau report regarding S. N. Kumar was also sent by the Law Minister to the Chief Justice of India for his opinion along with his letter dated 22nd May, 1981, but the Chief Justice of India could not give his opinion with reference to the report since he had no time to examine it and he therefore stated that he would give his opinion after his return to New Delhi on 26th May 1981 and in the circumstances he recommended extension of the term of S. N. Kumar for another short term of three months. But, since one short term extension had already been granted, the Law Minister presumably thought that it would not be right to go on giving short term extensions but that a decision should now be taken whether S. N. Kumar should be continued or not and he therefore, proceeded to make his recommendation ignoring the Intelligence Bureau Report against S. N. Kumar, the rate of his disposals and even his alleged behaviour in Court and confining himself only to the question of his reputation for integrity. The Law Minister put up a note before the Prime Minister on 27th May, 1981 summarising the effect of the correspondence which had taken place be-

tween him, The Chief Justice of Delhi and the Chief Justice of India and pointing out that notwithstanding his specific request as to details of the inquiries made by him, the Chief Justice of India had not furnished the same to him and on the contrary the letter dated 22nd May 1981 addressed by the Chief Justice of India revealed "that he became a victim of his own charge of vagueness made by him against the Chief Justice of Delhi." The Law Minister stated in the note that he presumed that when the Chief Justice of Delhi and the Chief Justice of India met, "the former must have informed the latter about the details that he had mentioned in his letter dated 7th May 1981" and this inference was obvious from the letters addressed by the Chief Justice of Delhi to the Law Minister and the Chief Justice of India. The Law Minister observed that even according to the Chief Justice of India, the prevailing practice in the Delhi High Court was that not every part heard case but only those part-heard cases on which substantial amount of time had already been spent would go with the Judge when there was change of allocating of work but the Chief Justice of India had "surprisingly left the matter there" without probing further "as to whether the part-heard matters which Justice Kumar chose to handle as a single Judge notwithstanding his having been allocated to the Division Bench were such on which substantial amount of time had already been spent by him." It was also pointed out by the Law Minister in his note that it was not merely a case of drawing inference against the integrity of S. N. Kumar from his taking up part-heard cases after being transferred to the appellate side but the details given by the Chief Justice of Delhi in his letter dated 7th May 1981 went further and in contrast, the letter of the Chief Justice of India dated 22nd May, 1981 was not only lacking in details but was too vague. The Law Minister after making this analysis concluded that in the matter of assessment of integrity he preferred to accept the opinion of the Chief Justice of Delhi since "it is in his association that the Judge concerned discharges his duties and he has a better occasion and opportunity to watch his work and conduct" and on this view he

recommended that S. N. Kumar may not be continued any further as an additional Judge. The result was that S. N. Kumar was not continued as an additional Judge on the expiration of his term on 6th June, 1981.

99. Now the argument urged on behalf of the petitioners and S. N. Kumar was that the facts set out in the letter of the Chief Justice of Delhi dated 7th May, 1981 on which the decision of the Central Government not to continue S. N. Kumar as an additional Judge was based, were not disclosed to the Chief Justice of India and he had therefore no opportunity to consider those facts and give his opinion upon them and hence there was no full and effective consultation between the Central Government and the Chief Justice of India and the decision of the Central Government not to continue S. N. Kumar as an additional Judge was vitiated by reason of non-compliance with the requirement of consultation laid down in Article 217. This argument was pressed with great vehemence by the learned counsel appearing on behalf of S. N. Kumar and he injected considerable amount of passion in it, but we do not think it can be sustained. It is undoubtedly true that it was constitutionally impossible to the Central Government to arrive at the decision not to continue S. N. Kumar as an additional Judge without consultation with the Chief Justice of Delhi and the Chief Justice of India as mandatorily required by Article 217. But as pointed out by us in an earlier portion of the Judgment, it was not necessary that the full and identical facts which at once constituted "both the source and foundation of the final decision" of the Central Government should be placed before the Chief Justice of Delhi and the Chief Justice of India by the Central Government itself or that they should be brought to the notice of the Chief Justice of Delhi and the Chief Justice of India in any particular order or by following any particular procedure. What was necessary to constitute full and effective consultation within the meaning of Article 217 was that the Chief Justice of Delhi and the Chief Justice of India should have for their consideration "full and identical facts" which ultimately formed the basis of the decision.

of the Central Government. Now there can be no doubt that the decision of the Central Government not to appoint S. N. Kumar for a further term was based on the facts provided by the Chief Justice of Delhi in his letter dated 7th May, 1981 and if these facts were not placed before the Chief Justice of India before he gave his opinion in regard to the continuance of S. N. Kumar in his letter dated 22nd May, 1981, the decision of the Central Government would be clearly vitiated for want of full and effective consultation with the Chief Justice of India. It therefore, becomes material to enquire whether the facts set out in the letter of the Chief Justice of Delhi dated 7th May, 1981 were placed before the Chief Justice of India before he gave his opinion in the letter dated 22nd May, 1981. We have already discussed this question at some length while dealing with the meeting held by the Chief Justice of Delhi with the Chief Justice of India on 26th Mar., 1981, and the letters dated 28th March, 1981 addressed by the Chief Justice of Delhi to the Law Minister and the Chief Justice of India subsequent to that meeting. We have pointed out various circumstances which establish beyond any doubt that all the facts relating to the complaints and doubts expressed against the integrity of S. N. Kumar which were in the possession of the Chief Justice of Delhi must have been disclosed by him to the Chief Justice of India at the meeting held on 26th March, 1981. We need not repeat what we have already discussed in great detail but we may add that, judging as practical men conversant with the ordinary course of human affairs, we do not see any reason why the Chief Justice of Delhi should not have disclosed these facts to the Chief Justice of India, particularly when the Chief Justice of India had asked him to furnish "details and concrete facts in regard to the allegations against Justice Kumar". But, the question may then be asked as to why, if the Chief Justice of Delhi had disclosed all the facts set out in the letter dated 7th May, 1981, to the Chief Justice of India at the meeting held on 26th March, 1981, the Chief Justice of Delhi should have requested the Law Minister not to bring the letter dated 7th May, 1981 to the attention of the Chief Justice of India. The Law Minis-

ter was also intrigued by this request and he therefore, asked the Chief Justice of Delhi as to why he did not want the letter dated 7th May 1981 to be placed before the Chief Justice of India and the Chief Justice of Delhi gave three reasons which we have reproduced verbatim a little earlier. The first reason given by the Chief Justice of Delhi is extremely significant because it shows clearly and indisputably that the facts set out in the letter dated 7th May, 1981 were discussed by the Chief Justice of Delhi with the Chief Justice of India at the meeting held on 26th March, 1981. The Chief Justice of Delhi pointed out that he did not want the letter dated 7th May, 1981 to be brought to the attention of the Chief Justice of India because, as observed by him in the opening portion of the letter, he had discussed the "details and concrete facts in regard to the allegations against Justice Kumar" with the Chief Justice of India but the letter dated 28th March, 1981 was written by him in the terms in which it was couched as per the desire of the Chief Justice of India and therefore it was embarrassing and painful for him to write the letter dated 7th May, 1981. This reason given by the Chief Justice of Delhi carries a veiled suggestion though not expressly articulated but implicit in what he has stated, that the Chief Justice of India did not want him to place on record the "details and concrete facts in regard to the allegations" against S. N. Kumar and that is why he wrote the letter dated 28th Mar., 1981 in the terms he did according to the desire of the Chief Justice of India. This was perhaps the reason why the Chief Justice of Delhi found it embarrassing as well as painful to write the letter dated 7th May, 1981 setting out the "details and concrete facts in regard to the allegations" against S. N. Kumar, such a course being presumably contrary to the suggestion of the Chief Justice of India. We have, of course, no definite material before us on the basis of which we can conclude that the Chief Justice of India must have asked the Chief Justice of Delhi not to place the detailed facts relating to the complaints and doubts against S. N. Kumar in writing, but it does appear that some discussion must have taken place between the Chief Justice of Delhi and the Chief Justice of India as a result of

which the Chief Justice of Delhi bona fide carried a feeling that the Chief Justice of India might feel offended if the Chief Justice of Delhi were to put the detailed facts in regard to the allegations against S. N. Kumar on record, contrary to the view held by the Chief Justice of India. That is why the Chief Justice of Delhi was anxious that his letter dated 7th May, 1981 should not be brought to the attention of the Chief Justice of India. It was not because the Chief Justice of Delhi did not want the facts set out in the letter dated 7th May, 1981 to be disclosed to the Chief Justice of India that he requested the Law Minister not to place that letter before the Chief Justice of India, but because in view of the impression given or perhaps a suggestion made at the meeting by the Chief Justice of India, he apprehended that if he placed those facts on record contrary to the wish of the Chief Justice of India, the Chief Justice of India might feel offended and his relations with the Chief Justice of India might be spoilt. The second reason given by the Chief Justice of Delhi was that he had found that the contents of his previous letter dated 19th Feb., 1981 had come to be known to S. N. Kumar and some of his colleagues on the Bench and he therefore felt that if the letter dated 7th May, 1981 was not kept by the Law Minister with himself alone, but was sent by him to the Chief Justice of India, leakage might occur in the process and the contents of that letter also might get known to S. N. Kumar and others, causing him further embarrassment. The Chief Justice of Delhi might have been right or might have been wrong in entertaining the apprehension that if his letter dated 7th May 1981 was sent to the Chief Justice of India, its contents might in the process leak out and S. N. Kumar and others might come to know about them, but there is no reason to doubt that he bona fide felt this apprehension and that weighed with him by asking the Law Minister not to bring this letter dated 7th May 1981 to the attention of the Chief Justice of India particularly since he had already discussed the "details and concrete facts" set out in that letter with the Chief Justice of India. The third reason given by the Chief Justice of Delhi was that the Chief Justice of

India had already started wrongfully denigrating him for his letter dated 19th Feb., 1981 as intimated to him by his friends and that if the Chief Justice of India came to know that he had placed the detailed facts in regard to the allegations against S. N. Kumar on record contrary to his wish, the Chief Justice of India might feel offended and in that event his functioning as Chief Justice of Delhi would become difficult vis-a-vis the Chief Justice of India. This feeling voiced by the Chief Justice of Delhi might or might not be justified and the information received by him from his friends in regard to the feelings of the Chief Justice of India might or might not be correct, but we have no reason to hold that the Chief Justice of Delhi acted otherwise than bona fide in carrying this feeling. It may be that the Chief Justice of Delhi was wrong in entertaining this feeling, but his bona fides and veracity cannot be doubted for a moment. Moreover, that is not a matter which falls within the scope of our inquiry. What we have to determine is only a very limited issue, namely whether the facts set out in the letter dated 7th May, 1981 were disclosed by the Chief Justice of Delhi to the Chief Justice of India and so far as that is concerned, there is no doubt in our minds that these facts were discussed by the Chief Justice of Delhi with the Chief Justice of India at the meeting held on 26th March 1981 and no contrary inference can be drawn merely because, for the three reasons given by him, the Chief Justice of Delhi asked the Law Minister not to bring his letter dated 7th May 1981 to the attention of the Chief Justice of India.

100. There is, in fact, another piece of evidence which clearly establishes that the detailed facts in regard to the allegations against S. N. Kumar were discussed between the Chief Justice of Delhi and the Chief Justice of India. The petitioners and S. N. Kumar of course did not dispute that the meeting of 26th March, 1981 did take place between the Chief Justice of Delhi and the Chief Justice of India but their contention was that the only circumstance pointed out by the Chief Justice of Delhi to the Chief Justice of India for drawing an adverse inference against the integrity of S. N. Kumar was that

he had taken up part-heard cases of the original side even after he was transferred to the appellate side and no other facts in regard to the integrity of S. N. Kumar were discussed by the Chief Justice of Delhi with the Chief Justice of India. This contention of the petitioners and S. N. Kumar is wholly without force and it stands completely answered by what we have already discussed in the preceding paragraphs of this judgment. But, additionally, we may point out that this contention is also belied by the counter-affidavit dated 7th July 1981 filed by S. N. Kumar himself. If the only complaint in regard to integrity of S. N. Kumar mentioned by the Chief Justice of Delhi to the Chief Justice of India related to the taking up of part-heard cases by S. N. Kumar after transfer to the appellate side and that was a fortiori the only matter mentioned by the Chief Justice of India to S. N. Kumar when he called S. N. Kumar for discussion after his meeting with the Chief Justice of Delhi, it is difficult to understand how S. N. Kumar happened to refer to Suits Nos. 1408, 1409 and 1417 of 1979 in his counter-affidavit filed before the disclosure of the letter dated 7th May, 1981. These three suits were not part heard suits because the summonses for judgment in these three suits had been disposed of by S. N. Kumar on 7th March, 1980 by granting unconditional leave to defend and yet they were specifically referred to by S. N. Kumar in his counter-affidavit and explanation was sought to be given in regard to them. These three suits were particularly mentioned in the letter dated 7th May, 1981 and according to that letter, it was in relation to these suits that allegation of lack of integrity was made against S. N. Kumar. Now if the complaint against the integrity of S. N. Kumar in relation to these three suits was not mentioned by the Chief Justice of Delhi to the Chief Justice of India at the meeting held on 26th Mar. 1981, how could S. N. Kumar think of dealing with them in his counter-affidavit. The reference to these three suits in the counter-affidavit of S. N. Kumar clearly shows that apart from the part-heard suits, these three suits and the allegations relating to them were also disclosed by the Chief Justice of Delhi to the Chief Justice of India and if that

be so, there can be no doubt that all the facts in regard to the allegations against S. N. Kumar must have been discussed between the Chief Justice of Delhi and the Chief Justice of India.

101. It was suggested by the learned counsel on behalf of S. N. Kumar in the course of arguments that the Chief Justice of Delhi was anxious to keep the facts set out in the letter dated 7th May, 1981 secret from the Chief Justice of India, lest he should make his comments on them and reject the recommendation not to continue S. N. Kumar as an additional Judge based on these facts. But this suggestion is meaningless because the Chief Justice of Delhi in any event knew as a result of the meeting held on 26th March 1981 that the Chief Justice of India was not agreeing with the view expressed by him and was against his recommendation to discontinue S. N. Kumar as an additional Judge, while he, on his part, was not prepared to change his view and retract the recommendation made by him, because even after the discussion with the Chief Justice of India, he felt that he could not honestly recommend continuance of S. N. Kumar as an additional Judge and if that be so, there is no reason why he should have wanted to keep back his letter dated 7th May, 1981 from the Chief Justice of India except for the three reasons given by him. We must, of course, observe that in our opinion, howsoever strong and cogent might be the three reasons given by him, the Chief Justice of Delhi should never have asked the Law Minister not to place his letter dated 7th May, 1981 before the Chief Justice of India. So long as the Chief Justice of Delhi was acting bona fide in the discharge of his constitutional duty — and we have no doubt that in the matter of continuance of S. N. Kumar he was acting bona fide, he should not have bothered whether by his action in putting the facts on record in the letter dated 7th May, 1981 the Chief Justice of India would be offended and his relations with the Chief Justice of India would be spoilt. There are occasions when persons holding high constitutional offices are called upon to perform an unpleasant duty and this duty they have to perform, whatever by the consequences. If necessary, let the heavens fall but what is right and just

shall be done without fear or favour, affection or goodwill. Long years ago that great common law Judge, Lord Mansfield spoke of the judicial office in majestic tones and said:

"I will not do that which conscience tells me is wrong, upon his occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press; I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow.....Once for all, let it be understood, 'that no endeavours of this kind will influence any man who at present sits here.'"

What the learned Chief Justice said in regard to judicial function must apply with equal validity where a Judge is called upon to discharge any other function entrusted to him by the Constitution and he must boldly and fearlessly do that which Constitution commands. But merely because the Chief Justice of Delhi flinched and faltered out of a sense of apprehension that the Chief Justice of India might feel offended by his writing the letter dated 7th May, 1981, it does not follow that the facts set out in that letter were not personally discussed by him with the Chief Justice of India at the meeting held on 26 Mar. 1981. We are clearly of the view that the "full and identical facts" on which the decision of the Central Government was based were placed before the Chief Justice of India there was full and effective consultation with him before the Central Govt. reached the decision that S. N. Kumar should not be continued as an additional Judge. We may also point out that this decision of the Central Government was not based on any irrelevant considerations, since, as we have already pointed out earlier, lack of of reputation for integrity is certainly a most relevant consideration in deciding whether a person should be appointed a Judge.

102. We may make it clear that in taking this view we do not for a moment wish to suggest that S. N. Kumar was lacking in integrity. That is not a matter into which we are called upon to enquire and nothing that is stated by us should be regarded as expression of any opinion on this question. We may observe in

fairness to S. N. Kumar that the Chief Justice of India clearly stated it to be his opinion that the integrity of S. N. Kumar was unquestionable. What happened here was that there were two conflicting opinions given by the two constitutional authorities required to be consulted, namely, the Chief Justice of Delhi and the Chief Justice of India. Both were perfectly bona fide opinions and the Central Government had to choose between them and come to its own decision. The Central Government preferred the opinion of the Chief Justice of Delhi for the reasons mentioned in the note of the Law Minister dated 27th May, 1981 and decided not to appoint S. N. Kumar as an additional Judge for a further term. We do not think this decision suffers from any constitutional infirmity.

103. But before we part with this point, we must refer to one last contention urged on behalf of the petitioners and S. N. Kumar and that contention was that the non-appointment of S. N. Kumar as an additional Judge was tantamount to his removal and the Central Government was therefore bound to follow the principles of natural justice before taking the decision not to continue him an Additional Judge. This contention is without merit and the premise on which it is based is not sustainable. It is wholly incorrect to say, that when an additional Judge whose term has expired and who would therefore have to return to the Bar or to the subordinate judicial service, is not appointed a permanent Judge or an additional Judge for a further term he is removed by the Central Government. We have already discussed this aspect of the matter and pointed out that on the expiration of his term, an additional Judge has no right to be appointed a permanent Judge or an additional Judge for a further term and his only right is to be considered for such appointment and if as a result of such consideration, after going through the consultation process envisaged in Article 217, he is not considered suitable for further appointment and it is decided not to reappoint him, he cannot complain against the decision, unless he can show that there was no full and effective consultation as contemplated in Art. 217 or that the decision not to appoint him was based on

irrelevant considerations. If he is not appointed a permanent Judge or an additional Judge for a further term, he goes out, but that happens because the term, for which he was originally appointed has come to an end and not because he is removed. There is therefore no question of giving him an opportunity to be heard before the decision is taken not to appoint him as a permanent Judge or an additional Judge. We must in the circumstances reject the challenge levelled on behalf of the petitioners and S. N. Kumar against the decision of the Central Government not to appoint S. N. Kumar as an additional Judge for a further term.

104. We would therefore dismiss the first group of writ petitions in so far as they seek relief in respect of O. N. Vohra and S. N. Kumar. No relief can be granted in respect of O. N. Vohra because, though added as a party respondent, he has not appeared and claimed any relief against the decision of the Central Government to discontinue him as an additional Judge and has accepted such decision without protest or complaint. That is the reason why we have not examined the complaint of the petitioners in regard to discontinuance of O. N. Vohra as an additional Judge. So far as S. N. Kumar is concerned, we have rejected his claim for relief, because, in our opinion, and we have already given our reasons taking this view, the decision to discontinue him as an additional Judge was taken by the Central Government after full and effective consultation with the Chief Justice of Delhi and the Chief Justice of India and it was not based on any irrelevant considerations. We have taken the view that the circular letter issued by the Law Minister was not unconstitutional and void and hence the first group of writ petitions must also fail in so far as they challenge the constitutional validity of the circular letter. The other relief claimed in the first group of writ petitions have also been rejected by us and hence this group of writ petitions must wholly fail.

105. But, while dismissing this group of writ petitions, we may observe that though, in our opinion, there was full and effective consultation with the Chief

Justice of Delhi and the Chief Justice of India before the decision was taken by the Central Government to discontinue S. N. Kumar as an additional Judge and neither the petitioners nor S. N. Kumar could therefore have any legitimate cause for grievance against such decision, it would be a good thing if, having regard to the high status and dignity of a High Court Judge, the Union of India could see its way to place the letter dated 7th May, 1981 addressed by the Chief Justice of Delhi to the Law Minister before the Chief Justice of India and elicit his opinion with reference to that letter and then consider whether S. N. Kumar should be re-appointed as an additional Judge in the Delhi High Court. This is only a suggestion which we are making *ex cathedra* for the acceptance of the Government; if thought fit.

K. B. N. Singh's case

106. The second group of writ petitions raises the question of constitutional validity of the orders transferring Chief Justice M. M. Ismail to the Kerala High Court and Chief Justice K. B. N. Singh to the Madras High Court. However, so far as Chief Justice M. M. Ismail is concerned, the question has become academic because he has stated in the counter-affidavit filed by him in reply to the writ petition of Miss Lily Thomas that he does not want anyone to litigate for or against him nor does he want anything about him to be argued or debated and he has subsequently resigned his office as Chief Justice of the Madras High Court the only question which therefore survives for consideration is whether the transfer of Chief Justice K. B. N. Singh to the Madras High Court could be said to be constitutionally invalid. The determination of this question obviously depends upon the true scope and ambit of the power of transfer conferred under Cl. (1) of Art. 222. That Article reads as follows:

"Article 222 (1). The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court."

This article came up for consideration before a Bench of five Judges of this Court in Sankalchand Sheth's case (AIR 1977 SC 2328) (*supra*), Mr. Seervai arguing on

behalf of Sankalchand Sheth in that case contended that a Judge cannot be transferred from one High Court to another without his consent, and there were two grounds on which he rested this contention. One was that on a proper construction of Art. 222 Cl. (1) in the context of the basic principle of independence of the judiciary, consent must be read as a necessary requirement in that article and the other was that since transfer of a Judge involves a fresh appointment in the High Court to which he is transferred, such transfer cannot be made without the consent of the Judge. The majority Judges comprising Chandrachud, J., (as he then was) Krishna Iyer, J. and Fazal Ali, J., rejected this contention of Mr. Seervai and held that there was no need or justification, in order to uphold and protect the independence of the judiciary, to construe Art. 222 Cl. (1) as meaning that a Judge can be transferred from one High Court to another only with his consent. Justice Untwalia and myself, however, took a different view. We upheld the contention of Mr. Seervai and held that a Judge cannot be transferred from one High Court to another without his consent. Mr. Justice Untwalia based his conclusion on the second ground urged by Mr. Seervai, namely, that the transfer of a Judge involves fresh appointment in the High Court to which he is transferred and the Judge is also required to take a fresh oath in accordance with Article 219 and in the form prescribed in the Third Schedule and he cannot therefore be transferred without his consent. I accepted both the grounds urged by Mr. Seervai in support of his contention and held that it is no doubt true that the words "without his consent" are not to be found in Cl. (1) of Article 222, but the word "transfer" which is used there is a neutral word which can mean consensual as well as compulsory transfer and if the high and noble purpose of the Constitution to secure the independence of superior judiciary by insulating it from all forms of executive control or interference is to be achieved, the word "transfer" must be read in the limited sense of consensual transfer. I pointed that when a Judge is transferred to another High Court, he has to make and subscribe a fresh oath or affirmation before the Governor of the State to which

he is transferred before he can enter upon the office of a Judge of that High Court and such transfer would not become effective unless the Judge makes and subscribes an oath or affirmation before the Governor and that would plainly be a matter within the volition of the Judge and I therefore, concluded that since the volition of the Judge who is transferred is essential for making the transfer effective, there can be no transfer of a Judge of a High Court without his consent. The view taken by Justice Untwalia and myself was thus a minority view, but since the present writ petitions were being heard by a larger Bench than that which decided Sankalchand Sheth's case, Mr. Seervai canvassed the minority view for acceptance by the Bench of seven Judges. The learned Attorney General, on the other hand, contended that the majority view taken in Sankalchand Sheth's case represented the correct law on the point and the Bench of seven Judges should affirm that view. I have carefully examined the arguments which have been advanced with great ability and learning on both sides, but I am afraid I find it impossible to change the view I took in Sankalchand Sheth's case. Nothing that has been said in the course of the arguments has persuaded me to take a different view. I remain unconvinced of the incorrectness of the view taken by me and I hold to that view despite the fact that I still happen to be in a minority. I have already given elaborate reasons in my judgment in Sankalchand Sheth's case for taking the view that a Judge cannot be transferred from one High Court to another without his consent and I think it would be a futile exercise on my part to reiterate those reasons once again in this judgment. I hold for the reasons given by me in my judgment in Sankalchand Sheth's case that the power of transfer under Article 222 clause (1) cannot be exercised against a Judge without his consent. It is, I may repeat, a highly dangerous power involving great hardship and injury to the Judge transferred including a stigma on his reputation in cases where the transfer is not effected pursuant to any policy but the Judge is picked out for transfer on a selective basis and to my mind, it makes no difference whether the transfer is made by the Government on its own

initiative or it is made at the instance of the Chief Justice of India as in the case of Chief Justice K. B. N. Singh,

107. Even if I am wrong in taking the view that no Judge can be transferred from one High Court to another without his consent, the transfer of Chief Justice K. B. N. Singh must still fail. It has been held in Sankalchand Sheth's case (AIR 1977 SC 2328), and on this point there was no disagreement between the majority and the minority, that the power to transfer a Judge from one High Court to another can be exercised only in public interest and there must be full and effective consultation between the President, that is, the Central Government and the Chief Justice of India before the decision to transfer a Judge is taken. I wholly accept this construction of clause (1) of Article 222 and since full and detailed reasons have been given in the various judgments in Sankalchand Sheth's case I need not indulge in the same exercise again.

108. Now it is obvious that when a Judge is transferred from one High Court to another by way of punishment, it can never be in public interest for no public interest would countenance punishment of a Judge except by way of impeachment under proviso (b) to clause (1) of Article 217 read with clause (4) of Article 124. There is a clear antithesis between a transfer by way of punishment and a transfer in public interest and therefore, a transfer by way of punishment must be held to be outside the scope and ambit of Article 222 clause (1). In fact, it was so held in Sankalchand Sheth's case by all the Judges. But the question then arises when can it be said that a Judge is transferred from one High Court to another by way of punishment. Undoubtedly, when a Judge is transferred by the Government because he does not toe the line of the executive or gives decisions against the Executive or has for some reason or the other fallen from its grace, it would be a transfer by way of punishment. That would be the plainest case of penal transfer. But these are not the only circumstance in which a Judge may be transferred from one High Court to another by way of punishment. The element of punishment is not confined merely to the wrath of the Government on account of a Judge be-

ing inconveniently independent. There may be cases where a Judge may be transferred because he is not behaving properly or is conducting himself in a manner not befitting the position of a High Court Judge and such a transfer grounded on the conduct or behaviour of the Judge would clearly be punishment, even if it be on the recommendation of the Chief Justice of India. It is also possible that the Chief Justice of India may find in a given case that a Judge of a High Court is promoting the interest of his son or brother in practice or by passive inaction allowing his son or brother to exploit his relationship with the Judge for the purpose of advancing his professional interest and in such a case, the Chief Justice of India may recommend that the Judge should be transferred to another High Court and the Government may accept such recommendation. Would the transfer in such a case not clearly be by way of punishment? There may also be cases where the recommendation of the Chief Justice of India for transfer of a Judge may proceed from his disagreement with the social philosophy of the Judge or his unhappiness with the manner in which he is deciding cases and the Government may unquestioningly accept such recommendation. This would also, in my opinion, be nothing short of punishment. I take the view that whenever transfer of a Judge is effected for a reason bearing upon the conduct or behaviour of the Judge, it would be by way of punishment and therefore, not permissible under Cl. (1) of Article 222. When I say this, I may make it clear that I do not regard transfer *per se* as a punishment. It is the reason for which the transfer is made, which makes it penal and if that reason is related to the conduct or behaviour of the Judge the transfer would clearly be a penal transfer not in public interest and hence outside the scope and ambit of Article 222 clause (1).

109. That takes me to a consideration of the question whether in the present case where there was full and effective consultation between the Central Government and the Chief Justice of India before the decision was taken to transfer Chief Justice K. B. N. Singh to the Madras High Court and whether such transfer was effected in public interest

and not by way of punishment. While considering this question, I would like to emphasise at the outset, and the point I am making here is one of great importance, that when a transfer of a Judge of a High Court is challenged in a Court of Law, the burden must lie upon the Government to sustain the validity of the transfer. The power of transfer even according to the majority decision in Sankalchand Sheth's case (AIR 1977 SC 2328), is a drastic power to be exercised only in rare cases as it has the effect of destroying the right of the Judge who is transferred, to continue as a Judge in the High Court to which he was appointed until he reaches the age of 62 years and removing him to another High Court where possibly he would not have agreed to go if he had been asked at the time of his original appointment. When an order of transfer is made, the Judge has a difficult choice, either to go to the High Court where he is transferred or to resign and having burnt his boats and given up his profession long back, he would be in great difficulty if he chose to resign and therefore, from a practical point of view, he would have no option but to go to the other High Court, howsoever inconvenient it may be to him. Moreover, it would be almost impossible for the Judge to successfully challenge the order of transfer if the burden of showing its invalidity were cast upon him. Even as it is, the Judge would have to wage a lone and unequal battle against the Government when he challenges the Order of transfer and if the onus of establishing facts invalidating the order of transfer were thrown upon him, the battle would be rendered still more unequal and the scales would be weighted heavily against him. The result would be that even an invalid order of transfer would pass muster on account of the inability of the Judge to discharge the burden of showing the invalidity of the order of transfer and the virtual immunity thus granted to the order of transfer would seriously impair the independence of the judiciary. Furthermore, having regard to the high status and dignity of a Judge of a High Court, it is but fair that when the Government is displacing the right of the Judge to continue in his High Court, up to the age of 62 years, he should be told what are the reasons which have weighed

with the Government in transferring him. He must be assured that all the constitutional requirements have been complied with. Besides, the facts showing that there was full and effective consultation between the Government and the Chief Justice of India and the reasons for making the transfer would be within the special knowledge of the Government and the onus must therefore be upon the Government to prove them. Thus the burden of sustaining the validity of the order of transfer must rest on the Government and this burden, it may be pointed out, is a heavy burden, which must be satisfactorily discharged by the Government. This is the same principle which has been applied by this Court when the legality of detention of a person is challenged by filing an application for a writ of habeas corpus. This Court has consistently taken the view in such cases, unlike the House of Lords in *Zamir's case*, that the burden of sustaining the validity of the detention must lie on the detaining authority.

110. I may observe that this is a remarkably unusual case in which there is substantially a contest between the Chief Justice of a High Court on one hand and the Chief Justice of India on the other. The Government is, of course, a party to this contest since it is ultimately the order of transfer made by the Government which is called in question by Chief Justice K. B. N. Singh, but since the order of transfer was made by the Government on the recommendation of the Chief Justice of India, it is the Chief Justice of India who has accepted the gauntlet and joined the contest against Chief Justice K. B. N. Singh. The Chief Justice of India has filed a counter-affidavit in reply to the writ petition of Chief Justice K. B. N. Singh and others, but having filed such counter-affidavit, he has chosen not to appear before us through counsel. The result is that we have been deprived of the opportunity of asking for clarification of some of the averments made in the counter-affidavit, which appeared at least to some of us to be vague and indefinite. When we asked the learned Solicitor General in the course of the hearing to give us particulars of one statement made in the counter-affidavit

of the Chief Justice of India, namely, "Every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer," the learned Solicitor General rightly rejoined by saying that he was not appearing for the Chief Justice of India and he could not therefore give the particulars asked for by the Court. We have therefore to proceed on the basis of the counter-affidavit of the Chief Justice of India as it stands without any further clarification or elucidation. We must also remind ourselves when we are deciding this contest between Chief Justice K. B. N. Singh on the one hand and the Chief Justice of India and the Government on the other, that we are sitting as Judges, who have taken an oath to perform the duties of our office without fear or favour, affection or ill-will and it is our solemn and sacred duty to do justice, irrespective of who is the litigant before us. We have the highest regard for the Chief Justice of India as we have for Chief Justice K. B. N. Singh, but they are both litigants before us and while deciding the contest between them, we must be blind to their status or position and we must adjudicate the controversy between them as we might do in the case of any other litigants before us. We must apply the same standards in assessment of the affidavits and Counter-affidavits filed by Chief Justice K. B. N. Singh and Chief Justice of India as we would do in any other case. The scales of justice cannot tilt one way or another merely because a litigant before us happens to be the Chief Justice of a High Court or the highest amongst the Indian Judiciary. They are all equal before us when we sit on the seat of Justice and we shall do justice, without fear or favour, affection or ill-will and decide the issues arising in the case objectively and dispassionately, forgetful of the high status and dignity enjoyed by the two litigants before us.

111. With these preliminary observations I may now proceed to consider the facts. But on facts, I do not wish to say much because I agree with the judgment prepared by my learned brother D. A. Desai on this point. He has carefully analysed the correspondence as well as the affidavits and reached the conclusion that there was no full and

effective consultation between the Central Government and the Chief Justice of India before the decision was taken to transfer Chief Justice K. B. N. Singh to the Madras High Court and the transfer was made by way of punishment and not in public interest. I wholly endorse this view taken by him as also the reasons given by him in support of that view, but having regard to the importance of the matter affecting as it does the fate of the Chief Justice of a High Court, I would add a few words in support of what my learned brother D. A. Desai, has stated in his judgment.

112. So far as the first question is concerned whether there was full and effective consultation between the Central Government and the Chief Justice of India, I have already pointed out, while discussing the scope and effect of clause (1) of Article 217 as to what is the meaning and content of 'consultation'. It requires that the Central Government must make available to the Chief Justice of India relevant data in regard to the Judge proposed to be transferred and the Chief Justice of India must also elicit and ascertain all relevant material relating to the Judge either directly from him or from other reliable resources and place such material before the Central Govt. Each of the two constitutional authorities, the Central Govt, and the Chief Justice of India, must have for its consideration full and identical facts which can at once constitute both the source and foundation of the final decision. There must be careful and intelligent deliberation on the part of each of them on full and identical facts. Each must make known to the other its point of view and they must discuss and examine the relevant merits of the views. It is only after this process is gone through that a decision can be taken by the Central Government to transfer a Judge from one High Court to another. Now here, in the present case, the initiative for transferring Chief Justice K. B. N. Singh was taken by the Chief Justice of India. He proposed by his letter dated 7th Dec., 1980, that Chief Justice K. B. N. Singh may be transferred to the High Court of Rajasthan. This means that on his part he had made up his mind prior to 7th December, 1980 that Chief Justice K. B. N. Singh should be moved

out of Patna. Now admittedly, the Chief Justice of India had not mentioned anything about the proposed transfer to Chief Justice K. B. N. Singh prior to making his proposal of 7th Dec., 1980. This was rather strange — I might say almost inexplicable — because the judgments of the Chief Justice of India and Krishna Iyer, J. in *Sankalchand Sheth's case* (AIR 1977 SC 2328) have clearly laid down that it is the duty of the Chief Justice of India to elicit and ascertain, if necessary by asking directly the Judge concerned all relevant material relating to the Judge and such material would include, for example, the health of the Judge, the availability of medical facilities in and the climate of the place to which he is to be transferred, the business or occupation of his wife or daughter, the position of his parents and the education of his children etc. as a part of the process of consultation. The Chief Justice of India should have therefore, before making his proposal for transfer by his letter dated 7th Dec. 1980, informed Chief Justice K. B. N. Singh about his proposed transfer to Rajasthan High Court and enquired from him whether he would have any particular problems or difficulties, if he was transferred to the Rajasthan High Court. But unfortunately, no such enquiry was made by the Chief Justice of India before he made his proposal for transfer of Chief Justice K. B. N. Singh to the Rajasthan High Court, which proposal might well have been accepted by the Central Government immediately, but for the fact that there was some difficulty in regard to another proposal simultaneously put forward by the Chief Justice of India for transfer of Chief Justice K. D. Sharma from the Rajasthan High Court to the Kerala High Court. The Chief Justice of India however, changed his proposal in regard to the transfer of Chief Justice K. B. N. Singh and asked the Central Government by his letter dated 20th Dec., 1980, addressed to the Law Minister to transfer Chief Justice K. B. N. Singh to the Madras High Court. There was thus a change in the proposal for transfer of Chief Justice K. B. N. Singh within a period of less than 14 days. But even then, the Chief Justice of India did not inform Chief Justice K. B. N. Singh that he was being transferred to the Madras High

Court nor did he enquire to gather from him any relevant material bearing upon the proposal for transfer. Now it is significant to note that neither of the two letters dated 7th Dec., 1980 and 20th Dec., 1980 sets out any facts showing why the Chief Justice of India desired that Chief Justice K. B. N. Singh should be transferred from the Patna High Court. Neither of these two letters throws any light as to what were the facts on the basis of which the Chief Justice of India recommended transfer of Chief Justice K. B. N. Singh from the Patna High Court and there is also nothing in these two letters to show that these facts were communicated by the Chief Justice of India to the Law Minister or to any other high level functionary of the Central Government. The letter dated 7th Dec., 1980 merely states that he was recommending the transfer of Chief Justice K. B. N. Singh on the basis of the data which he had collected as a result of personal inquiries made from several lawyers and many other Judges of the High Court and which he had considered with the greatest objectivity. What were the data collected by him on the basis of which he was recommending the transfer of Chief Justice K. B. N. Singh was not disclosed by the Chief Justice of India in his letter dated 7th Dec., 1980 and from the tenor of this letter it appears though it cannot be said with certainty that no such data must have been communicated to the Law Minister prior to 7th December, 1980, for otherwise the Chief Justice of India would have stated in this letter that he was recommending the transfer on the basis of the data which he had already pointed out to the Law Minister. It is a little surprising that if any facts bearing upon the transfer of Chief Justice K. B. N. Singh were to be communicated by the Chief Justice of India to the Law Minister, it should not have been done in writing particularly when the letter dated 7th Dec., 1980, recommending the transfer was addressed by the Chief Justice of India to the Law Minister, and this was followed by another letter dated 20th Dec., 1980, addressed to the Law Minister. It was quite some time after the revised proposal for transfer of Chief Justice K. B. N. Singh was made in the letter dated 20th Dec., 1980 that on 5th Jan., 1981, the Chief

Justice of India telephoned to Chief Justice K. B. N. Singh and informed him that Chief Justice M. M. Ismail was proposed to be transferred to the Kerala High Court and that he may therefore have to go to the Madras High Court and enquired him "if he had anything to say on the question of his proposed transfer". Chief Justice K. B. N. Singh thereupon enquired from the Chief Justice of India as to why "he may be transferred to Madras" on which, according to the counter-affidavit of the Chief Justice of India, he gave two reasons, one that it was Government policy and the other that it was proposed to transfer Chief Justice M. M. Ismail from Madras and "it was necessary to appoint an experience and senior Chief Justice in his place." Chief Justice K. B. N. Singh, however, informed the Chief Justice of India that his mother was bedridden and was not in a position to go with him to Madras and that if his transfer was insisted upon, he would prefer to resign. The Chief Justice of India requested him not to act in haste and to give the matter a close thought. Chief Justice K. B. N. Singh thereafter met the Chief Justice of India in New Delhi in the evening of 8th Jan., 1981 and discussed the question of his proposed transfer with him for some time. When Chief Justice K. B. N. Singh mentioned his difficulty in regard to his mother's advanced age and illness, the Chief Justice of India told him that he was unable to agree with him "since there were available persons in his family who could look after his mother and in any case, his brother S. B. N. Singh who was practising in the High Court was quite capable of looking after the mother." Chief Justice K. B. N. Singh, however, informed the Chief Justice of India that his mother has a special attachment to him and he could not leave her to the care of his brother or other members of his family. Chief Justice K. B. N. Singh then told the Chief Justice of India that certain persons connected with the High Court who were influenced by communal considerations, had made some baseless complaints against him and that he on his part did not permit communal or any other extraneous considerations to influence him administratively or judicially. The Chief Justice of India, how-

ever, assured Chief Justice K. B. N. Singh that he did not hold that Chief Justice K. B. N. Singh himself was to blame, but certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. Chief Justice K. B. N. Singh thereafter left and on the next day that is, 9th Jan., 1981, the Prime Minister endorsed her decision on the file in regard to transfer of Chief Justice K. B. N. Singh to the Madras High Court and the formal order effecting such transfer was made on 19th Jan., 1981.

113. It is extremely difficult on these facts to hold that there was full and effective consultation between the Central Government and the Chief Justice of India. The burden of showing that there was full and effective consultation rests heavily on the Government and it is not possible to say that this burden has been discharged by the Government. I have already referred to the correspondence exchanged between the Chief Justice of India and the Law Minister and there is nothing in it which shows that any facts bearing upon the transfer of Chief Justice K. B. N. Singh were communicated by the Chief Justice of India to the Law Minister. We were informed by the learned Solicitor General on an enquiry made by us that there is also nothing in the notings which might indicate even remotely that any such facts were communicated by the Chief Justice of India to the Law Minister or to the Prime Minister or to any other high level constitutional functionary of the Central Government. The only statement which we have on this point is the one made by the Chief Justice of India in his counter-affidavit, namely, that "every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer." This statement, even if it be accepted as wholly correct, is, in my opinion, not sufficient to discharge the burden which lies upon the Government to show that there was full and effective consultation. In the first place, it does not say who was the constitutional functionary on behalf of the President with whom "every relevant aspect of that question was discussed." Did the Chief Justice of India discuss

the matter with the President personally, though, of course, a statement was made to us on behalf of the President that he had no discussion with the Chief Justice of India in this respect or did he discuss with the Prime Minister or did he discuss with the Law Minister? We are not informed as to who was the person with whom the discussion took place and unless the name of the person is mentioned, I do not see how the correctness of the statement can be verified or challenged by the other side. It is not enough merely to repeat the constitutional formula that every aspect of the question was discussed with the President. It is an affidavit which is made by the Chief Justice and the affidavit must contain not merely the constitutional incantation but facts giving particulars stating with whom the Chief Justice of India had discussion. The affidavit also does not give the date or dates when the discussion took place between the Chief Justice of India and the President. The statement made in the affidavit is delightfully vague. According to this statement, the discussion took place "both before and after I proposed the transfer". This would mean that the discussion could have taken place at any time before 20th Dec., 1980 or at any time after 20th Dec. 1980 up to 9th Jan., 1981. How can Chief Justice K. B. N. Singh possibly meet such a vague allegation? I personally fail to see why if the Chief Justice of India had discussion with the Law Minister or the Prime Minister in regard to the proposed transfer of Chief Justice K. B. N. Singh, the Chief Justice of India could not give us the date or dates when such discussion took place, because surely he must be having some record in regard to his meetings with the Law Minister or the Prime Minister. Then again, the statement in the affidavit merely says that every relevant aspect of the question was discussed, but does not indicate what aspects were discussed. It is for the Court to decide whether all relevant facts were discussed between the Chief Justice of India and the Central Government so as to constitute full and effective consultation and this enquiry cannot be pre-empted by the Chief Justice of India by asserting in his affidavit that every relevant aspect of the question was discussed by him with the

Central Government. It is not for the Chief Justice of India to decide, but it is for the Court to be satisfied, that all relevant aspects of the question were discussed by him with the Central Government. It is possible that the Chief Justice of India might have considered some facts as irrelevant and not discussed them with the Central Government, but the Court may find that such facts were relevant and should have formed the subject matter of discussion and it is equally possible that some facts might have been discussed which the Chief Justice of India considered relevant but the Court might find them to be irrelevant. We are not told by the Chief Justice of India as to what were the facts discussed by him with the Central Government and in the absence of this information, it is not possible for us to conclude that there was full and effective consultation between the Chief Justice of India and the Central Government.

114. There is also another infirmity from which the process of consultation suffers. It was on 8th Jan., 1981 that Chief Justice K. B. N. Singh discussed with the Chief Justice of India the difficulty arising from his mother's advanced age and illness and when the Chief Justice of India pointed out to him that his brother and other family members were there to look after his mother, he explained to the Chief Justice of India that his mother had a sentimental attachment to him and he could not leave her to the care of his brother or other members of the family. There is nothing to show that this particular difficulty of Chief Justice K. B. N. Singh was brought to the notice of the Central Government by the Chief Justice of India before the decision was taken by the Prime Minister on 9th January, 1981, to transfer Chief Justice K. B. N. Singh. The meeting between Chief Justice K. B. N. Singh and the Chief Justice of India took place at 7.00 p.m. on 8th January, 1981 and on the next day, the Prime Minister made her endorsement on the file and there is absolutely nothing to show, nothing even in the counter-affidavit of the Chief Justice of India, that after his talk with Chief Justice K. B. N. Singh, he telephoned either to the Law Minister or to the Prime Minister pointing out

this particular difficulty of Chief Justice K. B. N. Singh to the Central Government. There is nothing even in any notings on the file showing that any such information was conveyed by the Chief Justice of India to the Law Minister or to the Prime Minister in the evening of 8th Jan., 1981 or on 9th Jan., 1981. This omission to communicate the difficulty which would be experienced by Chief Justice K. B. N. Singh as a result of transfer is sufficient to vitiate the process of consultation and it must be held that there was no full and effective consultation as required under Art. 222 Cl. (1).

115. We may now examine the reasons for which Chief Justice K. B. N. Singh was transferred to the Madras High Court. Two reasons were given by the Chief Justice of India to Chief Justice K. B. N. Singh in the course of the telephonic talk which took place on 5th Jan., 1981. One was that the transfer was being made on account of Government policy and the other was that since Chief Justice M. M. Ismail was being transferred from Madras, it was necessary to appoint an experienced and senior Chief Justice in his place. So far as the first reason is concerned, I find it rather difficult to appreciate it. The Government policy which the Law Minister put forward was that there should be Chief Justice from outside in every High Court, but the Chief Justice of India in his letter dated 7th Dec., 1980 expressed his firm opposition to this Government policy and stated that transfers of Chief Justices "may be made in appropriate cases for strictly objective reasons," and it was in pursuance of this view taken by him that he recommended the transfer of Chief Justice K. B. N. Singh. The Chief Justice of India did not recommend the transfer of Chief Justice K. B. N. Singh pursuant to the Government policy because he was firmly opposed to that policy, but he recommended the transfer because he thought that for strictly objective reasons, it was necessary to transfer Chief Justice K. B. N. Singh. Then, how could the Chief Justice of India tell Chief Justice K. B. N. Singh that he was being transferred on account of Government Policy. The second reason given by the Chief Justice of India is also a little intriguing. If Chief Justice

K. B. N. Singh was proposed to be transferred to Madras because it was necessary to appoint an experienced and senior Chief Justice in place of Chief Justice M. M. Ismail, why, may I ask was he proposed for transfer to the Rajasthan High Court? This reason could not possibly apply to the proposed transfer to the Rajasthan High Court. There is no doubt that Chief Justice K. B. N. Singh was proposed to be transferred not because he was a senior and experienced Chief Justice who was required to man the High Court of Madras in place of Chief Justice M. M. Ismail but because the Chief Justice of India was of the view that he should be moved out of the Patna High Court.

116. Then, in the course of the discussion at the meeting which took place on 8th Jan., 1981, the Chief Justice of India stated to Chief Justice K. B. N. Singh that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. I do not know whether this statement was made by the Chief Justice of India by way of furnishing to Chief Justice K. B. N. Singh the reason why he was being transferred because I do not find it so stated in the counter affidavit of the Chief Justice of India. But even if it be assumed that this was the real reason why Chief Justice K. B. N. Singh was sought to be transferred from the Patna High Court, I cannot say whether this reason was communicated by the Chief Justice of India to the Central Government because there is nothing in the correspondence or in the notings showing that any such communication was made by the Chief Justice of India to the Central Government, nor does the counter affidavit of the Chief Justice of India throw any light on this point beyond making a vague and indefinite statement which I have already discussed. This circumstance would also show that there was no full and effective consultation. But assuming that this reason was communicated by the Chief Justice of India to the Central Government and it weighed with the Central Government in making the order of transfer; it would, I am afraid, have the effect of converting the transfer into a penal transfer. It is undoubtedly true that the Chief Justice of India told

Chief Justice K. B. N. Singh that he was not personally to blame, but if he was by his passive inaction allowing certain persons — and certain persons in this context must mean his close relatives — to take advantage of their proximity to him and he was being transferred on that account, it would certainly be a transfer for a reason related to his conduct or behaviour. But quite apart from that, I find that this is not the reason which weighed with the Central Government in making the order of transfer against Chief Justice K. B. N. Singh. The Central Government stated in a note handed over by the learned Solicitor General to the Court that the reason why the Central Government made the order of transfer was; "(1) it was felt that not agreeing to these transfers may be construed as though the Government is departing from the view of having Chief Justices from outside; (2) the policy aspect could still be pressed into service later." This reason which prevailed with the Central Government was totally different from the reason which induced the Chief Justice of India to make his proposal for transfer and there is nothing to show that this reason which weighed with the Government of India was communicated to the Chief Justice of India for his opinion. There was therefore clearly no full and effective consultation even in regard to this aspect. Moreover this reason given by the Central Government for making the order of transfer clearly shows that the Central Government did not apply its mind to the question whether on the facts, it was necessary or expedient to transfer Chief Justice K. B. N. Singh, but accepted the recommendation of the Chief Justice of India, because it thought that if the recommendation of the Chief Justice of India was accepted and the transfers of Chief Justice M. M. Ismail, and Chief Justice K. B. N. Singh were made, it would be easier for the Central Government thereafter to press for acceptance of the government policy by the Chief Justice of India. There was in my opinion, clearly abdication of its constitutional function by the Central Government. The order of transfer of Chief Justice K. B. N. Singh to the Madras High Court must therefore be held to be unconstitutional and void.

117. I would, therefore, allow the second group of writ petitions in so far as they challenge the constitutional validity of the order transferring Chief Justice K. B. N. Singh and issue a writ declaring the order of transfer of Chief Justice K. B. N. Singh as unconstitutional and void.

118. There will be no order as to costs in both the groups of writ petitions. There will also be no order on the special leave petition.

GUPTA, J.:— 119. This batch of writ petitions raises broadly two issues:

(i) whether on the expiry of the term of office of an additional Judge of a High Court it is permissible to drop him by not giving him another term though the volume of work pending in the High Court requires the services of another Judge; and

(ii) in what circumstances a Judge of a High Court can be transferred to another High Court.

A number of other matters connected with these questions, directly or remotely, were discussed at length at the hearing of the petitions. As I happen to agree with the conclusions reached by one or another of my learned brethren on the different questions that arise for decision, I shall deal with only some aspects of the controversy. It is necessary at the outset to state two propositions on which there is no controversy; one is that the independence of the judiciary is a cardinal principle of our Constitution, and the other is that an additional Judge of a High Court is not appointed on probation. The first proposition needs a little elaboration. Independence of the judiciary does not mean freedom of the Judges to act arbitrarily, it means that the Judges must have freedom in discharging their judicial functions. In order to maintain the independence of the judiciary it has to be protected against interference, direct or indirect; it also follows that the constitutional provisions should not be construed in a manner that would tend to undermine this independence.

120. The first of the two questions set out above arises on the decision of the Union of India not to extend the tenure of Shri S. N. Kumar, an Additional Judge of the Delhi High Court, on the expiry of his initial term of office. Shri Kumar was appointed an Additional Judge of the Delhi High Court for a period of two

years. He assumed the charge of his office on March 7, 1979. On Feb. 19, 1981, a few days before Shri Kumar's term of office was to expire, the Chief Justice of the Delhi High Court wrote to the Union Law Minister saying that it was his "very painful duty not to recommend an extension for Justice Kumar" as he had been receiving "persistent" and "serious complaints" against Shri Kumar. The Chief Justice of India to whom a copy of this letter was sent wanted to look carefully into the charges against Shri Kumar and accordingly advised extension of his term by a period of six months. Ultimately on the recommendation of the Law Minister Shri Kumar's tenure as Additional Judge of the Delhi High Court was extended by three months commencing from March 7, 1981; at the end of this period the Chief Justice of India took a different view from the Chief Justice of the High Court and in a letter to the Law Minister written on May 22, 1981 he said that he had "made independent enquiries in regard to Justice Kumar's integrity" and that "Not one member of the Bar or of the Bench doubted the integrity of Justice Kumar" and that "on the other hand, several of them stated that he is a man of unquestioned integrity". However, in a note recorded on the relevant file on May 27, 1981 the Law Minister said "In the matter of assessment of integrity, I prefer that the views of C. J. Delhi be given credence" and recommended that "Shri Justice S. N. Kumar may not be continued any further as Additional Judge of the Delhi High Court after the expiry of the present tenure on 7-6-1981". Shri Kumar's tenure of office as an Additional Judge thus ended. In the aforesaid letter dated Feb. 19, 1981 written by the Chief Justice of the High Court to the Law Minister, the Chief Justice had also said: "Normally, extension of the tenure of an Additional Judge is recommended keeping in view the pendency in Court. The pendency in this Court still justifies the appointment of Additional Judges".

121. In my opinion the decision not to extend Shri Kumar's term of office as an Additional Judge was invalid and unconstitutional on several grounds. The first ground is that when the question before the concerned authorities was whether the term of an Additional Judge should be extended and the volume of work pending in the High Court admittedly required the services of another Judge, it was not permissible to refuse exten-

sion on the basis of unconfirmed reports. The scheme of the constitutional provisions does not warrant such a course of action. Under Art. 217 (1) of the Constitution the President, before he appoints a person as a Judge of a High Court, whether permanent or additional, has to consult these functionaries: the Chief Justice of India, the Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. A permanent Judge holds office until he attains the age of 62 years. The tenure of an Additional Judge, Article 217 (1) says, is as provided in Art. 224. Art. 224 (1) provides that the President may appoint duly qualified persons to be Additional Judges if it appears to him that "by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein" the number of the Judges of the court "should be for the time being increased" and that the appointment of Additional Judges shall be for a period not exceeding two years. It is thus clear that the appointment of an Additional Judge depends on the volume of work pending in the court. The maximum period of two years was fixed presumably to introduce a measure of uniformity and to serve as a check on the number of such appointments because the appointment of Additional Judges was apparently considered as an exceptional measure to meet a particular situation when Art. 224 in its present form was introduced in the Constitution in 1956. As things stand at present, however, this seems to have become a regular feature as would appear from the chart supplied during the hearing of these petitions showing the number of permanent and Additional Judges in the different High Courts. There can be no dispute however that the continuance of an Additional Judge in office is conditional upon the continued existence of arrears in a High Court. Except that the tenure of an Additional Judge is limited depending on the arrears of work or the temporary increase in the business of a High Court, the position and powers of an Additional Judge and a permanent Judge are the same. Qualifications required of a person for appointment as a Judge of a High Court as stated in Art. 217 (2) are the same for both. Art. 221 (1) read with the Second Schedule which provides for the salaries payable to the Judges of the High Court makes no distinction between an Additional and a permanent Judge.

Cls. (4) and (5) of Art. 124 provide the procedure for the removal of a Judge of the Supreme Court from his office and Art. 218 makes these provisions applicable in relation to the Judges of a High Court. Here also there is no special provision for Additional Judges; it cannot be suggested that an Additional Judge of a High Court cannot be removed from office. The oath of office which a Judge has to take before assuming office is also the same for both.

122. I have already referred to the provisions of Art. 217 (1) which provides that the President must consult the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court concerned before appointing a person as a Judge of a High Court, whether permanent or additional. Naturally, the fitness of a person to be appointed a Judge has to be considered by the three functionaries and this fitness test is applicable to both permanent and additional Judges. Fitness must include both capacity and integrity. It is admitted in the affidavit sworn on July 22, 1981 by Shri K. C. Kankan, Deputy Secretary in the Department of Justice, Ministry of Law, Justice and Company Affairs, and filed on behalf of the Union of India that an Additional Judge is not a Judge on probation. To say that an Additional Judge is not on probation means that his appointment is not a tentative appointment, it is not for trying out if he is fit to be a permanent Judge. An Additional Judge is appointed for a certain period to cope with the temporary increase and the pending arrears of work in a High Court. Therefore, if the volume of work still pending in the High Court justifies the appointment of an Additional Judge, when the term of an Additional Judge is about to expire, there seems to be no reason why the Judge should not be appointed for another term. Shri Kankan's affidavit however adds: "It is denied that the appointments of Additional Judges should always be for a period of 2 years unless the amount of business or arrears of work do not warrant the appointment for that period. It is submitted that the 2-year period is the ceiling mentioned in Art. 224 and that the President is competent to appoint all or any Additional Judges for any shorter period as he may consider justified." This claim of absolute power for the Government is not acceptable. The argument is that Art. 224 only fixes an outer limit of time, and

the President is therefore free to appoint Additional Judges for varying periods of time not exceeding 2 years — for three months or six months — as he pleases without reference to the volume of work pending in the High Court. Such a claim is untenable on the language of Art. 224 and militates against the conception of independence of the judiciary. The independence of the judiciary depends to a great extent on the security of tenure of the Judges. If the Judge's tenure is uncertain or precarious, it will be difficult for him to perform the duties of his office without fear or favour. On a proper reading of Art. 224 (1) it must be held that the tenure of an Additional Judge is not uncertain or precarious but it is conditional on the existence of arrears in the High Court which is an objective condition of fact. It was pointed out on behalf of the petitioners that the practice has always been to appoint an Additional Judge for a further period on the expiry of his previous term if the pending work in the High Court required the services of an Additional Judge and to appoint the seniormost among the Additional Judges as a permanent Judge when a vacancy was available. The existence of such practice could not be denied. However, as an Additional Judge has to be appointed again on the expiry of his initial term, Art. 217 (1) is attracted. The fitness of the Judge had been considered at the time of his initial appointment what then should be the scope of consultation when the appointment of an Additional Judge for another term is contemplated? In my opinion it reasonably follows that in such a case the scope is limited to an enquiry as to the volume of work pending in the High Court and the time likely to be required to dispose of the arrears. If his initial appointment was not on probation, the Judge's capacity and integrity cannot come within the scope of the consultation necessary under Art. 217 (1) for giving him another term on the expiry of his previous term of office.

123. A question then arises, whether the Judge should be appointed for another term if there are complaints against him regarding his integrity. If the complaints are serious and are from a responsible source, they cannot certainly be ignored. But, as pointed out by Mr. Seervai appearing for the petitioners in Transfer Case No. 22 of 1981 which is Writ Petn. No. 527 of 1981 filed in the Bombay High Court that the allegations cannot

not be presumed or assumed to be true and have to be proved. In his letter written to the Law Minister on Feb. 19, 1981 the Chief Justice of the Delhi High Court while stating that it was his "very painful duty not to recommend an extension for Justice Kumar", added that he had "no investigating agency to conclusively find out whether the complaints are genuine or not". That being so, the only reasonable course open, which does not undermine the independence of the judiciary was to appoint the Judge for another term having a rational nexus with the volume of arrears pending in the High Court and then proceed with an enquiry into the allegations and remove the Judge if the allegations were found true, in accordance with the procedure laid down in cls. (4) and (5) of Art. 124 read with Article 218. I do not think the language of Art. 224 (1) permits short term extensions of the tenure of an Additional Judge to enable the authorities to complete investigation into the allegations against him. That being so there seems to be no possible alternative to what has been suggested above as the proper course to follow. In the case of Shri Kumar, admittedly there has been no real investigation into the complaints against him. Possibly conscience of this position the Chief Justice of the Delhi High Court in a letter to the Law Minister written on May 7, 1981 said "To my mind, the reputation of integrity is just as important as a person actually being above-board". This statement should then apply to both additional and permanent Judges, but a permanent Judge cannot be removed from office on the ground that his reputation is bad. From long practice, mentioned earlier, an additional Judge has a legitimate expectancy, if not a right, to be appointed for another term if the pending business in the High Court requires the services of an Additional Judge, or as a permanent Judge, when a vacancy is available, if he is the senior-most of the Additional Judges. Refusing to appoint him again when the conditions required an appointment to be made means in substance his removal. To remove a permanent Judge the prescribed procedure must be followed and the allegations against him proved; dropping an Additional Judge at the end of his initial term of office on the ground that there are allegations against him without properly ascertaining the truth of the allegations may be expedient but it is destructive of the independence of the judi-

ciary. This would be an easy way for the executive to get rid of an inconvenient Judge. Taking into consideration all these aspects I am of the view that the scope of consultation contemplated in Art. 217 (1), when the question is whether an Additional Judge should be given another term, is limited to the enquiry whether the volume of work pending in the High Court requires his re-appointment.

124. Assuming that the scope of consultation under Art. 217 (1) is the same for the initial appointment of an Additional Judge and also for his appointment for another term, it seems to me that there has been no proper consultation in the case of Shri Kumar. In *Union of India v. Sankal Chand Himatlal Sheth*, (1978) 1 SCR 423 : (AIR 1977 SC 2328 at p. 2347), Chandrachud J., explained what consultation means within the meaning of Article 222 (1) which provides that the President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to another High Court. What is said in that case should apply also to 'consultation' for the purpose of Art. 217 (1). It is observed in Sheth's case: "..... there can be no purposeful consideration of a matter, in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and the right decision taken. It must, therefore, follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Art. 222 (1), therefore, means full and

effective, not formal or unproductive, consultation."

125. From the facts appearing from the correspondence that passed between the Chief Justice of India and the Chief Justice of the High Court, the Chief Justice of the High Court and the Law Minister, and between the Chief Justice and the Law Minister, it would appear clearly that there has been no complete and effective consultation on the question whether Shri Kumar's term as an additional Judge of the Delhi High Court should be extended. It will be convenient for a proper appreciation of the matter to set out chronologically the gist of the letters that passed between the constitutional functionaries in Shri Kumar's case and certain other facts:

19-2-1981. The Chief Justice of the Delhi High Court wrote to the Union Law Minister that it was his "very painful duty not to recommend an extension for justice Kumar" because there had been "serious complaints against Mr. Justice S. N. Kumar, both oral and in writing. These complaints have been received by me direct as well as through you. I have examined these complaints and find that some of the complaints are not without basis. Responsible persons of the Bar and some of my colleagues, whom I would rather not name, have also complained about Mr. Justice Kumar. I have no investigating agency to conclusively find out whether the complaints are genuine or not. All the same the complaints have been persistent." It was added that "Mr. Justice Kumar has also not been very helpful in disposing of cases. Some responsible members of the Bar and some of my colleagues have also expressed doubts about Justice Kumar's integrity." The Chief Justice prefaced his statement about the complaints against Justice Kumar by saying: "Normally, extension of the tenure of an Additional Judge is recommended keeping in view the pendency in Court. The pendency in this Court still justifies the appointment of Additional Judges." The point to note in this letter is that it does not mention the facts constituting the basis of the complaints against Shri Kumar.

3-3-1981. 126. A copy of this letter was sent to the Chief Justice of India and on March 3, 1981 the Chief Justice of India recorded this note on the relevant file: "I would like to look carefully into the charges against Shri S. N. Kumar. The letter of the Delhi Chief Justice dated February 19, 1981 seems to me too vague

to accept that Shri Kumar lacks integrity". The Chief Justice of India recommended extension of Shri Kumar's term of office by six months. The term of office of Shri Kumar was to expire on March 7, 1981.

19-3-1981: The Law Minister in his letter to the Chief Justice of the High Court referred to the observations of the Chief Justice of India that the charges against Shri Kumar appeared to be "too vague" and asked for "further comments" from the Chief Justice of the High Court "on the question of continuance or otherwise of Shri Justice S. N. Kumar".

26-3-1981: The Chief Justice of the High Court and the Chief Justice of India had a discussion over Shri Kumar's case.

28-3-1981: The Chief Justice of the High Court wrote to the Law Minister saying that he had had "an opportunity to discuss the entire matter in detail with the Chief Justice of India" and that after the discussion he had also addressed a letter to the Chief Justice of India. The Chief Justice ended the letter by saying: "Perhaps you will consider this to be sufficient 'comments' on my part as desired by you in your letter under reply (letter dated 19-3-1981) about the observations of the Chief Justice of India which you have quoted in your letter."

127. The letter that the Chief Justice wrote to the Chief Justice of India on the same day refers to the three points mentioned in his letter dated 19-2-1981 addressed to the Law Minister repeating that he had "no investigating agency to conclusively find out whether the complaints are genuine or not". The letter ends as follows: "With regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us. About Justice Kumar not being very helpful in disposing of cases, I enclose a statement of disposal by Justice Kumar in 1980."

15-4-1981: The Law Minister wrote to the Chief Justice of the High Court in reply to the letter dated March 28, 1981. Among other things, the Law Minister in this letter said: "It is true that you have no investigating agency to conclusively establish the truth of complaints. Nevertheless, you must have had some material which provided the basis on which you concluded that Justice Kumar's reputation for integrity was not above board... .. In view of the observations of the Chief Justice of India asking for concrete material, it would be necessary for us to have it with your comments."

7-5-1981: In answer to the Law Minister's letter of 15-4-1981 the Chief Justice of the High Court wrote back saying that in regard to the allegations against Shri Kumar, he had discussed the matter with the Chief Justice of India and had also written to him. "Accordingly", the Chief Justice wrote, "it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis for me to conclude that Justice Kumar's integrity was not above board, I give below some facts". The facts which the Chief Justice mentioned in the letter are:

(i) In the first half of 1980 when he was not the Chief Justice "chance remarks" came to his knowledge about Shri Kumar's "conduct in Court as well as about his integrity" when Justice Kumar was doing mostly original side work sitting singly and that in early May of the same year one of his colleagues had told me that he had "information with him to the effect that if a substantial amount was paid to Justice Kumar, suits brought by a particular party against an insurance company would be decided in favour of that party."

(ii) As Acting Chief Justice he constituted the Benches for the second half of 1980 putting Justice Kumar in a Division Bench on the Appellate Side which he thought "was a safe way to finish the rumours if the same were incorrect and thus safeguard the reputation of a Judge". However "Justice Kumar did not release the original suits, regarding which allegations had been made, from his board". The particulars of the suits and the names of the parties were mentioned in the letter.

(iii) In August 1980 the same colleague of his who had talked to him earlier regarding Shri Kumar's integrity and another colleague mentioned that "doubts were being expressed about the integrity of Justice Kumar vis-a-vis the aforesaid cases and some others." He made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations. Looking into the matter more carefully he found that "it was not only the three suits mentioned above but that there were other Single Bench matters also which had been retained by Justice Kumar on his board despite being put in the Division Bench... .. In some of these the parties involved were rich and influential including some former princes."

128. The Chief Justice added that these "unconfirmed reports" made him "conclude that the reputation for integrity of Justice Kumar was not what should be for a Judge of the High Court. To my mind, reputation of integrity is just as important as a person actually being above board." The Chief Justice also mentioned certain figures to show the rate of disposal of cases by the Division Bench of which Justice Kumar was a member.

129. It seems from what the Chief Justice of the High Court said in his letter of May 7, 1981 that he had not recommended extension of Justice Kumar's term not really because he found the reports against Shri Kumar were true — he had admittedly no "investigating machinery" — but because he thought that reputation of integrity is as important as a man being actually above board. I have already said that this is a view which will undermine the independence of the judiciary.

130. The letter of May 7, 1981 written by the Chief Justice of the Delhi High Court to the Law Minister was marked "SECRET (For Personal Attention Only)". It appears from a subsequent letter addressed by the Law Minister to the Chief Justice of the High Court on May 29, 1981 that a few days after the letter of May 7 was written, the Chief Justice of the High Court had requested the Law Minister to keep that letter a secret from the Chief Justice of India. The letter of May 29 discloses that the Chief Justice of the High Court mentioned three reasons for not disclosing the letter to the Chief Justice of India. The reasons as appearing from the Law Minister's letter are as follows:

"1. the reasons stated in the opening portion of your letter dated 7th May, 1981."

Probably the reference is to the following lines of the 7th May letter written by the Chief Justice of the High Court:

"Hon'ble the Chief Justice of India had made certain observations with regard to my recommendation about Mr. Justice S. N. Kumar and the same were communicated to me by you for my comments in your D.O. No. 50/2/81-Jus., dated 19th March, 1981. The Chief Justice had also written to me a letter dated 14th March, 1981 asking for "details and concrete facts in regard to the allegations against Justice Kumar." As I wrote to you in my D.O. No. 293-HCJ/PPS, dated 28th March,

1981, I discussed the matter with Hon'ble the Chief Justice and as desired by him, in reply to his letter, wrote my D.O. No. 292-HCJ/PPS, dated March 28, 1981, a copy of which was forwarded to you. Accordingly, it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis for me to conclude that Justice Kumar's integrity was not above board, I give below some facts."

"2. You felt highly embarrassed as the contents of your letter dated 19th February, 1981 about Shri Kumar came clearly to be known to Shri S. N. Kumar and some of his colleagues on the Bench. You felt that the contents of your letter dated 7th May, 1981 might also get known to them and cause you further embarrassment.

3. You felt that the Chief Justice of India had already started wrongfully denigrating you for your letter of February 19, 1981."

The letter of May 29 concludes by saying that in view of the fact that the Chief Justice of the High Court was keen on keeping the letter "confidential from the Chief Justice of India", the letter was not shown to him. Whether the reasons for not disclosing the letter of May 7 to the Chief Justice of India were valid or not, it is clear that the Chief Justice of India was not apprised of the particulars contained in the letter of May 7 concerning Justice Kumar's integrity. It was argued on behalf of the Union of India and the Law Minister that it must be presumed that all the details were placed before the Chief Justice of India because the Chief Justice of the High Court in his letter dated March 28, 1981 addressed to the Law Minister had stated that he "had an opportunity to discuss the entire matter in detail with the Chief Justice of India" and that in another letter written on the same day to the Chief Justice of India he had said:

"With regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us."

That this presumption is wrong would appear from the following facts. On May 21, 1981 the Law Minister had written a letter to the Chief Justice of India when he was in Simla Paragraphs 3, 5 and 6 of this letter read as follows:—

"3. In regard to complaints regarding Justice Kumar's integrity and general conduct, the Chief Justice of the High

Court discussed the matter with you as mentioned in his D.O. letter No. 292-HCJ, dated 28th March, 1981, to you, a copy of which he had sent to me. In that letter he had also mentioned the disposals of Justice Kumar.

4. x x x

5. You will please see that in your advice dated 3rd March, 1981 you desired to look carefully into the charges against Shri S. N. Kumar. In terms thereof if you were pleased to make any inquiries, I shall be grateful to have the details.

6. I would be grateful for your urgent advice in regard to the continuance or otherwise of the terms of Justice S. N. Kumar....."

There is no reference here to the letter of May 7 from the Chief Justice of the High Court. The Chief Justice of India replied to this letter next day, May 22, 1981 from Simla. The relevant portions of the letter are as follows:—

"Shri Prakash Narain, Chief Justice of the Delhi High Court, had written a letter dated February 19, 1981 to you, a copy of which was sent to me. The Chief Justice had recommended in that letter that Justice Kumar's appointment should not be extended further for three reasons: (1) that serious complaints were received against Justice Kumar orally as well as in writing; (2) that Justice Kumar was not very helpful in disposing of cases; and (3) that some responsible members of the Bar and Bench had expressed doubts about Justice Kumar's integrity. By my letter dated March 14, 1981 to the Delhi Chief Justice I requested him to furnish further details and concrete facts in regard to the allegations against Justice Kumar since the result of the enquiries made by me was quite at variance with what the Chief Justice had stated in his letter of March 19.

The Chief Justice met me on March 26, 1981 when he told me that Justice Kumar was very slow in his disposals and that he doubted his integrity because even after Justice Kumar's allocation was changed from the original side to the appellate side, he still continued to hear the part-heard cases on the original side. The Chief Justice did not mention anything adverse in regard to Justice Kumar's political leanings or affiliations. By my request the Chief Justice promised to send a statement showing the disposals of Justice Kumar.

I have made the most careful and extensive enquiries in regard to both of

these matters and I am satisfied that there is no substance in any one of them. I have with me a detailed statement of the disposals of Justice Kumar from which it would appear that no charge can be made against him that he is slow in his disposals.

As regards the complaint of the Chief Justice that Justice Kumar's integrity was doubtful since he continued to take old part-heard matters even after the allocation of his work was changed, I have made enquiries not only from members of the Bar but from the sitting Judges of the Delhi High Court which show that it is a common practice in the Delhi High Court that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases on which a substantial amount of time has been already spent. Justice Kumar, therefore, did nothing out of the way or unusual in taking up part-heard cases after the allocation of his work was changed.

I find it, therefore, difficult to agree that Justice Kumar's term should not be extended for the reasons mentioned by the Chief Justice of the Delhi High Court. I disagree with the learned Chief Justice, on enquiries made by me, that Justice Kumar is either slow in his disposals or that his integrity is doubtful.

I must mention that I also made independent enquiries in regard to Justice Kumar's integrity generally and apart from the reason for which the learned Chief Justice thought that Justice Kumar lacked integrity. Not one member of the Bar or of the Bench doubted the integrity of Justice Kumar. On the other hand, several of them stated that he is a man of unquestioned integrity."

However, on May 27, 1981 the Law Minister recorded a note in the relevant file recommending that "Shri Justice S. N. Kumar may not be continued any further as Additional Judge of the Delhi High Court after the expiry of the present tenure on 7-6-1981". It appears from this note that in making this recommendation, the Law Minister confined himself only to Shri Kumar's reputation. The portion of the note relevant for the present purpose reads:—

"C.J.I. does mention that C. J. Delhi met him on 26-3-1981. He also refers about the common practice in the Delhi

High Court that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases on which a substantial amount of time has been already spent. I presume that when C. J. Delhi and the C. J. of the Supreme Court met, the former must have informed the latter about the details that he had mentioned to me in his letter dated 7-5-1981. This presumption is raised on the basis of the letters from the Chief Justice, Delhi..... The C.J.I. in his advice proceeds from the premises that taking up part-heard cases after the allocation of work is changed does not amount to lacking in integrity. If it were that simple I would not have joined issue, but the details furnished by the C. J. Delhi in his letter dated 7-5-1981 go farther.

xx xx xx xx
In the matter of assessment of integrity, I prefer that the views of C. J. Delhi be given credence as it is in his association that the Judge concerned discharges his duties and that he has a better occasion and opportunity to watch his working and conduct. The correspondence from the C. J. of Delhi addressed to me furnishes clear details which cannot easily be brushed aside."

131. Taking the last paragraph of the note first, I find it difficult to see how, because the Chief Justice of the High Court had a "better occasion and opportunity" to watch "his (Justice Kumar's) working and conduct", he was in a better position to come to a correct conclusion as to the Judge's integrity, if all the facts concerning the matter were also placed before the Chief Justice of India; it is not like watching the demeanour of a witness to test his credibility. As regards the statement that the letter from the Chief Justice of the High Court furnished "clear details which cannot easily be brushed aside", the details are only particulars of certain suits that Justice Kumar had dealt with, but it is difficult to follow what is sought to be conveyed by saying that these cannot "easily be brushed aside". Mere details of the suits can indicate nothing regarding Justice Kumar's integrity. If however 'by details' the unconfirmed reports against Justice Kumar were also sought to be included, no reasonable person could accept them as true without proof. As regards the earlier portion of the note quoted above, the presumption that the Chief Justice of the

High Court must have informed the Chief Justice of India about the details that the former had mentioned in his letter dated May 7, 1981 addressed to the Law Minister does not appear to have any basis. It is true the Chief Justice of the High Court in his two letters dated March 28, 1981 written respectively to the Law Minister and the Chief Justice of India had said that the "entire matter" concerning Justice Kumar's integrity had been discussed between him and the Chief Justice of India but it would be wrong to assume, though the Chief Justice of the High Court spoke of the "entire matter", the particulars of the suits and the allegations against Justice Kumar concerning them were placed before the Chief Justice of India. What was discussed between the two would appear very clearly from the letter addressed by the Chief Justice of India to the Law Minister on May 22, 1981. I have quoted above relevant extracts from this letter. It is plain from this letter that when the Chief Justice of the High Court met the Chief Justice of India on March 26, 1981 the only thing that he disclosed was the alleged impropriety of Justice Kumar's conduct that "even after Justice Kumar's allocation was changed from the original side to the appellate side, he still continued to hear the part-heard cases on the original side" and that "he continued to take old part-heard matters even after the allocation of his work was changed". There is no mention of the other allegations against Justice Kumar concerning these part-heard matters. It is impossible to think that if the details that the Chief Justice of the Delhi High Court mentioned in his letter of May 7, 1981 addressed to the Law Minister for his "personal attention only" were disclosed to the Chief Justice of India he would not have referred to them in his letter on May 22. It further appears from the affidavit of Shri Kumar, sworn on July 17, 1981, that the Chief Justice of the Delhi High Court had not asked him any question or called for any explanation or clarification from him regarding the allegations against him, but the Chief Justice of India had a discussion with him only with regard to the allegations that he was slow in his disposal and that it was improper for him to continue to deal with the original side matters heard in part by him while sitting on the appellate side. It is also impossible to think that the Chief Justice of India though apprised of the allegation of corruption

against Shri Kumar would not ask for his explanation on this serious charge and discussed only the minor allegations against him.

132. As part of the relevant material was withheld from the Chief Justice of India it must be held that there was no full and effective consultation as contemplated in Article 217 (1) and this vitiates the decision not to extend Shri Kumar's term of office as an Additional Judge of the Delhi High Court though the volume of pending work in that High Court required the services of another Judge.

133. In any event, even assuming that the Chief Justice of the Delhi High Court had informed the Chief Justice of India of the allegation of corruption against Shri Kumar, it is clear that it was not disclosed to Shri Kumar and he was not given an opportunity to explain the charge against him. Assuming again that Shri Kumar had no legal right to have his term extended, he had at least a legitimate expectation that his tenure as an Additional Judge would continue following the usual practice, and it appears from the letter of the Chief Justice of the Delhi High Court written to the Law Minister on February 19, 1981 that but for the allegations against him, Shri Kumar would have got an extension of his tenure as an Additional Judge in view of the arrears of work in the Delhi High Court. Consistent with the principles of natural justice Shri Kumar who had undoubtedly suffered an injury by his term of office not being extended should have been given an opportunity to explain the charge of corruption against him. The principles of natural justice apply even to a person who has no legal right. (See *In re H. K. (An Infant)*; (1967) 2 QB 617). The decision against Shri Kumar cannot be sustained on this ground as well.

134. As stated above, in reaching the decision not to extend Shri Kumar's tenure of office, the Law Minister preferred the opinion of the Chief Justice of the Delhi High Court to that of the Chief Justice of India on the view that the Chief Justice of the High Court had "better occasion and opportunity" to watch his working and conduct. As I have already said, this is a view which has no valid basis. Under Art. 217 (1) the President, before appointing a person as a Judge of a High Court has to consult three functionaries, the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court; for the

appointment of the Chief Justice of the High Court, the President has to consult the Chief Justice of India and the Governor of the State. The controversy is over the question whether the opinion of the Chief Justice of India should have primacy or the three functionaries must be regarded as coordinate authorities for the purpose of Art. 217 (1) and the President was free to accept the opinion of any of them. Assuming however they are coordinate authorities in the sense that each of them must be consulted, the scope of consultation is not the same so far as the Governor is concerned. He is certainly not in a position to give any opinion on the legal acumen of the persons proposed to be appointed. His opinion is relevant on matters on which the Chief Justice of the High Court or the Chief Justice of India are not expected to have any information. The question however remains, whose opinion should the President accept if the Chief Justice of the High Court and the Chief Justice of India differ? Normally, the Chief Justice of the High Court is likely to know more about a lawyer practising in that court whose name is proposed for appointment but where the question is whether or not the tenure of an Additional Judge should be extended, if all the relevant materials are before both, the Chief Justice of the High Court and the Chief Justice of India, it is difficult to see how the Chief Justice of the High Court is in a better position than the Chief Justice of India to give a correct opinion. However, as Krishna Iyer J., has said in *Shamsher Singh's case* (1975) 1 SCR 814: (AIR 1974 SC 2192), the Chief Justice of India is the "highest dignitary of Indian Justice". The President has to consult him for the appointment of the Chief Justice of a High Court. He is, as Mr. R. K. Garg appearing for Shri S. N. Kumar in Transferred Case No. 20 of 1981 (which is Writ Petition No. 882 of 1981 filed in the Delhi High Court) described as the pater familias of the Indian judiciary. In my view the President should accept the opinion given by the Chief Justice of India in such a case unless the opinion suffers from any obvious infirmity; he cannot act as an umpire and choose between the two opinions,

135. For the reasons indicated above, the decision in *Shri S. N. Kumar's case* must be held invalid and the case should go back to the President for a fresh decision after a full and effective consultation

as contemplated in Art. 217 (1) of the Constitution.

136. The other main issue arising on these writ petitions relates to the transfer of Judges from one High Court to another High Court. The question of transfer arises upon a letter addressed by the Law Minister on March 18, 1981 to the Governor of Punjab and the Chief Ministers of different States, except the North-eastern States, stating that the Law Commission, States Reorganisation Commission and various Bar Associations had expressed the view that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one-third of the Judges of a High Court should be from outside the State in which that High Court is situated, the Law Minister in this letter requested those to whom the letter was addressed to (a) obtain from all the Additional Judges of the High Court in a State their consent to be appointed as permanent Judges in any other High Court in the country and (b) also to obtain similar consent from those persons who have been or in the future likely to be proposed for appointment as Judges. The letter also carried a request to obtain from the Additional Judges and the proposed appointees names of three High Courts in order of preference to which they would like to be appointed as Judges or permanent Judges as the case may be. It was however added that it should be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of the Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given. The letter says that the written consent and preferences of the Additional Judges and the persons recommended for initial appointment should be sent to the Law Minister within a fortnight of the receipt of the letter.

137. The question of transfer also arises in Transferred Case No. 2/81 which is Writ Petition No. 390 of 1981 filed in the Madras High Court and in Transferred Case No. 24 of 1981 which is Writ Petition No. 2224 of 1981 in the Patna High Court. These petitions relate to the transfer of the Chief Justice of the Patna High Court, Shri K. B. N. Singh, to the Madras High Court. Art. 222 (1) says that the President may, after consultation with the Chief Justice of India, transfer

a Judge from one High Court to any other High Court. It was argued that the letter seeking to obtain general consent of the Additional Judges to their transfer to other High Courts was only a device to circumvent Art. 222 (1) reducing the requirement of consultation with the Chief Justice of India to a formality. Clearly, the Constitution does not contemplate taking of such general consent to transfer which might take place at some future dates in respect of only some of the Judges. The letter has thus no authority of law. This aspect has been dealt with in detail in the judgments of Tulzapurkar J., and Pathak J., which I have had the advantage of reading. I agree with them that the said letter dated March 18, 1981 is of no consequence legally and cannot bind or affect in any way those for whom it was intended.

138. This letter of March 18, 1981 suggests in defence of the proposed transfer of Judges that for furthering national integration and combating narrow parochial tendencies one-third of the Judges of a High Court should be from outside the State in which that High Court is situated. It has been held by a majority in Sankal Chand's case (AIR 1977 SC 2328) that transfer of a Judge of a High Court to another High Court is permissible only in public interest and not by way of punishment. One reason stated in support of the policy of transfer in the letter of March 18, 1981 is that it would combat narrow parochial tendencies. However, the transfer of an individual Judge on the ground that he is guilty of parochial tendencies would be a transfer by way of punishment and as such not permissible. If the proposed transfer is with a view not to allow parochial tendencies to grow, then again the question will remain who among the Judges should be transferred and to which High Courts. Also, whether the transfer of Judges from one High Court to another would really further national integration may be open to debate. However, the validity of the policy does not arise for decision on these writ petitions. Apart from its validity, to what extent the policy is relevant in the context of Article 222 (1) is a question. As held in Sankal Chand's case mass transfers are not contemplated under Article 222 (1). The President may transfer a Judge from one High Court to another only after consultation with the Chief Justice of India. The policy may provide the President with a ground to suggest the transfer of a Judge,

but the Chief Justice of India must consider in each case whether the proposed transfer is in public interest because, even granting the validity of the policy, the question would remain who among the Judges should be transferred and to which High Courts.

139. In Transferred Case No. 24 of 1981 which was Writ Petition No. 2224 of 1981 in the Patna High Court in which Shri K. B. N. Singh, Chief Justice of the Patna High Court has been transposed as a petitioner, and Transferred Case No. 2 of 1981 which was Writ Petition No. 390 of 1981 in the Madras High Court, the validity of the Notification transferring Shri K. B. N. Singh as Chief Justice of the Madras High Court is challenged. The notification is challenged mainly on the ground that the order of transfer was bad as Shri K. B. N. Singh had not consented to it, that there was no full and effective consultation between the Central Government and the Chief Justice of India before the order was made, and that the transfer was not in public interest but was really by way of punishment. Tulzapurkar J. has dealt with this aspect of the case in detail in his judgment and I do not propose to go over the same ground as I agree with him for the reasons given by him that the impugned order of transfer is valid under Art. 222 (1) of the Constitution.

140. I would however like to add that an order of transfer even if made for administrative reasons and in public interest is likely to cause some injury to the Judge transferred, though that could not be valid ground for holding that the transfer is by way of punishment; it is the reason behind the order of transfer that should determine its nature. It would be only fair not to let the Judge who is being transferred face more difficulties than are absolutely necessary. If the Judge is wholly unfamiliar with the language of the State to which he is transferred, it is possible in some cases that it will affect his efficiency. I would ask the Government to consider if it is possible to transfer Shri K. B. N. Singh to some High Court, consistent with his position as a senior Chief Justice, where the language difficulty will not be so acute.

141. Counsel for the Law Minister questioned the locus standi of the petitioners in these cases who are members of the legal profession. The question however seems to be academic because Shri S. N. Kumar and Chief Justice

K. B. N. Singh are parties respectively in Transferred Case No. 20 of 1981 and Transferred Case No. 24 of 1981; Shri S. N. Kumar, impleaded as respondent No. 5 in Transferred Case No. 20 of 1981 has supported the petitioners in challenging the validity of the decision not to extend his term of office as an Additional Judge of the Delhi High Court and Shri K. B. N. Singh transposed as petitioner in Transferred Case No. 24 of 1981 has challenged the notification transferring him to the Madras High Court. Apart from the fact that they are both parties, for the reasons given by Bhagwati, J. and Tulzapurkar J. in their respective judgments I agree with them that the petitioners who are practising advocates of different High Courts are competent to maintain the petitions.

142. In the course of the hearing of these petitions we had made two orders for the disclosure of certain documents. The reasons in support of these orders will appear from the judgment of Bhagwati J. with which I agree.

143. The petitions shall be disposed of in accordance with the conclusions reached on the various points arising for decision in these petitions.

Transferred Case No. 22 of 1981.

S. M. FAZAL ALI, J.:— 144. The petitioners, Advocates practising in the High Court of Bombay, filed a Writ Petition No. 527/81 before the Bombay High Court challenging the constitutionality of Exhibit 'A', a Circular said to have been issued by the Union Law Minister on March 18, 1981 and addressed to the Governor of Punjab and Chief Ministers of States (except the North-Eastern States). The petitioners prayed for several reliefs to which we shall refer hereafter. The writ petition was transferred to this Court with the consent of the parties by an order dated June 9, 1981.

145. The petitioners alleged that the Union Law Minister who was respondent No. 1 in the original writ petition had issued a Circular Letter dated 18-3-1981 (hereafter referred to as the 'Circular') to the Governor of Punjab and the Chief Ministers of States requesting them to obtain the consent of Additional Judges of the High Courts concerned to their transfer as permanent Judges of High Courts other than those in which they were appointed as Additional Judges. We shall give details of this Circular when we deal with it. The Circular was received

by the Chief Justice of the Bombay High Court on 29-3-81 and on 30-3-81 he addressed a letter to the Additional Judges (respondents 3 to 12) and asked them to do the needful. The said Circular seems to have created a serious upheaval in the rank and file of the lawyers of Bombay Bar resulting in a special general meeting of the Advocates Association of Western India on 3-4-81. It is alleged in the petition that the meeting was largely attended and a unanimous resolution was passed, *inter alia*, condemning the Circular as being subversive of judicial independence and demanding that the Government be directed to withdraw the Circular. The furore on the Circular seems to have infiltrated into the Bombay Bar Association which also held several meetings and similar resolutions were passed. On 14-4-81 at meeting of the Managing Committee of the Bombay Incorporated Society passed similar resolutions and also resolved that the President of the Society should join as a petitioner, as a result of which the fourth petitioner was added as one of the petitioners. As a mark of serious protest against the Circular and the discourteous language in which the said document (circular) is alleged to have been expressed, the legal practitioners practising in the High Court, city civil courts, Small Cause Courts and the police courts resolved not to attend those courts on 15-4-81. The petitioners further alleged that they represented a large body of legal opinion of Bombay as also representing public interest in a free and independent judiciary which was the very bulwark of the democratic form of Government contemplated by the Constitution. In the writ petition, which has now been transferred to this Court, the petitioners sought the following reliefs:—

"(a) that it may be declared that the said letter, Exhibit 'A' to the petition, is *ultra vires* and void;

(b) that it may be declared that the consent if any consequent on or arising from the said letter given by an additional Judge or any person whose name has been or is to be submitted for his appointment as a Judge is null and void;

(c) that this Hon'ble Court will be pleased to issue an order or direction under Article 226 quashing the said letter Exhibit 'A', and the consent, if any, obtained from any person following on or as a result of the said letter;

(d) that in the alternative to prayer (c) above this Hon'ble Court will be pleased to issue a writ of mandamus (or any

other writ, order or direction) directing respondents 1 and 2 to withdraw the said letter and to abstain from using or in any manner acting on the consent, if any, obtained from any person following on or arising from the said letter."

146. The petitioners also prayed for an ad interim injunction pending hearing of the petition. This seems to have been the reaction of the Bombay lawyers to the aforementioned Circular.

Transferred Case No. 20 of 1981.

147. Another writ petition was filed by Shri V. M. Tarkunde, a senior Advocate of the Supreme Court in the High Court of Delhi making Union of India, Justice O. N. Vohra, Justice S. N. Kumar and Justice S. B. Wad as respondents and alleging that the independence of judiciary which was essential for the preservation of civil liberty was being eroded by the actions of the Government, viz., short-term appointment of Additional Judges for 3-4 months and short extensions granted after the term was over. Another grievance made regarding the Circular issued by the Union Law Minister compelling more than 100 Additional Judges all over the country to give their consent for being appointed as permanent Judges outside their State on the pain of being dropped was that this was an indirect method of bypassing the consultative process contemplated by Article 222.

148. Apart from these apprehensions the petitioner made serious allegations the purport of which was that a consistent campaign had been launched by some of the Ministers of Central Government and Chief Ministers of States against the higher judiciary. In this connection, statements of a Cabinet Minister and some Chief Ministers were mentioned. Referring to some concrete cases it was alleged that although permanent vacancies in the High Court of Delhi were available yet Justice Goswami and Justice Sultan Singh instead of being made permanent Judges were appointed as Additional Judges for a period of two years in July and August, 1980 respectively whereas Justice Vohra as an Addl. Judge only for three months. It was further alleged that two more Additional Judges, viz., Justice Kumar and Justice Wad were appointed for three months. According to the allegations made by the petitioner, the terms of the aforesaid three Judges, Justice Vohra, Kumar and Wad was to expire on 6-6-81. It appears that after the term

of Justice Vohra and Justice Kumar expired on the 6th of June 1981, the Central Government did not reappoint them as a result of which they were sent back to the Bar. Justice Vohra did not file any petition and instead started his practice.

149. The writ petition filed by Mr. Tarkunde in the High Court of Delhi was also transferred to this Court and was numbered as Transferred Case No. 20 of 1981. While this case was pending in this Court the term of Justice Kumar expired and at his request he was impleaded and transposed as third respondent in the case so that he may be in a position to defend his cause. The petition of Mr. Tarkunde apart from challenging the Circular has also assailed the refusal of the Government to grant further extension to Justice Kumar and Justice Vohra. As Justice Vohra's case was not pressed it is not necessary for us to go into the circumstances under which the term of Justice Vohra was not extended.

Transferred Case No. 19 of 1981.

150. This petition has been filed by Mr. S. P. Gupta against the President, Union of India, Chief Justice of the Allahabad Court and the Governor of U. P. In view of similar petitions having been transferred to this Court, this petition was also transferred to this Court from the Allahabad High Court by an order dated 1-5-1981. In this petition, the following reliefs were prayed:

"(a) issue a writ, direction or order in the nature of a declaratory writ that Justice Murlidhar, Justice A. N. Verma, Justice N. N. Mitthal have already been appointed as permanent Judges of the High Court of Judicature at Allahabad by virtue of the warrants of appointment dated 12-12-1980, 12-3-1981 and 12-3-1981 respectively.

(b) in the alternative, issue a writ, direction or order in the nature of Mandamus directing the President to appoint Judges of the High Court according to the submissions made in this petition;

(c) issue a writ, direction or order in the nature of Mandamus directing the President of India to appoint permanent judges of the High Court on the vacancies in the office of the permanent Judges, whenever such vacancies occur; in accordance with the constitutional scheme and provisions, as submitted in this petition and found by this court;

(d) issue a writ, order or direction in the nature of Mandamus directing the

President of India to fill the vacancy of the Additional Judges of the High Court without delay."

Transferred Case No. 21 of 1981.

151. A petition exactly similar to the one filed by Mr. S. P. Gupta was also filed by Mr. J. L. Kalra, Advocate and others in the Delhi High Court which was also transferred to this Court by an order dated 1-5-1981 along with the case of Mr. S. P. Gupta. In this case, the following reliefs were sought:

(a) issue a writ of mandamus or any other appropriate writ, order or direction commanding the respondent to assess the number of permanent and additional Judges required for this Hon'ble Court having regard to its current business and the accumulated arrears of work and create such number of permanent and additional posts of Judges as may be required, within such reasonable time as this Hon'ble Court may deem fit, in accordance with law;

(b) direct the respondent to appoint Hon'ble Mr. Justice N. N. Goswamy, Mr. Justice Sultan Singh and Hon'ble Mr. Justice O. N. Vohra as permanent Judges of this Hon'ble Court against the three vacant permanent posts forthwith;

(c) direct the respondent to extend the term of the additional Judges namely Hon'ble Mr. Justice S. N. Kumar and Hon'ble Mr. Justice S. B. Wad by a period of two years within two weeks from the date of the order;

(d) direct the respondent likewise to confirm/extend the terms of the additional Judges of the High Courts of Madhya Pradesh, Punjab and Haryana and Rajasthan, whose names are mentioned in paragraph No. 5 of this petition;

(e) direct that no such piecemeal extension, but a reasonable long term shall be given to the other additional Judges of this Hon'ble Court as well as of other High Courts in future."

152. Apart from these petitions which have been transferred to this Court other petitions were also filed against the order of the President transferring Justice Ismail, Chief Justice of the Madras High Court to be the Chief Justice of Kerala High Court and Justice K. B. N. Singh, Chief Justice of the Patna High Court to be the Chief Justice of Madras High Court.

Writ Petition No. 274 of 1981.

153. This writ petition was filed by Miss Lily Thomas, an Advocate of the Supreme Court challenging the order of

transfer of Justice Ismail from Madras High Court to Kerala High Court. While the petition was pending, Justice Ismail chose to retire from service and hence the petition became infructuous so far as the main relief was concerned. Miss Thomas, however, pressed the petition only on one ground, viz., that even if the grievance against the transfer of Justice Ismail no longer survived yet she was entitled to contest the order of the President of India transferring Justice K. B. N. Singh from Patna High Court to Madras High Court. She was permitted to argue the case on this limited point.

Transferred Case No. 2 of 1981.

154. Another petition was filed by Mr. Rajappa, Advocate in the Madras High Court being writ petition No. 3 of 1981 praying that the orders of the President of India transferring Chief Justice of the Madras High Court to the Kerala High Court and the Chief Justice of the Patna High Court to the Madras High Court be quashed on the ground that they were null and void and unconstitutional. This case was also transferred to this Court and numbered as T. C. No. 2 of 1981. This case, therefore, raises substantially the same questions as are involved in Writ Petition No. 274 of 1981.

Transferred Case No. 24 of 1981.

155. So far as the case of Justice K. B. N. Singh, Chief Justice of the Patna High Court is concerned, Mr. D. N. Pandey, Secretary of the Bihar State Socialist Lawyers' Association along with Thakur Ramapati Sinha filed a Writ Petition No. CMJC 2224/1981 in the Patna High Court against the Union of India, the Chief Justice of India, Mr. Justice K. B. N. Singh, Chief Justice of the Patna High Court and the Registrar, Patna High Court. Justice K. B. N. Singh, respondent No. 3, later after filing an affidavit in this Court prayed that he may be transposed to the category of petitioner. He was directed to file a detailed affidavit which was filed on 16-9-81 and he was transposed as petitioner No. 3. This petition was also transferred to this Court as similar points were involved. In this petition, the petitioners prayed that the order of the President transferring Justice K. B. N. Singh be quashed and the respondents be directed not to give effect to the notification issued by the President transferring petitioner No. 3 to Madras.

Transferred Case No. 6 of 1981.

156. A similar Writ Petition No. 553/81 was filed by Mr. P. Subramanian, be-

fore the Madras High Court praying that the order of the President transferring Justice Ismail from the Madras High Court to Kerala High Court be quashed. This petition also does not survive in view of the retirement of Justice Ismail.

Special Leave Petition (Civil)

No. 1509 of 1981.

157. This petition has been filed by Ripudaman Prasad Sinha praying for a writ of the quo warranto against Justice K. B. N. Singh, Chief Justice, Patna High Court for not proceeding to join his new posting at Madras and in continuing as Chief Justice of Patna High Court without any sanction of law in view of the order of the President transferring him to Madras. Special leave has not yet been granted in this petition but it has been tagged on with the cases relating to Justice K. B. N. Singh but was ultimately withdrawn before the conclusion of hearing of their cases.

158. Since the various writ petitions and intervener applications transferred to this Court raised almost common questions they were heard together but so far as the petitions relating to Justice K. B. N. Singh, Chief Justice of the Patna High Court are concerned they were relinked. After having heard Dr. Singhvi, counsel for the petitioners, on the point of law regarding the interpretation of Art. 222 of the Constitution, we proceeded to deal with the questions of law and the constitutional points raised in the petitions of Mr. Chagla, Mr. Tarkunde, Mr. S. P. Gupta and others as also the constitutional points involved in Justice K. B. N. Singh's case. So far as Justice K. B. N. Singh's case is concerned we delinked it from other cases because his was the only case which had to be heard on facts turning upon mainly on the question — whether or not there was an effective consultation between the Chief Justice of India, the President of India and the Chief Justice concerned, viz., Justice K. B. N. Singh.

159. As these petitions more or less involve common and overlapping points, we shall dispose them of by one common judgment but deal with individual cases separately wherever necessary.

T. C. Nos. 19 and 22/1981.

160. We would first deal with the question relating to the various facets, shades and aspects of Art. 222 of the Constitution as contended before us by Messrs. Seervai, Sorabjee, Dr. Singhvi and others during their respective turns.

161. So far as Mr. Seervai is concerned his contentions on the interpretation of Art. 222, apart from its legislative history and setting, may be indicated as follows:—

(1) The language of Art. 222 (1) is clear enough to enable the Court to hold that the transfer must be with the consent of the Judge concerned. Even if it is not so, then the main object of Art. 222 is not very clear and plain and, therefore, it is necessary to go into the legislative history of the doctrine of transfer in order to ascertain the real intention of the Founding Fathers of the Constitution and, if so read, it would be amply clear that even if Art. 222 (1) does not expressly mention 'consent', the same must be implied in the Article by necessary intentment.

(2) As transfer of a High Court Judge from one High Court to another is an extraordinary phenomenon and has to be made in public interest, we must read consent of the Judge concerned before he can be transferred under Art. 222, otherwise the very purpose and object of the Article would be defeated.

(3) As a transfer without consent of a Judge amounts to punishment, such a transfer involves a serious stain and stigma. Hence, in order to avoid such an anomalous position it should be held that no Judge can be transferred under Article 222 from one High Court to another without his consent.

In the same token it was argued by Dr. Singhvi that before transferring a Judge various aspects of public interest have to be examined qua the circumstances under which the Judge is transferred the compelling reasons why the transfer is being made and the personal difficulties or hardships that the Judge may suffer as a result of his transfer. In other words, by and large, it was contended that non-consensual transfers should be considered to be prima facie punitive and, therefore, violative of Art. 124 (4) because if they amount to punishment then the punishment can only be for his misbehaviour or incapacity as contemplated by Art. 124 (4) and the procedure established by the Constitution for impeachment. We shall, however, develop the detailed aspect of the arguments of Dr. Singhvi when we deal with the same at a later stage.

(4) It would appear from the historical background of Art. 222 that a transfer of a Judge from one High Court to another

really amounts to a fresh appointment as a Judge to the transferee court because before taking oath in the transferee court, the Judge has to vacate his office of the original court and thereby he ceases to be a Judge in the legal sense of the term of the transferor court although for purposes of pension, allowances and salary, etc. he continues to be a Judge by virtue of a legal fiction.

As no person can be appointed as a Judge of the High Court in the first instance against his consent the same principle will apply mutatis mutandis to a Judge who is transferred from one High Court to another because his transfer to the transferee court would amount to his first appointment. In other words, the argument comes to this that once an order of transfer is passed by the President of India under Art. 222, the Judge so transferred dies a civil death in the original High Court where he was appointed and takes a new birth in the new High Court where he is transferred.

(5) That if a transfer is made by the President without the consent of a Judge, it will seriously undermine and impair the independence of the judiciary which is doubtless the basic structure of our Constitution.

(6) That the majority decision of this Court in *Union of India v. Sankal Chand Himatlal Sheth*, (1978) 1 SCR 423: (AIR 1977 SC 2328). (Hereinafter referred to as 'Sheth's case') merits a second look and since the present is a larger Bench consisting of seven Judges, the previous decision should be reconsidered and the view taken therein that consent is not necessary for the application of Art. 222 must be overruled.

162. Thus, the sum and substance of the contentions raised by Mr. Seervai is that the words 'with his consent' should be read into Art. 222 (1) after the words 'transfer a Judge'.

163. Messrs. Sorabjee, Garg and S. P. Gupta who followed Mr. Seervai adopted his arguments in toto so far as the interpretation of Art. 222 is concerned. They, however, laid greater emphasis on the question of primacy of the Chief Justice of India (hereinafter referred to as 'CJI') and contended that the opinion of the CJI was final and binding on the President or on the Council of Ministers who should tender advice to the President in accordance with the opinion expressed by the CJI if independence of judiciary was to be ensured.

164. Dr. Singhvi while adopting the arguments of Mr. Seervai submitted that a transfer without consent affects a Judge adversely and results in evil consequences and virtually amounts to a punishment which is worse than removal but he laid greater stress on the efficacy of the consultative process by the constitutional authorities concerned and a proper meeting and application of minds before a transfer is ordered. Other aspects and conditions of Art. 222 relating to the nature and content of consultation will be examined when we deal with the case of D. N. Pandey (T.C. No. 24/81) in which the Chief Justice of Patna High Court has been transposed as a petitioner.

165. These are the broad contentions advanced before us by the counsel for the parties in these petitions.

166. The Attorney General, the Solicitor-General and Mr. Mridul appearing for the Law Minister have countered all the arguments advanced by the petitioners and have fully defended the impugned orders, the Circular and the transfer of Justice K. B. N. Singh, Chief Justice of the Patna High Court to Madras High Court. We shall indicate the arguments in opposition when we deal with the arguments of the counsel for the petitioners.

167. Thus, from the facts disclosed in the various petitions and in the light of the arguments advanced before us by the counsel for the parties, the following points arise for determination:—

1. Locus standi

2. Article 217

(a) where is the power to appoint located, is it with the Executive?

(b) Is the opinion of CJI entitled to primacy where the two constitutional functionaries, namely, CJ of a High Court and CJI differ, does the adverse opinion of either of them operate as a VETO against appointment; where both the CJ of a High Court and CJI agree upon accepting or rejecting a candidate for appointment, can the executive take a different view and appoint or decide not to appoint?

(c) who can initiate the proposal for appointment under this Article?

(d) whether consultation is necessary in case the Executive decides not to appoint a person?

(e) Does this Article apply when an Additional Judge is to be appointed for a further term or as a permanent Judge?

(f) Scope of judicial review in case of appointment or non-appointment.

3. Policy of General Transfers:

(a) Is the general policy of transfers of all CJs so that every State has a CJ from outside, good, valid and constitutional and in public interest?

(b) Can this policy be formulated and laid down by a declaration made by the President or an executive order of the Council of Ministers without any legislation?

(c) Is the policy of recruiting one-third Judges from outside the State good, valid and constitutional and, if so, what should be the mechanism for implementing the said policy and the manner of its formulation?

(d) Has it been shown that the aforesaid policy has already been evolved, formulated and finalised by the Central Government?

4. Article 216.

(a) What is the scope of the power of the President under this Article?

(b) Is the exercise of the power by the President under this Article amenable to the judicial review and, if so, to what extent?

5. Article 224.

(a) What are the conditions and circumstances under which Additional Judges can be appointed?

(b) On the expiration of his term, is an Additional Judge entitled to be continued automatically, if the conditions for appointment of an Additional Judge continue to exist or is he again liable to be subjected to the process of Art. 217.

(c) Does the Additional Judge have a right to be considered for appointment for a further term or as permanent Judge on expiration of his term or he can be just dropped without any consideration at all?

(i) Is there any convention that an Additional Judge must on the expiration of his term be continued for a further term or be appointed permanent Judge and if so, what is its legal effect on the interpretation of Arts. 217 and 224?

(ii) If there is no convention, is there a practice to the above effect and, if so, what is its effect?

(d) Can an Additional Judge be appointed when a permanent post is vacant: if such an appointment is made, can the Additional Judge be deemed to be a permanent Judge?

(e) Can a short-term appointment of an Additional Judge be made under this Article?

6. Article 222,

(a) Who can initiate the proposal for transfer of High Court Judge?

(b) Is consent of a Judge to be transferred necessary before he can be transferred?

(c) What is the nature and effect of the consultation with CJI?

(d) Does the requirement of public interest limit the exercise of the power of transfer under this Article?

(e) What is the nature of public interest for which transfer of a High Court Judge can be effected?

(f) Can a Judge be transferred on account of complaints or grievances against him or on account of anything in his conduct or behaviour?

7. Circular letter dated March 18, 1981.

8. Claim of privilege against disclosure.

9. T. C. No. 20 of 1981— whether there was full and effective consultation; if not, what relief can be granted.

10. T. C. No. 24 of 1981.— whether there was full and effective consultation between the Govt. and CJI, whether the transfer of K. B. N. Singh was effected in public interest.

168. We first propose to deal with the various aspects of Art. 222, the question of privilege, the nature and extent of consultative process under Art. 222, the legal effect of the Circular and its constitutionality.

169. Coming to the interpretation of Art. 222, the first question that falls for determination is as to whether or not consent can be read into Art. 222 as argued by the counsel for the petitioners. To begin with, this matter was fully considered in Seth's case (AIR 1977 SC 2328) where the majority judgment considered almost all the aspects of the matter and held that consent cannot be read into Art. 222 and a transfer of a Judge from one High Court to another High Court can be made even without his consent subject to effective consultation which has been explained by all the Judges. In that case Bhagwati J. and Untwalia J. dissented from the majority decision and took the view that no transfer of one High Court Judge to another High Court can be made without his consent. In other words the minority was of the view that the word 'consent' has to be read into Art. 222 having regard to the extraordinary circumstances in which such a power is exercised and the constitutional position of a Judge. Normally, the decision in Seth's case would have concluded the matter because in the instant case also the points raised are more or less

similar but the arguments advanced before us in these cases have revealed many more aspects which may not have been before this court in Seth's case and have opened new vistas which undoubtedly require a further consideration. Moreover, in that case the stand taken by the Union of India was that the matter may be decided as a sort of an academic question as the transfers made by the previous Government would be nullified by retransferring them. In view of this concession made by the Union of India in that case it was not necessary for this Court to go deep into the matter because ultimately the decision would turn out to be purely academic.

170. Thirdly, as the question of general policy of transfer has clearly arisen in these cases and lot of material has been produced before us to justify both the constitutionality and the legality of this policy, Art. 222 as also the consultative process now assume a new complexion.

171. For these reasons, therefore, we are of the opinion that the judgment in Seth's case (AIR 1977 SC 2328) (supra) may be reconsidered in the light of the fresh facts which have emerged since then though ultimately we may reach the same conclusions as held by the majority judgment.

172. We shall now examine the first limb of the contention of Mr. Seervai that the word 'consent' should be read into Art. 222. It cannot be doubted that a transfer under Article 222 must be made in public interest and it was so held in Seth's case by all the Judges who were completely unanimous on this aspect of the matter. In this connection, Chandrachud J. (as he then was) observed thus:—

"The power to transfer a High Court Judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who, for some reason or the other, has fallen from its grace." (p. 444 of SCR): (at p. 2339 of AIR 1977 SC).

And Bhagwati J. made the following observations (at p. 2352 of AIR):—

"One thing is, however, certain that the power to transfer a Judge from one High Court to another under Art. 222, clause (1) can be exercised only in public interest."

Krishna Iyer, J., speaking for himself and one of us (Fazal Ali, J.) expressed his views thus (at p. 2376 of AIR):

"Indeed, the independence of the judiciary is itself a necessitous desideratum of public interest, and so interference with it is impermissible except where other considerations of public interest are so strong, and so exercised as not to militate seriously against the free flow of public justice."

And Untwalia, J. in his judgment struck an identical note and observed as follows (at p. 2388 of AIR):—

"It was, however, accepted by all concerned that the transfer can be made only in public interest or on the ground of public policy which sometimes has been characterised by eminent jurists as on unruly horse."

173. This position is also conceded by the Attorney General, the Solicitor General and Mr. Mridul. The main reason why this Court had held that the transfer of a Judge from one High Court to another should be in public interest was that the President should not exercise power by way of victimisation or to impede the free flow of public justice or as Chandrachud, J., put it "for an extraneous or collateral purpose". Where, however, the compelling circumstances and the exigencies of administration or situation are objectively considered and it becomes necessary for the exercise of this power, these factors would constitute public interest to justify the exercise of the power by the President under Article 222. In the instant case, a general and unanimous policy of transfer of judges and Chief Justices of High Courts to promote national integration and suppress fissiparous tendencies, would doubtless be in public interest. Although Art. 222 does not contain the words 'public interest' in so many words but the very exercise of the power, which is not a normal power but an exceptional one, it follows as a logical consequence that public interest is a necessary concomitant of the exercise of this power.

174. The question that now arises is: if it can be said on a parity of reasoning, that 'consent' also should be read as a part and parcel of the exercise of the power under Art. 222. It is difficult to accede to this contention because if a Judge cannot be transferred without his consent then the power loses its significance and becomes an immunity to a Judge from transfer by withholding his consent. Thus, a power which is to be exercised by the President can be defeated or stalled by a simple act of the Judge in refusing to give his consent to the

transfer. This could never have been the intention of the Founding Fathers of the Constitution. Article 222 may be extracted thus:

"222. Transfer of a Judge from one High Court to another.

(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and until so determined, such compensatory allowance as the President may by order fix."

175. A perusal of Art. 222 unmistakably shows that it is expressed in absolutely clear, explicit, intelligible, plain and unambiguous language which admits of no vagueness or ambiguity. Mr. Seervai, however, by an involved process of reasoning wants us to import the concept of 'consent' by reading the same into the Article by way of necessary intendment of the Parliament. It is not the function of the court to supply words to suit a particular course of action so as to be acceptable to a particular act of persons as a doctrine of implied consent. It is just like first raising a ghost and then trying to kill it. Before we enter into a detailed discussion of the Rules of interpretation of Statutes we might indicate that there is intrinsic evidence in the various constitutional provisions which clearly show that the word 'consent' has been dropped by the legislature deliberately or it is a case of deliberate omission rather than casus omissus. In order to drive home our point we would give a brief survey of the scheme of the Constitution regarding the expressions 'consent', 'concurrence' or 'consultation' used in various Articles to determine the context, the purport and the intention of the Founding Fathers of the Constitution.

176. Take, for instance, Art. 127 which expressly deals with previous consent of the President, and may be extracted thus:

"127. Appointment of Ad hoc Judges.

(1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with

the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an ad hoc Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court." This Article may be divided into four parts:—

(1) that there should be a lack of quorum of the Judges of the Supreme Court.

(2) that the Chief Justice of India may with the previous consent of the President and

(3) after consultation with the Chief Justice of the High Court,

(4) request in writing the attendance, as an ad hoc Judge, for such period as may be necessary of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court.

Clause (2) of the Article provides that it shall be the duty of the Judge to attend the sittings.

177. It would thus appear that when the Constituent Assembly intended that there should be consent, it has said so in very clear terms. The first part clearly shows that the power under Art. 127 (1) can be exercised only with the previous consent of the President and not otherwise. Similarly, in the second part, the word 'consultation' is used and in cl. (2), the word 'duty' is used which completely rules out 'consent'. An analysis of this Article clearly shows that whenever the Constitution intended a particular expression to have a particular meaning it has made its intention clear and unambiguous by using the word 'duty', 'consent' or 'consultation'.

178. Article 128 requires consent of the President before an offer is made to a retired Judge to act as an ad hoc Judge of the Supreme Court. Proviso to Art. 128 may be extracted thus:

"Provided that nothing in this Article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do."

179. This proviso clearly enjoins that the ad hoc Judge cannot be requested to

sit in the court unless he consents to do so. Indeed, if the intention of the Constituent Assembly was that a transfer could not be made without the consent of the Judge, then a similar expression as contained in the proviso or something like that would have been used in Art. 222 (1). The absence of any such expression shows that the Constituent Assembly deliberately omitted 'consent' by necessary intendment.

180. Article 224-A deals with the appointment of retired Judges at sittings of High Courts which may be extracted thus:

"224-A. Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court:

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do."

181. The provisions of this Article make the exercise of powers conditional on the consent of the Judge concerned. In *Chandra Mohan v. State of U. P.*, (1967) 1 SCR 77: (AIR 1966 SC 1987) this Court has clearly indicated that where the Constitution intended particular expressions to be used it has expressed its intention clearly and observed thus (at p. 1990 of AIR):

"Wherever the Constitution intended to provide more than one consultant, it has said so: see Arts. 124 (2) and 217 (1). Wherever the Constitution provided for consultation of a single body or individual it said so: see Art. 222. Art. 124 (2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted."

182. Article 258 runs thus:

"258. (1) Notwithstanding anything in this Constitution the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any mat-

ter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers, and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties."

183. Here also, the President has to exercise his powers with the consent of the Government of a State either conditionally or unconditionally. In other words, where the power conferred on the President is to be exercised with consent, the Founding Fathers of the Constitution have expressly said so in the concerned Articles. On a parity of reasoning, therefore, if the intention of the Founding Fathers was to make 'consent' an essential ingredient of Art. 222, they would have used the expression 'the President may, with the consent of the Judge concerned, transfer a Judge from one High Court to another'. The fact that Art. 258 requires the President to act with the consent of the Government of a State, which is also a constitutional authority, the same principle will apply to a High Court Judge who is also a constitutional authority. Therefore, this leads to the irresistible conclusion that the word 'consent' was never intended to be included in the powers to be exercised under Art. 222.

184. Article 258-A runs thus:—

"258-A. Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends."

185. Here also, the Governor of a State has to exercise a particular power only with the consent of the Government of India and not otherwise. This also

shows that the Founding Fathers were fully aware of the situations where consent is necessary and where it is not.

186. Article 254 deals with the legislative powers of the Centre and the States. Clause (2) of Art. 254 provides thus:

"254 (2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent list contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

187. It is obvious that here as a legislation is concerned, the expression used is 'assent' and not 'consent' though both the terms are synonymous. The use of the word 'assent' is generally made when we are dealing with statutory enactments.

188. Sub-clause (ii) of clause (1) of Art. 370 may be extracted thus:

"(ii) such other matters in the said lists as, with the concurrence of the Government of the State, the President may by order specify."

189. The laws mentioned in Art. 370 can be applied to the State of Jammu & Kashmir only with the concurrence of the Government of the State. Here the word 'concurrence', which is stronger than 'consent', has been used to indicate and maintain the special status given to that State. Certain aspects of this matter have been clearly pointed out by Krishna Iyer, J. in *Sheth's case* (AIR 1977 SC 2328 at p. 2383) thus:

"It would thus appear that the Constitution itself specifies 'consent' where it is intended and omits it when unnecessary. If, therefore, the Constitution makers intended that under Article 222 a Judge cannot be transferred from one High Court to another without his consent then it should have been expressly so mentioned in the Constitution."

190. We have given these clear instances to drive home the point that wherever the Founding Fathers intended that a particular expression should be used in an Article as a condition precedent to the exercise of a particular power,

the same has been mentioned and where no such intention was there the expressions have not been used. As against this, Mr. Seervai submitted that in Art. 217 which provides for the appointment of High Court Judges, it has nowhere been indicated that the Judge proposed to be appointed should give his consent to the appointment. In *Seth's case* (AIR 1977 SC 2328), Krishna Iyer J. while dealing with an identical argument observed as follows (at p. 2382):—

"It would be seen that in this constitutional provision the words 'appointed' and 'transferred' have been used separately conveying different connotations; and if the Constitution makers had used these two terms in the said subject in different contexts it cannot be argued that these two terms are interchangeable. On the other hand, an analysis of Article 217 (1) (c) shows that the constitutional provision makes a clear-cut distinction between appointment and transfer."

191. We stick to the view expressed by Krishna Iyer, J. in the majority judgment. The argument of Mr. Seervai appears to be fallacious because this analogy cannot be applied to a Judge who after being appointed is transferred under Art. 222. It is obvious that there is no provision in the Constitution empowering the President to appoint for the first time a person as a Judge of a High Court against his consent and even if he is appointed, the person so appointed can refuse to act as a Judge and if he does so the matter ends there and he cannot be compelled to act as a Judge. Once, however, the person decides to accept the appointment of a Judge of a High Court he becomes a constitutional functionary and therefore would be subject to the provisions of the Constitution because before deciding to accept the appointment he must be presumed to be aware of the constitutional provisions contained in the various Articles regarding High Court Judges, viz., the conditions of service, the salary and other allowances, the date of retirement and also the provision regarding transfer as provided for in Art. 222 which does not contain the word 'consent'. It would thus not be open to any Judge to complain that he had been transferred against his consent or to plead that had he known this he may not have accepted the office of a High Court Judge. As the word 'consent' is conspicuously absent from Article 222, such a plea cannot in the very

nature of things be permitted to be taken by the concerned Judge. If he does not want to be transferred, it is always open to him to resign for which also there is a clear provision under proviso (a) to clause (1) of Art. 217. Therefore, the argument of Mr. Seervai must be overruled.

192. These are the intrinsic circumstances to show that the Founding Fathers did not intend to use the word 'consent' in Art. 222 deliberately. We have already held that Art. 222 is expressed in the clearest possible terms. But, assuming for the sake of argument as urged by Mr. Seervai, that there is some element of ambiguity either in the setting and pattern of Art. 222 or in the real object which it seeks to subserve, which according to Mr. Seervai finds ample support from the fact that two Judges in Seth's case (AIR 1977 SC 2328) have taken the view which is being propounded by the learned counsel, we would attempt to construe Art. 222 in the light of the well settled rules of interpretation of statutes.

193. Before, however, we discuss the various books, reference and authorities we must take into consideration a very weighty circumstance which is peculiar to our Constitution as also to the American Constitution. It must be remembered that in England if any error is committed by a court of Appeal, it may be corrected by the House of Lords or eventually by Parliament by a simple majority. Similarly, in Australia also if the High Court gives a wrong interpretation of a particular constitutional provision it can be set right by the Privy Council by an appeal against the said order of a High Court and the Parliament may amend the statute to bring it in conformity with the intention and that too by a simple majority. The position so far as our country is concerned is similar to that of America and if any error of interpretation of a constitutional provision is committed by the Supreme Court or any interpretation which is considered to be wrong by the Government can be rectified only by a constitutional amendment which is a very complicated, complex, delicate and difficult procedure requiring not merely a simple majority but two-third majority of the Members present and voting. Apart from the aforesaid majority, in most cases the amendment has to be ratified by a majority of the States. In these circumstances, there-

fore, this Court which lays down the law of the land under Art. 141 must be extremely careful and circumspect in interpreting statutes, more so constitutional provisions, so as to obviate the necessity of a constitutional amendment every time which, as we have already mentioned, is an extremely onerous task. S. R. Das, C.J. in the case of *Bengal Immunity Co. Ltd. v. State of Bihar*, (1955) 2 SCR 603 : (AIR 1955 SC 661) expressly referred to this aspect of the matter and observed as follows (at p. 672):—

"An erroneous interpretation of the Constitution may quite conceivably be perpetuated or may at any rate remain unrectified for a considerable time to the great detriment to public well being."

194. Having carefully interpreted a particular provision of the Constitution, the Court should as far as possible stick to the doctrine of stare decisis. It must be remembered that as Lord Wright pointed out in *James v. Commonwealth*, (1936) AC 578 that a Constitution is a federal component and the constituents must hold a balance between all its parts.

195. Thus, so far as the general principles regarding interpretation of statutes are concerned they are now well settled beyond any controversy for the last two centuries in almost all the countries of the world having a democratic constitution or pattern of Government. As far as this Court is concerned, on some points decisions during the first decade of its existence were somewhat inconsistent but generally the view which found favour with most of the Judges during the first decade was that the methodology of interpretation of statutes should be the same for constitutional provisions as it is for statutory provisions. It has further been held that external aids like Parliamentary debates, report of the Drafting or select committees, the Objects and Reasons of the Act are wholly inadmissible for the purpose of interpreting the provisions of a statute which would depend entirely on the language of the provisions concerned. Here also, some of the cases have held that where the language of the provisions is shrouded in obscurity or is not fully intelligible so as to ascertain or find out the objects of the Act, external aids may be permissible. So far as speeches made by a Minister is concerned, it has been consistently held to be wholly inadmissible because it represents the individual view of a single person with which the majority of the

Members of Parliament may or may not have agreed.

196. During the second and third decade this Court made a prominent shift from the original stand and a long course of recent decisions have permitted parliamentary debates or Reports of Drafting or Select Committees to be taken into consideration for the purpose of ascertaining the object or the real meaning of the language employed in a statutory or constitutional provision.

197. But there is one principle on which there is complete unanimity of all the courts in the world and this is that where the words or the language used in a statute are clear and cloudless, plain, simple and explicit unclouded and unobscured, intelligible and pointed so as to admit of no ambiguity, vagueness, uncertainty or equivocation, there is absolutely no room for deriving support from external aids. In such cases, the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words therefrom.

198. It is equally well settled that it is not the duty of the court to import words which have been omitted deliberately or intentionally in order to fill up a gap or supply omissions to fit in with the ideology or concept of the Judge concerned. The words and the language used must be given their natural meaning and interpreted in their ordinary and popular sense.

199. There may be a third type of cases which may be on the border line — where the language may admit of two interpretations in which case the court may consider the desirability of resorting to external aids in order to catch and delve into the spirit and object of the statute.

200. These principles have been enunciated over the years by several authorities of various courts to which I shall refer hereafter. Before, however, going to the authorities, it may be necessary to refer to extracts from the various books of legal scholars on the interpretation of statutes.

201. Crawford in his book captioned 'Statutory Construction' (1940 Edition) in para 158 'Purpose of Interpretation and Construction' (pp. 244-245) has observed thus:

"The basic principle has been announced time after time that if the statute is plain, certain and free from ambiguity, a bare reading suffices and interpretation is unnecessary."

202. At page 344, it has also been pointed out by the author that alteration, interpolation or elimination of words are not permissible. In this connection, the author makes the following observations while dealing with an American case:

"As we have already stated, the intention of the legislature must be primarily ascertained from the language used. This obviously means, as a general rule, that the courts have no power to add to, or to change, alter, or eliminate the words which the legislature has incorporated in a statute, not even in order to provide for certain contingencies which the legislature failed to meet, or to avoid hardship flowing from the language used, or to advance the remedy of the statute."

203. At pages 388-389, the author further observed thus:

"Where the meaning of a statute is in doubt, the court may resort to contemporaneous construction—that is, the construction placed upon the statute by its contemporaries at the time of its enactment and soon thereafter—for assistance in removing any doubt. Similarly, resort may also be had to the usage or course of conduct based upon a certain construction of the statute soon after its enactment and acquiesced in by the courts and the legislature for a long period of time. As is obvious, the meaning given to the language of a statute by its contemporaries is more likely to reveal its true meaning than a construction given by men of another day or generation. Even words change in meaning with the march of time. And the meaning given by contemporaries can be revealed with no more certainty than by resort to the common usage and practice under the statute itself over a considerable period of time."

204. The author has rightly observed that sometimes it so happens that words change in meaning with the march of times. If this is so, it is manifest that the court while interpreting a statute dealing with socialism cannot ignore the temper of the times and the modern trends of legal thought.

205. Similarly, while dealing with the circumstances and the history of the Statute, the author says thus:

"According to the weight of authority, and surely the better view, the court may consider the general history of a statute, including its derivation that is, the various steps leading up to and attending its enactment, as shown by the

legislative journals, in its effort to ascertain the intention of the legislature where it is in doubt. Conversely, the legislative history cannot be considered where the statute's meaning is plain." (p. 383)

206. Here also, we find that history, etc., is permissible only where the language of a statute is ambiguous and not where the meaning of the statute is plain and clear.

207. V. P. Sarathi in 'Interpretation of Statutes' (1975 Edn.) observed thus:

"In order to arrive at the intention of the legislature, the state of law and judicial decisions antecedent to and at the time the statute was passed are material matters to be considered....."

Courts sometimes make a distinction between legislative debates and reports of committees and treat the latter as a more reliable or satisfactory source of assistance.

It is submitted that the subtle distinction that parliamentary history may be referred for ascertaining the intention, but not for construction, is pedantic. In fact all such material must be freely referred; and it is only by resort to such material that the object of the legislation and how the legislature intended to achieve that object by the particular statute can be correctly ascertained by the Court." (p. 339)

208. At page 367, the author observes thus:

(a) Reference to English and American decisions may be made, because they have the same system of jurisprudence as ours, but do not prevail when the language of the Indian Statute or enactment is clear.

(b) They are of assistance in elucidating general principles and construing Acts in *pari materia*.

(c) But Indian statutes should be interpreted with reference to the facts of Indian life."

209. The observations in clause (c) are rather important because that seems to us to be the correct approach. Seervai in "Constitutional Law of India" (2nd Edn.) Vol. II, pp. 1543-44 observes thus:—

"Secondly, where words are clear and unambiguous effect must be given to them regardless of consequences..... After all the object of interpretation or documents and statutes is to ascertain 'the intention of them that made it.' The literal interpretation has a *prima facie* preference, but to get at the real meaning

it is necessary to apply the rule in Heydon's case.

.....
However, where the words of a statutory or constitutional provision are ambiguous, resort may be had to well recognised extrinsic aids to construction and regard may be had to the consequences of adopting one construction rather than another. The meaning of "ambiguity" has been considered at length in paras 2.31 and 2.32 of the text."

210. Craies on "Statute Law" (6th Edn.) while quoting Jervis C.J., at p. 86 observes thus:

"It is clear that 'if', as Jervis C.J. said in *Abley v. Dale* ((1850) 20 LJCP 33, 35) the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."

211. Similarly, the author has categorically observed that in the interpretative process *casus omissus* is not to be added or supplied. In this connection, the following observations have been made at p. 70:

"A second consequence of this rule is that a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made..... Although in construing an Act of Parliament the Court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there" and quoting Lord Parker, the author says thus:

"Where the literal reading of a statute..... produces an intelligible result..... there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament."

212. At page 66, the author observes thus:

"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves....."

If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver.

Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."

213. Lord Bacon says that the function of a Judge is *jus decere* and not *jus dare*, i. e., to interpret the law and not to make it. Similarly, Marshal, C.J. observed that we must remember that "it is the constitution that we are expounding". These observations aptly apply to the instant case where we are construing a constitutional provision, viz., Art. 222, particularly when a provision like this is not to be found in any Constitution of any other country of the world.

214. According to Maxwell, the golden rule of interpretation is to adhere to the ordinary meaning of the words used unless it is in direct conflict with the intention of the Act. In this connection, the author in his book 'Interpretation of Statutes' (12th Edition) observes thus:

"It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express."
(p. 33)

215. I have laid particular stress on the *casus omissus* aspect of the interpretative process because the main thrust of the argument of Mr. Seervai on interpretation of Art. 222 was that the word 'consent' should be read into Art. 222 which is not there at all, and if the contention of the counsel is accepted, it will amount to the court supplying an omission which has been made deliberately by the Founding Fathers of the Constitution and would be in direct contravention of the scheme of the Constitution as discussed above.

216. The leading case on the subject is *Heydon's case* (1584) 76 ER 637 where the broad principle of interpretation of Statutes was spelt out and explained. In this connection the Court observed as follows:

"And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the

common law), four things are to be discerned and considered:—

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

217. This case has been followed both by this Court as also by the courts in England for a pretty length of time. This may be the starting point of the manner and the method which the Court should adopt in interpretation of statutes.

218. The authorities on the question of interpretation of the constitutional provisions may roughly be divided into four categories which may not exactly be absolutely separate or independent so as to be confined in a watertight compartment but in some cases may overlap, yet they generally lay down the law on the subject categorised by us:

Categories

(A) Where the language of a statute is plain, explicit and unambiguous, no external aid is permissible.

(B) Where the language is vague and ambiguous or does not clearly spell out the object and the spirit of the Act, external aids in the nature of parliamentary debates, reports of Drafting or Select Committees may be permissible to determine and locate the real intention of the legislature.

(C) Where certain words are omitted from the statute, the court cannot supply the omission or add words to the statute on a supposed view regarding the intention of the legislature.

(D) Any speech made by a Minister or a Member in the Parliament is not admissible or permissible to construe a statutory or a constitutional provision.

219. We shall now deal with the authorities which fall more or less within the four categories indicated above.

Category (A)

220. The earliest case on the subject is *A. K. Gopalan v. State of Madras*, 1950 SCR 88: (AIR 1950 SC 27) where Kania C.J. pointed out that external aid was not permissible unless a statute was ambiguous and observed thus (at p. 38 of AIR):—

"Our attention was drawn to the debates and report of the drafting committee of the Constituent Assembly in respect of the working of this clause. The report may be read not to control the meaning of the article, but may be seen in case of ambiguity....."

Resort may be had to these sources with great caution and only when latent ambiguities are to be resolved."

221. Fazal Ali, J. (as he then was) speaking in the same strain made the following observations (at p. 56):—

"In my opinion, though the proceedings or discussions in the Assembly are not relevant for the purpose of construing the meaning of the expressions used in Article 21, especially when they are plain and unambiguous they are relevant to show that the Assembly intended to avoid the use of the expression without due process of law." (Emphasis ours)

And Mukherjea, J. observed thus (at p. 93):—

"It is well settled that the Constitution must be interpreted in a broad and liberal manner giving effect to all its parts, and the presumption should be that no conflict or repugnancy was intended by its framers. In interpreting the words of a Constitution, the same principles undoubtedly apply which are applicable in construing a statute.

As an aid to discover the meaning of the words in a Constitution, these debates are of doubtful value. "Resort can be had to them", says Willoughby, "With great caution and only when latent ambiguities are to be solved....."

222. The same view was expressed by Gajendragadkar, J. (as he then was) in *Kanai Lal Sur v. Paramnidhi Sadhukhan*, 1958 SCR 360: (AIR 1957 SC 907) where the learned Judge observed as follows (at p. 910):

"If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used

in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise.

223. In *M. Pentiah v. Muddala Veeramallappa*, (1961) 2 SCR 295: (AIR 1961 SC 1107) Sarkar, J. observed thus (at p. 1115):—

"Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a Statute, or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense.

224. In *M. V. Joshi v. M. U. Shimpi*, (1961) 3 SCR 986: (AIR 1961 SC 1494) Subba Rao, J. expressed the opinion of the Court thus (at p. 1498):—

"But these rules do not in any way affect the fundamental principles of interpretation, namely, that the primary test is the language employed in the Act and when the words are clear and plain the court is bound to accept the expressed intention of the Legislature."

225. In *Hansraj Gordhandas v. H. H. Dave, Asstt. Collector of Central Excise & Customs, Surat*, (1969) 2 SCR 253: (AIR 1970 SC 755) Ramaswami, J. speaking for the court observed thus (at page 759):—

"It is well established that in a taxing statute there is no room for any intentment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority.

It is an application of this principle that a statutory notification may not be extended so as to meet a *casus omissus*."

226. Although these observations were made in respect of a taxing statute, the principle of interpretation of provisions of a statute or of the Constitution is the same; the only difference being that in a taxing statute where two interpretations are possible, benefit of the doubt is normally given to the tax-payer.

227. In *Commissioner of Income-tax, Assam & Nagaland v. G. Hyatt*, (1971) 1 SCC 466 : (AIR 1971 SC 725), Hegde, J. speaking for the Court made the following observations (at p. 726):—

"In our opinion the meaning of Section 17 (3) (ii) is plain and unambiguous. Hence there is no need to call into aid any of the rules of construction as was sought to be done by the High Court."

228. In *Senior Superintendent, R.M.S., Cochin v. K. V. Gopinath, Sorter*, (1972) 3 SCR 530 : (AIR 1972 SC 1487), Mitter, J. reiterated this well settled principle thus (at p. 1488):—

"As has often said that if 'the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense'; 'and not to limit plain words in an Act of Parliament by considerations of policy, if it be policy, as to which minds may differ and as to which decisions may vary.'"

229. In *Umed v. Raj Singh*, (1975) 1 SCC 76 : (AIR 1975 SC 43), Bhagwati, J. (one of us made the following observations) (at p. 61):—

"But that does not mean that a construction should be adopted which ignores the plain natural meaning of the words or disregards the context and the collocation in which they occur. It is a familiar rule of interpretation that the words used by the Legislature must be construed according to their plain natural meaning."

230. In *Anandji Haridas & Co. Pvt. Ltd v. Engineering Mazdoor Sangh*, (1975) 3 SCR 542 : (AIR 1975 SC 946) this Court observed as follows (at p. 949):

"As a general principle of interpretation, where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external evidence such as Parliamentary Debates, Reports of the Committees of the Legislature or even the statement made by the Minister on the introduction of a measure or by the framers of the Act is admissible to construe those words."

231. In *Mangalore Electric Supply Co. Ltd. v. Commr. of Income Tax, West Bengal* (1978) 3 SCC 248 : (AIR 1978 SC 1272) this Court observed thus (at p. 1274).

"The justification for this submission is stated to be that the word 'transfer', occurs in the collocation of three other words 'sale', 'exchange' and 'relinquish-

ment' which are essentially volitional or voluntary acts, leading to the conclusion that the word 'transfer' must take its colour from the three other words in association with which it is used. 'Transfer' therefore, according to the learned counsel, means a voluntary transfer and cannot include all compulsory acquisition of property."

We find it impossible to accept the submission. In the first place if it was intended that voluntary transfers alone should fall within the meaning of the section, it was unnecessary for the legislature to use the expression 'transfer', an expression acknowledged in law as having a wide connotation and amplitude..... Without more, therefore, there is no reason for limiting the operation of the word 'transfer' to voluntary acts of transfer so as to exclude compulsory acquisitions of property."

232. This decision seems to us to be apposite to the facts of the present case, viz., interpretation of the word 'transfer' as the argument of Mr. Seervai is that the word 'transfer' used in Art. 222 must be confined only to a transfer with the consent of the Judge concerned, thereby limiting the scope and ambit of Art. 222. A similar argument was advanced in the case supra and rejected and the Court held that there was no reason to limit the word 'transfer' only to a voluntary transfer so as to include compulsory acquisition of property. On a parity of reasoning, therefore, we are of the opinion that to read 'consent' into Art. 222 would be to limit and whittle down the scope, ambit and purpose of Art. 222.

233. It is not necessary for us to multiply authorities on the subject covered by category 'A' because the text books and the authorities of this Court as also of some foreign courts referred to above, clearly lay down that where the language of a statute is plain and unambiguous it is not permissible to rely on external aids.

Category (B)

234. This category consists of those cases which have laid down that where the language is vague or ambiguous to what extent external aid can be used to locate the actual intention of the Legislature. In *Powell v. The Kempton Park Racecourse Co. Ltd.* (1899) AC 143, Lord Halsbury indicated the extent to which external aid could be used by courts in construing a statutory provision and observed thus:

"It has, indeed been argued that the history of the legislation and of the facts which gave rise to the enactment may in view of the preamble affect the construction of the Act itself, but though I do not deny that such topics may usefully be employed to interpret the meaning of a statute, they do not, in my view, afford conclusive argument here."

235. In *A. K. Gopalan's case* (AIR 1950 SC 27) (supra), Sastri, J. (as he then was) observed as follows:

"It is not a matter for surprise, therefore, that the Drafting Committee appointed by the Constituent Assembly of India recommended the substitution of the expression "except according to procedure established by law" taken from the Japanese Constitution, 1946, for the words "without due process of law" which occurred in the original draft, "as the former is more specific"."

236. The learned Judge has clearly indicated that the reason why our founding Fathers substituted the words 'except according to the procedure established by law' in Art. 21 instead of the words 'without due process of law' as used in the American Constitution because they implemented the Report of the Drafting Committee which had taken the words 'procedure established by law' from the Japanese Constitution of 1946. His Lordship then indicated the nature, extent and the circumstances in which external aid could be used to construe a constitutional provision. Sastri J., also commented on the extent of the relevancy of a speech made in the course of a debate on a Bill and in this connection observed thus:

"A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord."

237. Thus, the view of Sastri, J. was that a court could locate the objective and intent of the legislature primarily in the words used by the Constitution supported by such historical material as may be available.

238. In *Commr. of Income Tax, Gujarat v. Vadilal Lallubhai* (1973) 1 SCR 1058 : (AIR 1973 SC 1016), Hegde, J. observed as follows (at p. 1019):—

"In order to find out the legislative intent, we have to find out what was the

mischief that the legislature wanted to remedy. The Act was extensively amended in the year 1939, Section 44-F was not in the draft bill. That section was recommended by the Select Committee consisting of very eminent lawyers. It will not be inappropriate to find out the reasons which persuaded the select Committee to recommend the inclusion of Section 44F, if the section is considered as ambiguous."

239. In this case, the Court relied on the recommendation of the Select Committee in order to find out the reasons for inclusion of a particular section.

240. In *State of Mysore v. R. V. Bidap* (1974) 3 SCC 337 : (AIR 1973 SC 2555) this Court seems to have made a positive shift from the view taken in earlier cases of this Court and held that in order to ascertain the meaning of a statute or its object the court should not confine itself within a particular sphere but should take into consideration whatever is logically relevant or admissible. This is a decision of a Constitution Bench and shows the modern trend of interpretation of statutes. Krishna Iyer, J. speaking for the Court tersely observed as follows (at p. 2558):

"The Rule of Exclusion has been criticised by jurists as artificial. The trend of academic opinion and the practice in the European system suggest that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. Recently, an eminent Indian jurist has reviewed the legal position and expressed his agreement with Julius Stone and Justice Frankfurter. Of course, nobody suggests that such extrinsic materials should be decisive but they must be admissible. Authorship and interpretation must mutually illumine and interact. There is authority for the proposition that resort may be had to these sources with great caution and only when incongruities and ambiguities are to be resolved. There is a strong case for whittling down the Rule of Exclusion followed in the British courts and for less apologetic reference to legislative proceedings and like materials to read the meaning of the words of a statute. Where it is plain, the language prevails, but where there is obscurity or lack of harmony with other provisions and in other special circumstances, it may be legitimate to take external assistance such as the object of the provisions, the mischief sought to be remedied, the social

context, the words of the authors and other allied matters."

241. An identical view was taken in a later case of this Court in *Faqu Shaw v. State of West Bengal* (1974) 4 SCC 152 : (AIR 1974 SC 613) where Bhagwati, J. relied on the decision extracted above and observed thus (at p. 628):

"Since the purpose of interpretation is to ascertain the real meaning of a constitutional provision, it is evident that nothing that is logically relevant to this process should be excluded from consideration. It was at one time thought that speeches made by the members of the Constituent Assembly in the course of the debates on the Draft Constitution were wholly inadmissible as extraneous aids to the interpretation of a constitutional provision, but of late there has been a shift in this position and following the recent trends in juristic thought in some of the Western countries and the United States, the rule of exclusion rigidly followed in Anglo-American jurisprudence has been considerably diluted".

242. It is true that these observations are to be found in the dissenting judgment of Bhagwati, J. (one of us) but on this issue there was no dissent. We are inclined to endorse the observations made by Krishna Iyer, J. and Bhagwati, J. as referred to in the cases mentioned above.

243. In *Anandji Haridas & Co. v. Engineering Mazdoor Sangh*, (1975) 3 SCC 862 : (AIR 1975 SC 946), Sarkaria, J. speaking for the Court observed as follows (at p. 949):—

"It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the word in question."

244. In *Sole Trustee, Loka Shikshana Trust v. Commr. of Income-tax, Mysore*, (1976) 1 SCC 254 : (AIR 1976 SC 10), this Court made the following observations (at p. 22):

"But, in the case before us, the real meaning and purpose of the words used cannot be understood at all satisfactorily without referring to the past history of legislation on the subject and the speech

of the mover of the amendment who was, undoubtedly, in the best position to explain what defect in the law the amendment had sought to remove."

245. In *State of Tamil Nadu v. Pyare Lal Malhotra* (1976) 1 SCC 834 : (AIR 1976 SC 800) Beg, J. (as he then was) observed thus (at p. 803):

"The reason given, in the Statement of Objects and Reasons of the 1972 Act, for an elucidation of the "definition" of iron and steel, was that the "definition" had led to varying interpretations by assessing authorities and the courts so that a comprehensive list of specified declared iron and steel goods would remove ambiguity. The Select Committee, which recommended the amendment called each specified category "a sub-item" falling under "iron and steel."

246. In this case, the court relied on the Report of the Select Committee as also on the Statement of Objects and Reasons of the Act in order to elucidate the definition of certain words used in the statute.

247. To the same effect is a later decision of this Court in *Jaisingh Jairam Tyagi v. Mamanchand Ratilal Agarwal* (1980) 3 SCC 162 : (AIR 1980 SC 1201), where the court observed as follows (at p. 1203):—

"Amending Act 22 of 1972 was, therefore, enacted for the express purpose of saving decree which had already been passed. The Statement of Objects and Reasons of the Amending Act stated."

248. Same view was taken in a batch of appeals by this Court in *Polestar Electronic (Pvt.) Ltd. v. Addl. Commr. Sales-Tax* (1978) 1 SCC 636 : (AIR 1978 SC 897) where Bhagwati, J. (one of us) took into consideration the subsequent history of the Act as also the Statement of Objects and Reasons in order to construe certain provisions of the statute concerned and observed thus (at p. 910):—

"The subsequent history of the Act also supports the construction which we are inclined to place on Section 5 (2) (a) (ii) and second proviso. Section 5 (2) (a) (ii) was amended with effect from May 28, 1972 by Finance Act, 1972 and the words 'in the Union Territory of Delhi' were added after the word 'manufacturer' so as to provide that manufacture should be inside the territory It is clear from the Statement of Objects and Reasons that this amendment was not introduced

by Parliament *ex abundanti cautela*, but in order to restrict the applicability of the exemption clause in S. 5 (2) (a) (ii). The Statement of Objects and Reasons admitted in clear and explicit terms that... "....."

249. In *Mangalore Electric Supply Co.* (AIR 1978 SC 1272) (*supra*) Chandrachud, J. (as he then was) relied on the legislative history of the provision of the statute concerned in order to construe the intention of the legislature and pointed out thus:

"The legislative history of Section 12B (I) furnishes an important clue to the question raised by the appellant's counsel."

250. In *Dadaji v. Sukhdeobabu*, (1980) 1 SCC 621 : (AIR 1980 SC 150) this Court made the following observations (at p. 155):

"Even though the proceedings of the Joint Committee cannot be relied upon for the purpose of construing the order, they may be looked into to ascertain the circumstances in which the several communities were grouped under one entry or the other."
Category (C)

251. This category consists of those cases which take the view that words cannot be omitted from the statute or supplied to it if they are not there. In other words, in interpretation of statute, the doctrine of *casus omissus* is a fundamental test. In *A. K. Gopalan's case* (AIR 1950 SC 27 at p. 118) (*supra*) S. R. Das J. very poignantly pointed out thus:

"The Constitution has by Article 21 required a procedure and has prescribed certain minimum requirements of procedure in Article 22. To add to them is not to interpret the Constitution but to recast it according to our intellectual yardstick and our unconscious predilections as to what an ideal Constitution should be."

(Emphasis supplied)

252. A similar view was taken by Das, J. in *Nalinakhya Bysack v. Shyam Sunder Halder* 1953 SCR 533 : (AIR 1953 SC 148) where he very pithily observed thus (at p. 152):

"It must always be borne in mind, as said by Lord Halsbury in *Commissioner for Special Purposes of Income Tax v. Pemsel* (L. R. (1891) AC 531 at p. 549) that it is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. The

Court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature the Court cannot, as pointed out in *Crawford v. Spooner* (6 Moo PC 1) aid the Legislature's defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is a *casus omissus*, it is, as said by Lord Russell of Killowen in *Hansraj Gupta v. Official Liquidator of Dehra Dun Mussorie Electric Tramway Co. Ltd.* ((1933) 60 IA 13) : AIR 1933 PC 63 for others than the courts to remedy the defect."

253. Thus, this Court has clearly held that in construing a statutory or Constitutional provision, the court should not presume that the legislature has either committed a mistake or has omitted something which was very necessary. Das J. very rightly remarked that it was not for the Court but for others to remedy the defect, if any, found in a statutory provision. If we accept the argument of Mr. Seervai and read the word 'consent' in Art. 222 by supplying the omission, we will be violating the cardinal principle of interpretation as adumbrated by Das J. in the case *supra*.

254. In *Sri Ram Ram Narain Medhi v. State of Bombay*, (1959) Supp 1 SCR 489 : (AIR 1959 SC 459) the law on the subject was very succinctly and clearly laid down by this Court and N.H. Bhagwati J. observed thus (at p. 470):

"Acceptance of the interpretation which is sought to be put upon these words by the petitioners would involve the addition of words "in the process of the acquisition by the State of any estate or of any rights therein" or "in the process of such acquisition" which according to the well known canons of construction cannot be done. If the language of the enactment is clear and unambiguous it would not be legitimate for the Courts to add any words thereto and evolve therefrom some sense which may be said to carry out the supposed intentions of the legislature."

255. We find ourselves in complete agreement with these observations which aptly apply to the present case so far as Art. 222 is concerned and are sufficient to demolish the argument of Mr. Seervai that the word 'consent' should be added to or read into Art. 222 even if it is not there.

256. In *Commr. of Income Tax, Central Calcutta v. National Taj Traders* (1980) 1 SCR 370 : (AIR 1980 SC 485) Tulzapurkar, J. speaking for the Court highlighted the importance of the doctrine of *casus omissus* in a very poignant exposition of the law on the subject and opined thus (at p. 489):

"In other words, under the first principle a *casus omissus* cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a *casus omissus* should not be readily referred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute."

257. Thus, Tulzapurkar J. laid down three conditions under which omissions could be supplied to a statute—

(1) that there was a clear necessity for the same,

(2) that the reason for supplying the omission was to be found in the provisions of the statute itself expressed or by necessary intendment, and

(3) that the omission was to be supplied only to make the provision consistent with the object of the statute.

258. It is manifest that none of these conditions apply to Art. 222 and therefore to supply the omission by reading the word 'consent' would really be going against the principles laid down by this Court in the aforesaid case.

259. In *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : (AIR 1980 SC 1632) Chandrachud C. J. while dealing with this particular aspect of canon of construction of a statute, very pithily observed thus (at p. 1639):

"By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose."

260. It follows from the observations made by this Court that if the word 'consent' is read into Art. 222 then it will amount to imposing unnecessary restraints and conditions in the Article which are not there at all and which cannot be

done under the well-known rules of interpretation of statutes.

Category 'D'

261. In this category we shall include those cases which hold that a speech made by a Minister or by a Member of Parliament is neither admissible nor permissible to construe a statutory or a constitutional provision. It may, however, be noted that a speech made in a debate is different from the Report of a Select Committee or views expressed in close proximity to the making of a statute or introduction or insertion of a statutory provision where the statement would undoubtedly be relevant because it forms part of the formative process of the statutory provision itself. We have highlighted this particular aspect of the matter because in the instant case, we shall show that there are statements made by some of the Founding Fathers when the Constitution was being framed and the reasons given by the speakers formed the basis and foundation of the constitutional provisions inserted in the Constitution.

262. In A. K. Gopalan's case (AIR 1950 SC 27) (supra) Sastri J. while dwelling on the admissibility of the speech made by a Minister on the floor of the House observed thus:

"A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord."

263. Similar view was taken in *United States v. Trans Missouri Freight Association* (1896) 166 US 290 where the following observations were made:

"Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other."

264. To the same effect is a decision of this Court in *Aswini Kumar Ghosh v. Arabinda Bose*, 1953 SCR 1 : (AIR 1952 SC 369) where Sastri C. J. speaking for himself, Bose and Ghulam Hasan JJ. observed as follows (at p. 378):

"As regards the speeches made by the members of the House in the course of the debate, this Court has recently held that they are not admissible as extrinsic aids to the interpretation of statutory provisions."

Mukherjea J. also spoke in a similar strain and observed as follows (at pp. 384, 385):

".....the language of a "Minister of the Crown" in proposing a measure in Parliament which eventually becomes law is inadmissible."

A reference to the legislative debates or the speeches that were actually delivered in the floor of the House is, in my opinion inadmissible to ascertain the meaning of the words used in the enactment"

and Das J. observed thus (at p. 395):

"that the debates and speeches in the Legislature which reflect the individual opinion of the speaker cannot be referred to for the purpose of construing the Act as it finally emerged from the Legislature and so the debates must be left out of consideration."

265. It appears that while all the Judges were unanimously of the opinion that speech by a Minister or a speaker in the course of a debate was not admissible to construe the intention of the legislature, the majority judgment held that external aid in the nature of the legislative debates which resulted in the coming into existence of the constitutional provisions and were in close proximity to the same, could be pressed into service. On this point we would like to follow the majority decision on the subject, subject of course to the condition that the language of a statute does not clearly spell out the dominant object which was sought to be achieved by the legislature.

266. In *State of West Bengal v. Union of India*, (1964) 1 SCR 371: (AIR 1963 SC 1241) Sinha, C. J. speaking for himself, Jafer Imam, Shah, Ayyangar and Mudholkar JJ. observed as follows (at p. 1247):

"A statute, as passed by Parliament, is the expression of the collective intention of the legislature as a whole, and any statement made by an individual, albeit a Minister, of the intention and objects of the Act cannot be used to cut down the generality of the words used in the statute."

(Emphasis ours)

267. In another Constitution Bench decision in *Shyam Lal Mohan Lal v. State of Gujarat* (1965) 2 SCR 457: (AIR 1965 SC 1251) Shah J. speaking for the Court endorsed the stand taken in the case re-

ferred to above and observed as follows (at p. 1255):—

"In construing the words used by the Legislature, speeches on the floor of the Legislature are inadmissible. I do not refer to the speech for the purpose of interpreting the words used by the Legislature, but to ascertain the historical setting in which the statute which is parent to S. 94 (1) came to be enacted."

268. The learned Judge clearly held that while a speech on the floor of a legislature was inadmissible in ascertaining the real meaning of the word used by the legislature, the historical setting in which the statute was passed could doubtless be admissible. This decision, therefore, make a clear departure, on the point of admissibility of historical setting, from the minority dissenting judgment of Das J. as indicated above.

269. In *Anandji Haridas's case* (AIR 1975 SC 946) (supra) this Court observed thus (at p. 949):

"We are afraid what the Finance Minister said in his speech cannot be imported into this case and used for the construction of clause (c) of S. 7. The language of that provision is manifestly clear and unequivocal. It has to be construed as it stands, according to its plain grammatical sense without addition or deletion of any words."

270. In *Lok Shikshana Trust's case* (AIR 1976 SC 10 at p. 22) (supra), this Court made the following observations:

"It is true that it is dangerous and may be misleading to gather the meaning of the words used in an enactment merely from what was said by any speaker in the course of a debate in Parliament on the subject. Such a speech cannot be used to defeat or detract from a meaning which clearly emerges from a consideration of the enacting words actually used."

271. Thus, on a full and complete consideration of the decisions classified under the various categories, the propositions that emerge from the decided cases of this Court and other foreign courts are as follows:

(1) Where the language of a statute is clear and unambiguous, there is no room for the application either of the doctrine of *casus omissus* or of pressing into service external aid, for in such a case the words used by the Constitution or the statute speak for themselves and it is not the function of the court to add words or expressions merely to suit what the

courts think is the supposed intention of the legislature.

(2) Where, however, the words or expressions used in the constitutional or statutory provisions are shrouded in mystery, clouded with ambiguity and are unclear and unintelligible so that the dominant object and spirit of the legislature cannot be spelt out from the language, external aids in the nature of parliamentary debates, immediately preceding the passing of the statute, the report of the Select Committees or its Chairman, the Statement of Objects and Reasons of the statute, if any, or any statement made by the sponsor of the statute which is in close proximity to the actual introduction or insertion of the statutory provision so as to become, as it were, a result of the statement made, can be pressed into service in order to ascertain the real purport, intent and will of the legislature to make the constitutional provision workable. We might make it clear that such aids may neither be decisive nor conclusive but they would certainly assist the courts in interpreting the statute in order to determine the avowed object of the Act or the Constitution as the case may be.

(3) Except in the aforesaid cases, a mere speech of any member made on the floor of the House during the course of a parliamentary or legislative debate would not be admissible at all because the views expressed by the speaker may be his individual views which may or may not be accepted by the majority of the members present in the House.

(4) Legislative history of a constitutional provision though not directly germane for the purpose of construing a statute may, however, be used in exceptional cases to denote the beginning of the legislative process which results in the logical end and the finale of the statutory provision but in no case can the legislative history take the place of or be a substitute for an interpretation which is in direct contravention of the statutory provision concerned.

(5) Where the scheme of a statute clearly shows that certain words or phrases were deliberately omitted by the legislature for a particular purpose or motive, it is not open to the Court to add those words either by conforming to the supposed intention of the legislature or because the insertion or the omission suits

the ideology of the Judges deciding the case. Such a course of action would amount not to interpretation but to interpolation of the statutory or constitutional provisions, as the case may be, and is against all the well established canons of interpretation of statutes.

272. The main reason behind the principles enunciated above is that the legislature must be presumed to be aware of the expanding needs of the nation, the requirements of the people and above all, the dominant object which the legislation seeks to subserve.

273. Thus, where the language is plain and unambiguous the court is not entitled to go behind the language so as to add or supply omissions and thus play the role of a political reformer or of a wise counsel to the legislature.

274. On the other hand, the counsel for the respondents have strongly urged that the entire argument of Mr. Seervai to the effect that the word 'consent' should be read into Art. 222 is in vacuo and there is not the slightest vagueness or ambiguity in the words used in Art. 222 to necessitate the reading of the word 'consent' therein. The counsel further urged that the attempt of Mr. Seervai is merely to create a so-called cloud of suspicion and mystery and then to resolve it by asking the court to read consent into it. In other words, the counsel for the respondents have fully supported the propositions which we have adumbrated above.

275. Assuming for the sake of argument particularly in view of the far-reaching consequences of our decision and the large magnitude of the arguments that have been addressed to us, that the dominant object of Art. 222 is not very clear or unambiguous, we may discuss the legislative history of introduction of Art. 222 in the Constitution as also the parliamentary debates or Reports of the Drafting or Select Committees as a direct result of which the said Article came into existence.

276. So far as the legislative history of the provisions prior to the Constitution regarding the functioning and the constitution of High Court is concerned, we might start from the Government of India Act, 1915 (hereinafter referred to as the '1915 Act') because the prior Acts are neither helpful nor germane for construing the questions at issue in these petitions. Ss. 101 to 114 of the 1915 Act

are the provisions which relate to the High Courts. It may be noted that in this Act, there was no provision at all for transfer of a Judge from one High Court to another. Section 101 provided that each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint. This is the precursor of Art. 217 of our Constitution. It may be noticed that in the 1915 Act while the appointment of Judges vested in His Majesty the King but the power of appointment of Addl. Judges was vested in the Governor-General-in-Council although the Addl. Judges so appointed had the same powers as the Judges appointed by His Majesty. This complexion has been completely changed so far as the provisions of our Constitution are concerned. Further, under Section 102 a Judge of a High Court was to hold office during His Majesty's pleasure unless he resigned on his own. This provision has not been incorporated in our Constitution which has provided complete security of tenure to a Judge of a High Court who is to continue until he reaches the age of superannuation which is 62 years in the case of a High Court Judge and 65 years in the case of a Supreme Court Judge. The only manner in which a Judge can be removed before his term is by impeachment as provided under Art. 124 (2) read with the provisions of the Judges (Inquiry) Act of 1968. The other provisions are not relevant for the purpose of deciding this issue. S. 113 conferred powers on His Majesty to establish an Additional High Court in any territory in British India.

277. Thus, the only common feature which has been retained in our Constitution is regarding the appointment of Additional Judges of any High Court for a period not exceeding two years and while this provision was introduced by the 7th Amendment of the Constitution, it was slightly different from the one contained in proviso (i) to sub-sec. (2) of S. 101 of the 1915 Act which may be extracted thus :

"the Governor-General in Council may appoint persons to act as additional judges of any High Court for such period, not exceeding two years, as may be required; and the judges so appointed shall whilst so acting, have all the powers of a judge of the High Court appointed by His Majesty under this Act;"

In Art. 224, the purpose, viz., arrears, is mentioned which was conspicuously ab-

sent from the 1915 Act perhaps because at that time there were no heavy arrears.

278. The next statute which merits consideration is the Government of India Act 1935 (hereinafter referred to as the '1935 Act') which is merely a precursor of our Constitution as most of its provisions are based on the pattern and structure of this Act. The relevant sections dealing with High Courts are Ss. 219-231 and 253-256. S. 220 makes two marked improvements on the previous provisions of the 1915 Act — (1) that every Judge appointed by His Majesty held office until he attained the age of 60 years and not at the pleasure of His Majesty as provided by S. 101 of the 1915 Act, and (2) S. 220 (2) (b) expressly states that a Judge can be removed on the ground of misbehaviour or infirmity of body or mind if the Judicial Committee of the Privy Council, on a reference made to it by His Majesty, reported that the Judge ought on any such ground be removed. This provision has been retained by our Constitution but the procedure of removal has been substituted by the procedure of impeachment as contained in Art. 124 (4) read with Art. 218.

279. Although there is no specific provision for transfer of a High Court Judge from one High Court to another, an implied power seems to have been conferred in S. 220 (2) (c) of the 1935 Act, which may be extracted thus :

"The office of a judge shall be vacated by his being appointed by His Majesty to be a Judge of the Federal Court or of another High Court."

280. It may be pertinent to note that S. 220 (2) (c) provides that a Judge shall vacate his office either on his being appointed as a Judge of the Federal Court or of another High Court. This provision does not contain any element or concept of transfer of a Judge from one High Court to another. What it contemplated is that if a Judge of a High Court was to be transferred he would have to be appointed to that High Court. Our Constitution, however, makes a clear distinction so far as this aspect of the matter is concerned inasmuch as Art. 222 expressly uses the word 'transfer' rather than the word 'appointment' when a Judge is transferred from one High Court to another.

281. So far as our Constitution is concerned while Art. 222 confers on the President the power of transferring one

Judge of a High Court to another in consultation with the Chief Justice of India, Art. 217 (1) (c) provides that the office shall be vacated on his being appointed as a Judge of the Supreme Court or if he is transferred to any other High Court. It may thus be noticed that Art. 217 (1) (c) is placed in Chapter V which deals with High Courts and may be extracted thus :

"The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India."

282. While in the case of a Judge who goes to the Supreme Court, the word "appointed" is used to indicate that this is a fresh appointment in a higher Court, or rather the highest Court in the country, whereas when a Judge is transferred from one High Court to another, the word 'transfer' in contradistinction to the word 'appointed' as mentioned in S. 220 (2) (c) of the 1935 Act, has been deliberately used which clearly shows that the two modes of vacation of office by a sitting Judge are quite different. We have mentioned this fact because Mr. Seervai has argued before us that the transfer of a Judge from one High Court to another results in vacation of his office and therefore must be construed to be a fresh appointment implying thereby that he could be transferred only if he gives his consent as when he is first appointed to the High Court. The fact that he gives his consent has to be implied, for he cannot be appointed as a High Court Judge against his consent.

283. We have mentioned these circumstances in order to highlight the second argument of Mr. Seervai regarding interpretation of Art. 217 (1) (c) on the basis of which he contended that this would show that the transfer of a Judge under Art. 222 amounted to a first or a fresh appointment in the transferee Court as the moment a Judge is transferred to another High Court, he vacates his office in the original High Court and assumes the charge of a new office only after taking the oath. It was suggested by Mr. Seervai that under proviso (c) to Art. 217 (1) just as a Judge vacates his office on being appointed as a Judge of the Supreme Court, identical consequences follow when he is transferred to any other High Court.

284. The Attorney General has rightly pointed out that the proviso itself makes a difference between vacating the office by a Judge who is appointed to the Supreme Court and a Judge who is transferred. A Judge who is transferred merely vacates the office in a limited sense, namely, that he cannot act as a High Court Judge in the High Court where he was appointed but the fact remains that until he takes oath in the transferee High Court, he continues to be a Judge of the Original High Court. For these reasons, this argument does not appeal to us.

285. Finally, there is one more circumstance which clearly shows that a transfer cannot be treated as a first or fresh appointment. It would be seen that the heading of each Article which deals with the appointment of Judges clearly mentions this fact. Take for instance, Art. 217 — the heading is appointment and conditions of a Judge of a High Court. Art. 223 relates to appointment of acting Chief Justice and Art. 224 deals with appointment of additional and acting Judges. It may be pertinent to note here that Art. 223 comes immediately after Art. 222 where the heading is transfer of a Judge from one High Court to another. The Constitution has thus itself brought out a clear distinction between transfer and appointment. Similarly, Art. 224A deals with appointment of retired Judges at sittings of High Courts. There are number of other instances where the word 'appointment' is used in contradistinction to transfer in respect of authorities other than High Court Judges. This is, therefore, also an important circumstance to negative the argument of Mr. Seervai that as transfer amounts to a fresh or a first appointment in the transferee High Court and, therefore, consent becomes a necessary concomitant of such a transfer.

286. It may also be pointed out that whenever a legislature or constituent assembly uses a particular phrase in contradistinction to another phrase it is not possible to read the two phrases so as to indicate the same purpose. The instant case, the Constitution has used the word 'appointed' in the case of a Judge of the Supreme Court and 'transfer' in the case of a Judge of a High Court. A perusal of the language of Art. 217 (1) Proviso (c) leads to the irresistible conclusion and logical inference that the Founding Fathers have

made a clear distinction between transfer and appointment. It is true that in both cases the office held by a Judge is vacated in a fictional sense because there is a complete change in the life of the Judge but that does not mean that the incidents of both these appointments are the same. A Judge of the High Court when appointed as a Judge of the Supreme Court cannot be equated in any respect with a Judge of the High Court who is transferred to another High Court and continues to possess the same status, position and emoluments which is essentially different from a Judge of the Supreme Court. Mr. Seervai, however, submitted that both, Art. 124 which relates to the appointment of a Supreme Court Judge and Art. 217 which provides for the appointment of a High Court Judge do not mention anything about obtaining the consent of a Judge which has to be implied in both the cases. On a parity of reasoning it was submitted that where a Judge is appointed in a High Court or transferred to another Court, every time it is a new appointment as a result of which the Judge of the High Court on being transferred to another Court has to take a fresh oath because he ceases to be a Judge in the Court of its origin. It is true that on being transferred to another High Court a Judge ceases to be a Judge but then he ceases to be a Judge of the transferor Court only and does not cease to be a Judge for all times to come so as to make his transfer in the transferee Court a fresh appointment. This is clear from para. 11 (iii) to the Second Schedule to the Constitution which runs thus :

"joining time on transfer from a High Court to the Supreme Court or from one High Court to another."

287. It is true that in Para 11 (iii) to Sch. 2 of Constitution this schedule joining time is mentioned on transfer from a High Court to Supreme Court or from one High Court to another and the word 'appointment' has not been used as such. That however makes no difference because this schedule only refers to a small matter of joining time which both the judges, viz., a judge appointed to the Supreme Court and the judge transferred, are entitled to avail. Nothing, therefore, turns upon the language of para 11 (iii) of the Second Schedule.

288. Lastly, it was contended that the fact that a Judge who is transferred from the original High Court to another High

Court has to take oath suggests that his transfer amounts to an appointment and that is why the taking of a fresh oath becomes necessary. We are, however, unable to agree with this contention. It is obvious that when a Judge was appointed in the original High Court he had taken the oath of his office which bound him to act as a Judge of that particular High Court. Since by virtue of the transfer, the Court is changed, a fresh oath becomes necessary as a clerical formality to indicate that although his appointment as a Judge of a High Court does not cease to exist he discharges his duties as a Judge in another Court in respect of which he had not taken the oath of office. In these circumstances, it cannot be said that merely because a transferee Judge has to take a fresh oath the transfer becomes a new or a fresh appointment. Moreover, it is doubtful if the taking of a fresh oath is necessary at all because the warrant signed by the President appointing a person as a Judge of a High Court holds good in the transferee Court and the place is indicated by the notification issued under the authority of the President which really means that after the notification the warrant would have to be read to indicate that the Judge was transferred to the transferee Court where he is to act as a Judge. At any rate, we do not consider it necessary to go into this question in this particular case.

289. The last plank of the argument of Mr. Seervai was that no stress can be laid on the distinction between 'appointment' and 'transfer' because these are synonymous and interchangeable terms and in this connection he relied on a decision of this Court in *His Holiness Kesavananda Bharti Sripadagalavaru v. State of Kerala*, (1973) Supp. SCR 1 : (AIR 1973 SC 1461) where Chandrachud, J. (as he then was) observed as follows : (at p. 2027).

"These are not words occurring in a school text-book so that one can find their meaning with a dictionary on one's right and a book of grammar on one's left. These are words occurring in a Constitution and one must look at them not in a school-masterly fashion, not with the cold eye of a lexicographer, but with the realization that they occur in "a single complex instrument, in which one part may throw light on another," so that "the construction must hold a balance between all its parts..... A word is not a

crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to circumstances and the time in which it is used."

290. This Court merely held that in certain circumstances different words may not necessarily produce a change in the meaning and those observations have to be read with reference to the context. In the instant case, however, the plain and unambiguous language of Art. 217 (1) proviso (c) & Art. 222 cannot be stretched to indicate that 'appointment' and 'transfer' are synonymous terms when the constitutional provisions make it very clear that the power of transfer and the power of appointment are two different kinds of powers to be exercised in different ways. We, therefore, reject this part of the argument of Mr. Seervai as being without substance.

291. Having dealt with the legislative history and the setting of Art. 222 which, as pointed out by us earlier, took its birth for the first time in our country in the form of S. 220 (2) (c) of the 1935 Act and was later inserted in the Constitution after a full parliamentary debate. As we have already held that detailed speeches made on the floor of the house or the statement of Ministers are not admissible, we would confine ourselves only to those debates or statements which have been made by the sponsors or the architects of the Constitution itself and which immediately resulted in the introduction of Art. 222 in our Constitution.

292. On September 16, 1949 one of the architects of our Constitution, Dr. Ambedkar while proposing the insertion of Art. 128 (which became the present Art. 222) highlighted the various aspects of the philosophy and the doctrine of transfer of Judges and speaking with persuasion and poignancy observed thus (Constituent Assembly Debates Vol. 11 (1949), p. 580):

"The only question that we are called upon to consider is when a person is appointed as a judge of a High Court of a particular State, should it be permissible for the Government to transfer him from that Court to a High Court in any other State. If so, should this transfer be accompanied by same kind of pecuniary allowance which would compensate him for the monetary loss that he might have to sustain by reason of the transfer? The Drafting Committee felt that since all the

High Courts so far as the appointment of judges is concerned form now a central subject, it was desirable to treat all the judges of the High Courts throughout India as forming one single cadre like the I. C. S. and that they should be liable to be transferred from one High Court to another. If such power was not reserved to the Centre (the) administration of justice might become a very difficult matter. It might be necessary that one judge may be transferred from one High Court to another in order to strengthen the High Court elsewhere by importing better talent which may not be locally available. Secondly, it might be desirable to import a new Chief Justice to a High Court because it might be desirable to have a man who is unaffected by local politics and local jealousies. We thought therefore that the power to transfer should be placed in the hands of the Central Government.

We also took into account the fact that this power of transfer of judges from one High Court to another may be abused. A Provincial Government might like to transfer a particular judge from its High Court because that judge had become very inconvenient to the Provincial Government by the particular attitude that he had taken with regard to certain judicial matters, or that he had made a nuisance of himself by giving decisions which the Provincial Government did not like. We have taken care that in effecting these transfers no such considerations ought to prevail. Transfers ought to take place only on the ground of convenience of the general administration. Consequently, we have introduced a provision that such transfers shall take place in consultation with the Chief Justice of India who can be trusted to advise the Government in a manner which is not affected by local or personal prejudices."

293. Thus, the speech coming as it did immediately before Art. 222 was inserted completely demolishes the argument of Mr. Seervai because the apprehensions and fears expressed by him are found in the statement of Dr. Ambedkar and he had made it a point to emphasise that the power of transfer should serve three purposes:—

(i) that it might be necessary to transfer a judge from one High Court to another to strengthen the transferee Court by importing better talent in which the said Court may be lacking.

(ii) that it might be desirable to have a Chief Justice from outside who is unaffected by local politics and local jealousies, and

(iii) that transfer should be made only on the ground of convenience and general administration and since the transfers could be made by the President in consultation with the Chief Justice of India, who is the highest authority in the country, it can be safely presumed that exercise of such a power would not be affected by local or personal prejudices.

294. These observations, therefore, furnish a complete answer to the two arguments of Mr. Seervai that 'consent' should be read into Art. 222 or that the transfer amounted to a fresh appointment.

295. It may be mentioned that even in the Revised Draft, Art. 222 ran thus: "The Framing of India's Constitution" by B. Shiva Rao, Vol. IV p. 826 :—

"222. Transfer of a Judge from one High Court to another.

(1) The President may transfer a Judge from one High Court to any other High Court within the territory of India.

(2) When a Judge is so transferred, he shall, during the period he serves as a Judge of the other Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and until so determined such compensatory allowance as the President may by order fix."

296. It would be noticed that in this draft Article there was no mention of consultation of CJI by the President but this seems to have been later introduced as a result of the speech of Dr. Ambedkar as indicated above. Furthermore, it would appear from the Note appended by Mr. Santhanam in his book 'Constitution of India' as to how and under what circumstances the present Art. 222 came to be incorporated in the Constitution, where at page 169 the author says thus :

"This is a new article inserted in the final stage. It was objected that this power might be used to punish a judge who might not be in the good books of the Central Government. It was also suggested that such transfer should be made only with the consent of the judge concerned. This suggestion was rejected because it might become necessary in the national interests to send a competent

judge to some part of India in spite of his own inclinations. The President may be trusted not to use this power to the detriment of judicial independence."

(emphasis supplied)

297. This note clearly shows that even at the time when Art. 222 was taking its birth there was some talk of making the transfer with the consent of the Judge concerned but this idea was given up when it was pointed out that in the national interest it may be necessary to send a competent judge to another High Court and this policy may be stalled by the judge by withholding his consent. In other words, the idea of 'consent' having been conceived, discussed and rejected clearly shows that the Founding Fathers deliberately omitted the word 'consent' from Art. 222 and that knocks the bottom out of the argument of Mr. Seervai that if the Founding Fathers rejected the concept of 'consent', the Court should still read it into the Article which is patently against all canons of interpretation of statutes.

298. It was suggested that the note of Mr. Santhanam cannot be treated to be the last word in the matter. We are unable to agree with this contention. Santhanam is not merely the author of the Constitution but he was also a Member of the Drafting Committee and the Note fully shows that the speech made by Dr. Ambedkar regarding Art. 222 (which in its draft form was Art. 128) was incorporated according to the guidelines indicated by Dr. Ambedkar. The Note, therefore, finds ample support from what Dr. Ambedkar had said. No material has been placed before us to show that the Note of Mr. Santhanam was wrong either on point of fact or on a point of law. In our opinion, therefore, read with the speech of Dr. Ambedkar, the Note of Mr. Santhanam in regard to Art. 222 clinches the issue and no further argument on this question can be entertained.

299. Finally there is yet another aspect to which we may advert in order to understand the spirit, philosophy and pattern of our Constitution. Shiva Rao in 'The Framing of India's Constitution' (Vol. IV) refers to various speeches made after the adoption of the Constitution. To begin with, Dr. Ambedkar while explaining the various sources of the Constitution reminded the Member that before finally drafting the Constitution, the Member of the Drafting Committee had

before them almost all the important Constitutions of the big countries of the world. The American Constitution was considered, the Australian Constitution was also taken into account and comparisons were made with American, Canadian, South African and Australian Constitutions. Dr. Ambedkar further pointed out a distinctive feature in our Constitution which he highlighted thus: ('The Framing of India's Constitution' by B. Shiva Rao, Vol. IV, p. 936)

"In making comparisons on the basis of time consumed, two things must be remembered. One is that the Constitutions of America, Canada, South Africa and Australia are much smaller than ours. Our Constitution as I said contains 395 Articles while the American has just seven articles, the first four of which are divided into sections which total up to 21, the Canadian has 147, the Australian 128 and the South African 153 sections. The second thing to be remembered is that the makers of the Constitutions of America, Canada, Australia and South Africa did not have to face the problem of amendments. They were passed as moved. On the other hand, this Constituent Assembly had to deal with as many as 2,473 amendments. Having regard to these facts the charge of dilatoriness seems to me quite unfounded and this Assembly may well congratulate itself for having accomplished so formidable a task in so short a time."

300. Similarly, Dr. Rajendra Prasad, who was President of the Drafting Committee, observed thus: ('The Framing of India's Constitution' by B. Shiva Rao, Vol. IV, p. 936).

"We considered whether we should adopt the American model or the British model where we have a hereditary king who is the fountain of all honour and power, but who does not actually enjoy any power. All the power rests in the Legislature to which the Ministers are responsible. We have had to reconcile the position of an elected President with an elected Legislature and, in doing so, we have adopted more or less the position of the British monarch for the President

his provisions; so far as I know, in the Constitution itself making it binding on the President to accept the advice of his Ministers, it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and the President, not so much on account of the written word in the Constitution, but as the result of this very healthy convention, will become a constitutional President in all matters."

301. Dr. Prasad expressed a wish that by working the Constitution, the people of the country will evolve a convention by which the advice of the Council of Ministers would be binding on the President and his historical words have proved to be true and have now taken a constitutional shape because by virtue of the Constitutional 42nd Amendment, the advice of the Council of Ministers has been made binding on the President and he has to act on such advice. Thus, a convention which was ingrained in the Constitution has now taken a constitutional shape.

302. Lastly, Dr. Rajendra Prasad expressed his view that the Constitution undoubtedly made clear provisions for an independent judiciary and observed thus: ('The Framing of India's Constitution' by Shiva Rao (Vol. IV), p. 954)

"We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence. One of our articles makes it easy for the State Governments to introduce separation of executive from judicial functions and placing the Magistracy which deals with criminal cases on similar footing as civil Courts. I can only express the hope that this long overdue reform will soon be introduced in the States."

303. We have mentioned these facts at this stage for two reasons. In the first place, we wanted to illustrate and emphasise the actual philosophy of the Constitution so that the various articles may be read in the light of the views and the desire expressed by the Founding Fathers. Secondly, the fact that our Constitution is based not on the American but on the British Pattern is established from the observations extracted above.

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Then we come to the Ministers. They are of course responsible to the Legislature and tender advice to the President who is bound to act according to that advice. Although there are no speci-

and the internal evidence furnished by the various provisions of the Constitution itself. It is true that we have borrowed some provisions from the American Constitution and others from the Japanese Constitution but by and large our Constitution is fashioned on the British pattern. Therefore, while considering the doctrine of privilege or the doctrine of candour it would be safer to rely on English cases rather than the American doctrine. However, this aspect of the matter will be dealt with at the appropriate stage.

304. It was next contended both by Mr. Seervai and Dr. Singhvi that non-consensual transfers of High Court Judges are punitive in nature and amount to punishment. Detailed contentions in this regard have already been narrated by us when we dealt with their contentions on this point. One of the cardinal points made out by the learned counsel for the petitioners against non-consensual transfers was that if a transfer is made without the consent of the Judge it will arm the Central Government with a strong weapon to punish a High Court Judge who either does not share the ideology of the Government or is not prepared to oblige it, by compelling him to toe the line of the Government at the risk of being transferred. Reliance was placed in support of this argument on a large number of transfers that were made during the emergency resulting in writ petitions filed in the Gujarat High Court in Seth's case (AIR 1977 SC 2328) where this very point was argued on behalf of one of the Judges who had moved the petition before the Gujarat High Court. It was also pointed out that in the supreme Court both Bhagwati and Untwalia, JJ., dissented from the majority view and particularly Untwalia, J. mentioned the fact that the large number of transfers had created a panic. It is true that there were quite a few transfers during the emergency which were not in consonance with the spirit of Art. 222 and that is why the Government had conceded this fact and took steps to revoke the transfers by retransferring almost all the Judges to the High Courts from where they had been transferred. Even so, the Government insisted that the point of law involved should be decided by this Court as a result of which the majority

judgment held that Art. 222 does not contemplate that a transfer should be made only with the consent of the Judge concerned. Taking the argument at its face value, we cannot jump immediately to the conclusion that in all cases non-consensual transfers would amount to a punishment so as to arm the Government with a weapon to punish a Judge for not toeing the line of the Government. It is a well-known saying that one sparrow does not make a summer. It seems that it is neither logical nor congruent to draw an irresistible inference merely from the massive transfers made during the emergency inspired by particular motive to the conclusion that the power of the President enshrined in Art. 222 would be exercised for collateral reasons always in future also; more particularly so when this Court in the majority judgment in Seth's case had laid down the guidelines for transferring a Judge from one Court to another and also laid very great stress on the process of effective consultation, the possibility of abuse of power is completely ruled out. This Court in that case had laid down sufficient safeguards against a wrong or colourable exercise of power by the President under Art. 222. Therefore, there is no reason to presume that any order which is passed by the President under Art. 222 henceforward is bound to be mala fide or colourable and even if it is in a particular case or cases, it is doubtless subject to judicial review.

305. It was then contended that a transfer of a Judge from one High Court to another entails evil consequences inasmuch as it uproots the Judge from his hearth and home and transplants him in a new and alien place where he has to start his life or career anew and face several personal difficulties and inconveniences. Once it is conceded that the power of transfer under Art. 222 is to be exercised in public interest, then any inconvenience that is felt by the Judge would have to yield to the larger interest of the community so as to make the said article workable. Although Art. 222 is an extraordinary power, whenever a person accepts judgeship of a High Court he is fully aware that during his career as a Judge the power under Art. 222 could be exercised by the President without his consent and if knowing this he accepts the position of a High Court Judge, he

cannot be heard to say that he ought not to be transferred because he would suffer lot of inconvenience.

306. It is true that the transfer of a High Court Judge is an extraordinary phenomenon and is resorted to very sparingly. Though not the usual incident of the career of a High Court Judge as in the case of other services, particularly the subordinate judiciary the provision for transfer is undoubtedly there and has to be worked out in suitable cases. We shall deal with this aspect of the matter in greater detail when we come to the limb of the argument regarding the policy of general transfers.

307. Furthermore, the very concept of transfer under Art. 222 being a punishment is highly derogatory to the high constitutional position that a High Court Judge holds. Such a constitutional appointment, which makes a Judge a constitutional functionary and not a Government servant, more so when he obtains certain special privileges having regard to the high position he holds, is against the very concept of penalty or punishment. It is manifest that when a person is punished for an offence or a mistake or an error, then he is to undergo some penal process. In the case of a Judge who is transferred, no such penal consequences are at all visited because on the plain term of Art. 222 the Judge has to get special facilities before being transferred to the transferee High Court. Clause (2) of Art. 222 clearly provides that a transferred Judge is only to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and until so determined such compensatory allowance as the President may fix. Thus, the granting of compensatory allowance to a Judge in lieu of transfer completely destroys the concept that the transfer involves a stigma or a punishment. You don't have to award a person additional facilities if you punish him and if you do, then the act cannot amount to a punishment. Apart from the allowances, the High Court Judges (Conditions of Service) Act and the Rules made therein clearly provide that a Judge who is transferred from one High Court to another can always avail of the special leave concession rules by visiting his home State, along with his family, at Government cost once a year. The Judges Rules, as amended, further enjoin that the Judge must be supplied with

a free furnished house which under the Amendment Act of 1981 is not even to be treated as a perquisite under the Income-tax Act. It is true that some of these facilities are available to a Judge in his original High Court also but the totality of the facilities taken into consideration undoubtedly seek to make him as comfortable as possible in the transferee Court also.

308. In view of the speeches and statements of the Members of the Drafting Committee particularly those of Dr. Ambedkar Art. 222 (which was 128 in Draft Constitution) was introduced not by way of punishing a Judge but to import better talents in other High Courts and enable the Judge to work in a free and fair atmosphere where he can work without any local influence. Indeed, if our Founding Fathers were alive today and were to be told to their utter dismay that transfer amounts to a punishment, they would have got the greatest shock of their life.

309. Far from being a punishment the transfer of a Judge does not involve any stain or stigma nor even the slightest reflection on his legal functioning or his judicial character or integrity. The transfer of a Judge contemplated by Art. 222 is in the nature of a response to a call of duty in the larger national interest of the country in order to maintain and ensure absolute purity of judicial administration. On being transferred the Judge would find himself free to work in an independent atmosphere untrammelled by any provincial or parochial consideration, undaunted by any external or internal influences or local pulls or pressures and uninfluenced by the considerations of class, caste or creed. He would also generate much greater confidence in the people to whom he imparts justice which is bound to enhance his judicial prestige and as a logical result would subserve the concept of independence of judiciary. For a true and conscientious Judge there can be no higher honour than to create a feeling that justice is not actually done but also appears to have been done, the latter being more important and fundamental quality of judicial approach. The apprehension that a Judge on being transferred to another State is likely to face a hostile Bar is merely an anathema and an illusion which has neither a factual nor a legal existence. If the Judge's behaviour towards the Bar is

polite and courteous and he gives a little accommodation to the Bar he is bound to win laurels of the Bar. In fact, the Bar always welcomes an outside Judge who is likely to build up a new judicial structure and establish a flawless and unblemished reputation. This is not merely a pious wish or an ideal dream but a stark and speaking reality which is evident from the performance and reputation of Judges who had been transferred outside their States and had proved to be not only successful but memorable Judges.

Judges transferred as CJ/Judges outside their State:

1. Justice Sinha of the Patna High Court was transferred and appointed as CJ in Nagpur High Court.

2. Justice Sarjoo Prasad of the Patna High Court was appointed as CJ of Assam and later of Rajasthan High Courts.

3. Justice C. P. Sinha of Patna High Court to be CJ of Assam High Court.

4. Justice Malhotra of Allahabad High Court to be CJ of Assam High Court.

5. Justice Narasimham from Orissa to Patna as CJ

6. Justice Khalil Ahmed from Patna to Orissa as CJ

7. Justice A. T. Harries from Punjab to Calcutta as CJ

8. Justice S. R. Dasgupta from Calcutta to Karnataka High Court

9. Justice Ansari from Andhra Pradesh to Kerala High Court

10. Justice A. D. Koshal from Punjab & Haryana High Court to Madras High Court.

310. Apart from these there were other transfers, a list of which was submitted by the counsel for the respondents.

311. These Judges have left an indelible imprint in the judiciary of the State where on transfer or appointment they worked. We might also mention that the Solicitor General in his statement at the Bar drew our attention to the excellent manner in which our colleague Justice A. D. Koshal shaped himself when he was transferred to Madras during the emergency. The Solicitor-General said that he had left behind an unparalleled reputation of being a very sharp and independent Judge. These circumstances therefore, fully justify transfer of Judges from one High Court to another.

312. The Attorney General with his usual ingenuity submitted a very plausible

argument in order to show that transfer of a Judge from one High Court to another under certain circumstances even though inconvenient cannot by any process of reasoning amount to a reflection or stigma. It was submitted by the Attorney-General that there may be two contingencies where a Judge may or may not give his consent. One type of Judges may consent to the transfer against the background of public interest and the Judge responds to the sensitive call of duty ignoring his private losses and inconveniences and gives his consent to the said transfer. There may be other type of Judges who care more for their personal conveniences or losses and refuse to give their consent. The hardship involved in both the cases is the same. The only question to consider is as to whether or not Art. 222 operates to the disadvantage of a more conscientious Judge or of a Judge who is not willing to meet the demands of public interest or, if we may say so, national interest, for either public or national interest may some time make it not only desirable but imperative that a Judge should be transferred.

313. Furthermore, the Attorney General pointed out that there may be several factors which may affect the administration of justice or the confidence of the community which may involve the Judge himself on a purely environmental basis. For instance, the atmosphere may be vitiated by his close relations or friends even without the knowledge of the Judge who may remain innocent and become an unfortunate victim of environments. In such cases, his continued presence in the High Court is bound to vitiate the very atmosphere in which justice is to be dispensed with so that a conscientious Judge would himself opt for a transfer outside his State. We have to take into account the advice given by the CJI in one of the Seminars that where close relations of a Judge or the Chief Justice practise in the same Court and are likely to gain undue advantage, the concerned judge should himself, in obedience to the keen sense of justice which every Judge possesses opt to be transferred to some other High Court. This is undoubtedly a very valuable advice which seems to have been given by our CJI to the Judges in the country.

314. Mr. Seervai in his anxiety to drive home his opposition to non-con-

sensual transfers submitted that if the father-Judges or the uncle-Judges are transferred from one High Court to another and the relations who exploited him also follow suit and start practice in the transferee Court, could such a transfer be a sufficient cure for this malady? The answer to this argument is very short and simple. Where a Judge is transferred because the environment or the atmosphere is not congenial or conducive to administration of impartial justice, he does so as a conscientious Judge responding to a call of duty but where his sons or relations follow him in the transferee Court then it becomes the most cogent and reliable evidence to show that the Judge openly allows himself to be exploited by his sons or relations and this per se would be conclusive proof of misbehaviour for which he can be impeached under Art. 124 (4) read with Art. 218. If these facts are proved, then he will have to be removed, for no Court can ever accept a plea of the Judge that even after he was transferred to some other Court his close relations followed him there without his knowledge.

315. Another difficulty which was pointed out before us was regarding the language problem. This, however, appears to be of a very minor significance as compared to various plus points indicated above. After all, the British Judges could administer justice for two centuries in our country without knowing our language. Furthermore, at the High Court level there are ample facilities for translating the record into the language with which the Judge is conversant, and if necessary these facilities could be increased. The Law Commission suggested that even if transfers are made from one High Court to another they could be made on zonal basis which will eliminate the language difficulty to a great extent.

316. For these reasons, therefore, we are unable to accept the argument of the counsel for the petitioners that non-consensual transfer amounts to punishment or a reflection on the integrity of the Judge concerned or can in any way be described as penal.

317. The next pillar of the argument of Mr. Seervai regarding non-consensual transfer was that such a transfer would seriously affect and impair the independence of judiciary. Dr. Singhvi who followed him not only adopted this argument but elaborated it by giving illustra-

tions from various constitutional provisions which we shall deal presently.

318. Dr. Singhvi submitted that non-consensual transfer was against the very spirit of the doctrine of separation of powers contained in our Constitution. We have already shown from the concluding speeches of the Members of the Drafting Committee that our Constitution is based mainly on the British pattern although some provisions of the American Constitution have been borrowed. Secondly, a detailed survey of the various provisions of the Constitution dealing with judiciary would clearly reveal that our Constitution does not envisage a complete separation of powers between the judiciary and the executive as such. What our Constitution has done is to effect no separation of powers as such but separation of judicial and executive functions. In achieving this object, our Constitution has particularly relied on the American Constitution while rejecting the British pattern of conventions. For instance, the judiciary is absolutely independent and supreme in the decision-making process, that is to say, in deciding cases between men and men and State and man without being influenced by any governmental or official consideration. In England, in spite of the independence of judiciary even the highest judiciary does not have the power to strike down a law made by the Parliament. In contradistinction to this, our Constitution confers absolute powers on the High Courts and the Supreme Court to strike down not only legislations brought about by the legislature but also Acts passed by the Parliament and the peak of the judicial power reached when in *Kesavananda Bharati's case* (AIR 1973 SC 1461) (supra) this Court held that the amending power enshrined in Art. 368 of the Constitution could not be amended so as to affect the basic structure of the Constitution. We might mention that it has, however, not been doubted by counsel for any of the parties that independence of judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution. While this absolute judicial power has been conceded by the Constitution to the judiciary, a certain amount of executive control has already been vested in the higher judiciary in respect of the subordinate judiciary. At the same time the power of

appointment of High Court Judges including the CJ or Supreme Court Judges, including the CJI, vests entirely in the executive i.e., the President of India, who acts on the advice of Council of Ministers. Here again, this executive power is not absolute and has to be exercised in consultation with the C. J. I. in the case of appointment of Supreme Court Judges, as also in consultation with the CJI and the Governor of the States concerned in case of the appointment of Chief Justice of the High Court — in the case of appointment of High Court Judges, the Chief Justice of the concerned High Court is also to be consulted. This Court has in several cases, which need not be repeated here, clearly held that consultation contemplated by the Constitution must be full and effective and by convention the view of the concerned CJ and CJI should always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by these Constitutional authorities.

319. Thus, in fine, the doctrine of separation of power, so far as our Constitution is concerned, reveals an artistic blending and an adroit admixture of judicial and executive functions. The Constitution has taken the best of both, the British and the American Constitution. In order to illustrate our point and to show that the separation sought to be achieved by our Constitution is not absolutely or completely separate, let us compare our Constitutional provisions with those of the American Constitution.

320. Under the American Constitution Supreme Court Judges are appointed by the President with the advice and consent of the Senate and no qualifications are necessary for the appointment to the Court nor are any stipulations mentioned therein. The Judges, however, serve for life during good behaviour and may be removed by impeachment almost in the same manner as provided for in our own Constitution. Section 1 of Article I of the American Constitution runs thus (American Constitution Law by Rocco J. Tresolini (1959 Edition)) :

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

(Page 613)

And Section 1 of Article II reads thus (American Constitutional Law by Rocco J. Tresolini, 1959 Edition)

"The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows :

(Page 618)

321. Thus, under S. 1 of Art. I while legislative powers completely vests in the Congress, the executive powers vests in the President. Here our Constitution makes a distinct departure by making the President, in whom the executive power vests, to be bound by the advice of the Council of Ministers. Therefore, under our Constitution for all practical intents and purposes the executive power vests in the Council of Ministers only and the President is bound to accept the advice of the Council of Ministers. Proviso to clause (1) of Art. 74 may be extracted thus:

"Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."

322. Under this proviso, the President has no doubt the power to require the Council of Ministers to reconsider the advice if he (President) entertains any doubt in respect of the advice tendered to him, but if the same advice is given to him after reconsideration, the same is binding on him. Clause (2) of Art. 74 bars any inquiry by a Court into the nature of the advice tendered by the Council of Ministers to the President.

323. Thus, under our Constitution the executive power does not vest absolutely in the President as in the case of America where the President has got vast powers and is assisted by his Advisers who are called Secretaries.

324. Then we come to Art. III of the U. S. Constitution, which is most relevant for our purpose. Section 1 of the said Article runs thus (American Constitutional Law by Rocco J. Tresolini (1959 Edition)) :

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of supreme and inferior Courts shall hold their office during good behaviour, and shall, at stated times, receive for their services

a compensation, which shall not be diminished during their continuance in office." (pp. 620-21)

325. Thus, the judicial power vests completely in the Supreme Court or such inferior Courts as the Congress may from time to time establish or ordain. Sec. 2 of Article III provides that the judicial power shall extend to all cases in law and equity arising under the Constitution, including laws of the United States, Treaties made and cases affecting Ambassadors, Ministers and Consuls, etc.

326. Thus, in the American Constitution by virtue of the fact that the entire judicial power is vested in the Supreme Court or other Courts, the appointments have to be made by the Supreme Court, unlike the provisions of our Constitution where appointments are to be made by the President in consultation both with judicial and executive authorities as indicated above. Therefore, in expounding the concept of separation, the essential distinctive features which differentiate our Constitution from the American Constitution must be kept in mind.

327. An attempt was made by Mr. S. P. Gupta, one of the petitioners, to establish that even under our Constitution the judicial power exclusively vests in the CJI who takes the place of Council of Ministers. This argument is wholly unacceptable and cannot be countenanced because it is against the clear and express provisions of Arts. 224, 222 and 217 of our Constitution. However, this matter has been elaborately dealt with by brothers Desai and Venkataramiah, JJ. and I entirely agree with their opinions and have nothing useful to add so far as this aspect of the matter is concerned.

328. Lastly, on the question of separation of powers, apart from what we have said it may be noticed that so far as framers of our Constitution are concerned they had deliberately rejected the theory of complete insulation of the judicial system from the executive control. During the formative process of our Constitution though jurists like Shri B. N. Rau and Dr. Ambedkar wanted to give larger powers to the CJI or to a Council of State which may be appointed so as to be a judicial Body but these ideas were not accepted and ultimately the Constitution emerged as a valuable document which vests complete power in the President. The facts will be borne out from the observations made on pages 338-339

of Shiva Rao's Framing of India's Constitution (Vol. IV), and on pages 128-132 of the Indian Constitution-Cornerstone of a Nation by G. Austin. Even an attempt of Dr. Austin and others to introduce instruments of instructions to provide guidelines for the action to be taken by the President was rejected.

329. In fact, the method of appointment adopted by our country seems to have been followed in every democratic country except the United States where, as already shown, the Judges are not appointed by the executive excepting the Chief Justice of the Supreme Court but by the judiciary. Even in America, the Federal Court Judges of the States are not appointed by the judiciary. Similarly, in France, West Germany, Japan, Malawi and Sri Lanka the power of appointment of Judges vests in the executive (vide Garner: Political Science and Government pp. 726-727; Harold Laski: Grammar of Politics, pp. 545-548; 80th Report of the Law Commission, pp. 7-11; and Basu, Commentary on the Constitution of India (4th Ed.) Vol. 3, pp. 77-79).

330. It would appear that our Constitution has devised a wholesome and effective mechanism for the appointment of Judges which strikes a just balance between the judicial and executive powers so that while the final appointment vests in the highest authority of the executive, the power is subject to a mandatory consultative process which by convention is entitled to great weight by the President. Apart from these safety valves, checks and balances at every stage, where the power of the President is abused or misused or violates any of the constitutional safeguards it is always subject to judicial review. The power of judicial review, which has been conceded by the Constitution to the judiciary is in our opinion the safest possible safeguard not only to ensure independence of judiciary but also to prevent it from the vagaries of the executive. Another advantage of the method adopted by our Constitution is that by vesting the entire power in the President, the following important elements are introduced:

(1) a popular element in the matter of administration of justice,

(2) linking with judicial system the dynamic goals of a progressive society by subjecting the principles of governance to be guided by the Directive Principles of State policy,

(3) in order to make the judiciary an effective and powerful machinery, the Constitution contains a most onerous and complicated system by which Judges can be removed under Art. 124 (4), which in practice is almost an impossibility.

(4) in order to create and subserve democratic processes the power of appointment of the judiciary in the executive has been vested so that the head of the executive which functions through the Council of Ministers, which is a purely elected body, is made accountable to the people.

331. If absolute powers were to be vested in the judiciary alone for all its spheres of activities (appointment, retirement, removal, etc.) then the element of absolutism may have crept in, resulting in irreparable harm to the great judicial institution. Another reason why the power of appointment in the judiciary was not vested absolutely was to avoid judicial interference in the day-to-day working of the legislative or parliamentary institutions.

332. Dr. Singhvi submitted that independence of judiciary comprises two fundamental and indispensable elements, viz., (1) independence of judiciary as an organ and as one of the three functionaries of the State, and (2) independence of the individual Judge.

333. There can be no quarrel that this proposition is absolutely correct. Our Constitution fully safeguards the independence of Judges as also of the judiciary by a three-fold method—

(1) by guaranteeing complete safety of tenure to Judges except removal in cases of incapacity or misbehaviour which is not only a very complex and complicated procedure but a difficult and onerous one.

(2) by giving absolute independence to the Judges to decide the cases according to their judicial conscience without being influenced by any other consideration and without any interference from the executive. Art. 50 clearly provides that the State shall take steps to separate the judiciary from the executive in the public services of the State. This important Directive Principle enshrined in Art. 50 has been carried out by the Code of Criminal Procedure, 1973 which seeks to achieve complete separation of judiciary from the executive.

(3) so far as the subordinate judiciary is concerned the provisions of Arts. 233-236 vest full and complete control over

them in the High Court. Only at the initial stage of the appointment of munsiffs or the District Judges, the Governor is the appointing authority and he is to act in consultation with the High Court but in all other matters like posting, promotion, etc., as interpreted by this Court in *Samsher Singh's case*, (1975) 1 SCR 814 : (AIR 1974 SC 2192), the High Court exercises absolute and unstinted control over the subordinate judiciary. Promotion, holding of disciplinary inquiry, demotion, suspension of Sub Judges lie with the High Court and the Governor has nothing to do with the same. Hinting on the nature of the separation of powers brought about by our Constitution, this Court in *Chandra Mohan v. State of U. P.* (1967) 1 SCR 77 : (AIR 1966 SC 1987) made the following observations (at p. 1993):

"The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including inappropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction."

334. This Court has in several cases held that the condition of consultation which the Governor has to exercise implies that he would have to respect the recommendations of the High Court and cannot turn it down without cogent reasons and even if he does so, it is manifest that his order is always subject to judicial review on the ground of mala fide or exceeding his jurisdiction.

335. These are sufficient safeguards to ensure the independence of judiciary. The argument of Dr. Singhvi goes a step further so as to import the American concept of absolute independence in our Constitution which, however, is not permissible because as indicated above the provisions relating to judiciary of our Constitution and American Constitution are essentially different.

336. Dr. Singhvi then advanced the same argument which was put forward by Mr. Seervai that a transfer without consent would be punitive both in concept and consequences and would promote a relationship of master and servant

which is inapplicable to the case of Judges and the Chief Justices. We are, however, unable to accept this extreme argument because for the reasons that we have already given a transfer in public interest is an extraordinary provision which does not entail any stain or stigma and is a constitutional step which completely excludes the concept of master-servant relationship.

337. Dr. Singhvi later rightly laid greater stress on the nature and extent of the consultative process in the case of transfer. It was also submitted that even if a Judge is transferred individually, public interest, which leads to his transfer, would also have to be examined by the court. We propose to examine this aspect in greater detail when we deal with Transferred Case No. 24/81. At the moment it is sufficient to state that for the reasons that we have already given a non-consensual transfer cannot be treated as punitive, penal or punishment. Furthermore, we might state here that after a general policy is evolved by the Government for transfer of Judges of the High Court in order to ensure the goal of having 1/3rd Judges in each State from outside the State, such a policy would be fully justified not only on the ground of public interest but in the larger interest of the country as a whole to promote integration and crush parochialism and provincialism. If this is done, then the question of effective consultation would have to be looked from a different angle. Similarly, a general policy to have CJs from outside in every State would serve the same national interest and there also the effective consultation is to be confined only to the just exceptions that may be made while pursuing this policy.

338. The last question that remains to be determined is as to whether the proposal for transfer of Judges from one High Court to another should emanate from the CJI or from the President. In this connection, the Solicitor-General has produced a memorandum showing the procedure to be adopted in connection with the appointment and transfer of Judges. This memorandum cannot take the place of a statute or a constitutional document. It merely prescribes the manner in which the proposal can be processed. In a plain language of Article 222 it is manifest that the proposal for transfer can emanate either from the CJI or from the President through the Union

Minister for Law and Justice. What is important is whichever authority initiates the transfer, the conditions prescribed under Art. 222 must be complied with, viz.,

(a) if the proposal emanates from the President, he must ascertain the views of the CJI which are entitled to great weight, and

(b) as Art. 222 contemplates consultation with the highest judicial authority in the whole country, it is obvious that the CJI also represents the Judges or the Judges who are sought to be transferred.

339. As a logical result of this concept, it would be necessary for the CJI, on receiving the proposal from the President, to ascertain the views of the Judge concerned and his personal circumstances or objections, if any, and then after applying his mind to them, place the same before the President through the Law Minister. Thereafter, the matter would have to be processed according to the Rules of Business and advice sent to the President for formal orders.

340. Where, however, the proposal emanates from the CJI himself, then he should collect the necessary facts and examine the reasons given by the Minister concerned for the transfer and before giving his opinion or advice to the Minister he would have to consult the Judge concerned and ascertain his views and give due consideration to them. Thereafter he should also communicate the views expressed by the Judge concerned — whether against or in favour of the proposal — to the President through the Minister concerned so that even if the CJI does not agree with the view of the Judge, the President may be in a position to give his decision finally one way or the other.

341. These are the essential requirements of Art. 222 which are briefly contained in the memo, though not strictly in consonance with what we have said above. We might hasten to add here that although the Constitution does not mention either the Chief Minister or the Governor of the State being consulted in the manner of transfer of a Judge from one High Court to another but the memo. provides for this procedure in order to solve some practical difficulties because when a Judge is transferred from one State to another the transferor State must be told to make necessary arrangements for appointing his successor and

similarly at the other end the receiving State would have to make adequate arrangements for the residence and other facilities which are to be given to the Judge concerned. In this process, the Chief Minister or the Governor of the two States may express their opinion but the President is not bound under Art. 222 to accept their views. It does not appear to be the intention of the Memo to supplant two additional authorities for the purpose of consultation, for that would be in direct contravention of Art. 222 which merely stipulates consultation with the CJI and impliedly the Judge concerned. Thus, the information given by the Chief Ministers and the Governors of the States is merely for the limited purpose of ascertaining their views and other matters referred to above and is not, therefore, a part of the consultative process enshrined in Art. 222 otherwise if additional authorities are introduced for the purpose of being consulted, then the Memo will be clearly violative of Article 222.

342. Thus, the Memo, while prescribing that the proposal should emanate from the President does not exclude the other alternative, viz., that the proposal should emanate from the CJI. In Transferred Case No. 24/81 it is clear that the proposal of transfer of Justice K. B. N. Singh and others emanated from the CJI and that in our opinion was perfectly legal and constitutional and does not offend the provisions of the Memo, as suggested by counsel for the petitioners because the Memo does not and cannot in any way debar the CJI from initiating the proposal if he wants to do so.

343. This, therefore, disposes of all the contentions of the counsel for the parties so far as the various aspects of interpretation of Art. 222 is concerned. On a consideration, therefore, of the facts, circumstances and authorities the position is as follows:

(1) that Art. 222 expressly excludes 'consent' and it is not possible to read the word 'consent' into Art. 222 and thereby whittle down the power conferred on the President under this Article.

(2) that the transfer of a Judge or a CJ of a High Court under Art. 222 must be made in public interest or national interest,

(3) that non-consensual transfer does not amount to punishment or involve any stigma,

(4) that in suitable cases where mala fide is writ large on the face of it, an order of transfer made by the President would be subject to judicial review,

(5) that the transfer of a Judge from one High Court to another does not amount to a first or fresh appointment in any sense of the term,

(6) that a transfer made under Art. 222 after complying with the conditions and circumstances mentioned above does not mar or erode the independence of judiciary.

344. For the reasons given above, the contentions of Mr. Seervai, Dr. Singhvi and others fail and are overruled.

Point No. 3 — Policy of General Transfers:

345. We now come to the question of evolving a general policy of transfers (for short, to be referred to as the 'Policy') of Judges of Chief Justice from the home State to other States so that each State or a majority of them has a CJ from outside. Policy has two important limbs — (1) transfer of CJ or Judges from one High Court to another, and (2) recruitment of one-third judges in each High Court from outside the State in which the High Court is situate. The earliest roots and the foundation for evolving the aforesaid policy are to be found even when Art. 222 was in the process of its birth. The most prophetic and pregnant observations of Dr. Ambedkar give a clear clue to the desire expressed and the goal sought to be achieved by introducing Art. 222. These lines from his speech may be extracted thus:

"Secondly, it might be desirable to import a new Chief Justice to a High Court because it might be desirable to have a man who is unaffected by local politics and local jealousies. We thought therefore that the power to transfer should be placed in the hands of the Central Government."

(Emphasis ours)

(p. 580, Constituent Assembly Debates Vol. 11 (1949).)

346. These observations have a historical significance having been made by one of the greatest jurists, constitutionalist and one of the eminent Founding Fathers of our Constitution and perhaps the highest tribute that we can pay to the dedicated service of Dr. Ambedkar

is to evolve a policy and thus fulfil the pious wish and the last desire of the great jurist.

347. Nevertheless, the idea of evolving the Policy came to be seriously thought of when the States Reorganisation Commission (hereinafter referred to as the 'SRC') was entrusted with the arduous task of recommending reorganisation of States on linguistic basis—a step which was long overdue having been the subject of one of the earliest Resolutions passed by our freedom fighters—a solemn promise made to the Nation by its political leaders to be fulfilled as soon as the country attained freedom. This process of reorganisation was not a bed of roses but was fraught with grave consequences leading to parochialism and provincialism which, if not properly checked, controlled or safeguarded, might have brought about disintegration of the entire country. Perhaps this was one of the main reasons why the SRC being fully alive to these dangers tried its best to see that the reorganisation of States did not lead to disintegration and accordingly suggested a number of measures including a strong and independent judiciary free from parochial and fissiparous tendency. We, therefore, start the question of policy of transfers with the Report of the SRC which tried to tackle the second limb of the policy of importing one-third Judges in the High Court from outside. In this connection, it might be appropriate to refer to certain observations made by the SRC in the concluding portions of its Reports:

"846. We have now come to the end of our appointed task. The problem of reorganisation of States has aroused such passions and the claims which have been made are so many and so conflicting that the background against which this whole problem has to be dealt with may quite often be obscured or even forgotten. In order that the recommendations which we have made may be viewed in proper perspective, we should like to emphasise two basic facts. Firstly the States, whether they are reorganised or not, are and will continue to be integral parts of a Union which is far and away the more real political entity and the basis of our nationhood. Secondly, the Constitution of India recognises only one citizenship, a common citizen-

ship or the entire Indian people, with equal rights and opportunities throughout the Union." (Page 229)

348. Speaking in the same strain the SRC further observed thus :

"849. Unfortunately, the matter in which certain administrations have conducted their affairs has itself partly contributed to the growth of this parochial sentiment. We have referred earlier to the domicile rules which are in force in certain States, governing eligibility to State services. The desire of the local people for the State services being manned mainly by "the sons of the soil" is understandable, but only up to a point. When such devices as domicile rules operate to make the public services an exclusive preserve of the majority language group of the State, this is bound to cause discontent among the other groups, apart from impeding the free flow of talent and imparting administrative efficiency." (p. 230)

349. The SRC repeated the same concept in paras 854 and 856 of its Report thus:

"854. There are certain other measures which, if adopted, will, we hope, help in correcting particularist trends and also in securing greater inter-State co-ordination for the efficient implementation of all-India policies.

.....
856.....The Central and State Governments have to work in very close cooperation in executing important development projects, which necessitates that technical personnel should be recruited and trained on a common basis and that they should have uniform standards of efficiency and the feeling of belonging to common and important cadres." (Emphasis ours)

350. The SRC made the following further observations in paras 868, 870 and 871:

"868. From the point of view of national unity, it is also of great importance that there should be closer understanding between the north and the south. All institutions and establishments which help to bring about such an understanding should receive particular encouragement from the Government of India.....

870. The proposals which we have made in the preceding paragraphs are

intended to bring about greater administrative integrity and to provide against any particularist trends being promoted within the administration itself or in the country at large. Important as these measures are, it is obvious that they are by themselves not adequate to give a deeper content to Indian nationalism. National unity can develop into a positive and living force capable of holding the nation together against the disruptive and narrower loyalties only if there is a real moral and mental integration of the people. Fortunately, forces making for such integration are already at work. What is necessary is that nothing should be done to impede their freeplay. We should like to say something on this subject before we conclude.

871. India is now on the eve of vast economic and social changes. These changes must affect every institution and will call for a constant review of our traditional methods of thought and ways of life."

351. Here also the SRC took special care to lay great emphasis on the feelings of commonness, unity and integration in all spheres of activity so as to give a deeper content to independence and nationalism. In para 861 of its Report while dealing with the judiciary the SRC recommended that at least one-third of the number of judges in a High Court should consist of persons recruited from outside the State and in this connection observed as follows:-

"Guided by the consideration that the principal organs of State should be constituted as to inspire confidence and to help in arresting parochial trends, we would also recommend that at least one-third of the number of Judges in a High Court should consist of persons who are recruited from outside that State. In making appointments to a High Court bench, professional standing and ability must obviously be the overriding considerations. But the suggestion we have made will extend the field of choice and will have the advantage of regulating the staffing of the higher judiciary as far as possible on the same principles as in the case of the Civil Service."

And at page 263 in para 58 the SRC reiterated the policy indicated in para 861 extracted above. The SRC consisted of a very eminent Judge of the Supreme

Court and two persons of very great public and political eminence like Shri K. M. Panikkar and Shri H. N. Kunzru. When the Commission was appointed Shri Saiyid Fazal Ali was Governor of Orissa, Shri H. N. Kunzru was a Member of the Council of States and Sri Panikkar was Ambassador of India in Egypt. Shri Saiyid Fazl Ali was the Chairman of the SRC. Thus, the ideas coming as they did from such great and important personalities who had varied experience not only in all branches of the law but also in other socio-economic activities is undoubtedly entitled to great weight. The SRC tried to face some hard facts and prophetically foresaw what has now come to be a stark reality and the need to crush the fissiparous and parochial tendencies which may lead to the disintegration of the country is felt much more today than ever before. The concluding words of the Report light up the entire history, apprehension and views of the SRC. If the need to achieve unity in all spheres of activities, judiciary not excluded, is not only in public interest but also in national interest, we fail to see what else could be in public interest.

352. Perhaps it was due to the terse observations, recommendations and suggestions of the SRC that a high-powered Law Commission was set up by the Government in 1958 which was headed by Mr. M. C. Setalvad, ex-Attorney General of India, and this high-powered Commission fully endorsed the SRC Report and even suggested a mechanism to implement the recommendations.

353. It is true that at that time the idea of having Judges or CJs from outside the State had not been suggested or conceived though, as pointed out above, Dr. Ambedkar had hinted at even during the formative process of Article 222. This now brings us to the 14th Report of the Law Commission headed by Mr. Setalvad, where for the first time the policy having a CJ in every High Court from outside was not only suggested but supported by a large body of independent persons. Dwelling on this aspect of the matter the Law Commission in its 14th Report at page 76 (Para 26) observed thus :

"26. A large body of evidence before us has suggested, that it should be made an invariable practice to fill a vacancy

in the office of Chief Justice by appointing a Judge from outside the State. Such course, it is said, will have the advantage of giving the Chief Justice of India a wide choice in recommending a person suitable for that office. It has also been pressed upon us that bringing a Chief Justice from outside the State will have a very healthy influence, in that, it will promote a sense of unity in the country and prevent the Chief Justice being swayed by local connections and local influences. It may be mentioned that Chief Justices from outside the State have been appointed in some of the States and these appointments have proved a success. Though the analogy may not be very pertinent, we may refer to the practice of appointing Governors who do not belong to the State, which has been in vogue since the advent of the Constitution."

354. The observations referred to above clearly show that as far back as 1958 there was a strong view in favour of filling up the vacancies of CJs by appointing a Judge from outside the State. Although the Law Commission did not entirely agree with this opinion but it did notice that there was sufficient evidence to justify the same. As regards the other limb of the Policy to appoint one-third Judges in each High Court from outside the State, the Law Commission fully endorsed it and its recommendations on this subject may be extracted thus :—

"74.....The recent creation of various zones in the country and the efforts to treat the States forming part of these zones as one unit for various purposes would, we hope, lead to the States forming part of each zone to be the recruiting ground for appointments to the High Court from the members of the Bar in these States. It is hoped that in this manner the expectation of the States Reorganisation Commission that at least one-third of the High Court Judges would be persons drawn from outside the State will be realized."

(page 100).

355. In September 1963 a Study Team was appointed by the Administrative Reforms Commission (hereinafter referred to as 'ARC Study Team') to give its report on Centre-State relations. The said study Team in its Report at p. 190 (paras 13-20) suggested that so far as

practicable one-third of the number of Judges of the High Court should be from outside. In other words, the ARC Study Team also endorsed the SRC Report and the 14th Report of the Law Commission.

356. Immediately following the ARC Study Team Report, a meeting of the Committee of Zonal Council for National Integration was held on 31st August 1964 and in its Report on item 1 (viii) (b) the said Committee made the following recommendations.

"The Committee also commended the idea that as convention, the Chief Justice of the High Court of a State should be a person from outside the State".

357. It would appear that the said Committee gave full effect to the large body of public opinion which had expressed its intention before the Law Commission (14th Report) that in every High Court the Chief Justice should be from outside the State, and the Committee fully endorsed this view. Thus, the inescapable conclusion seems to be that right from 1954 up to 1964, the two limbs of the Policy referred to above were being debated and ultimately definite views were expressed by independent persons that a policy, consisting of the two limbs, be evolved and followed.

358. In 1967 the ARC Study Team headed by Mr. M. C. Setalvad, passed a clear Resolution that as far as practicable, one-third of the number of judges should be from outside.

359. Another Law Commission was set up some time in 1978 and the Bar Council of India in its reply dated 8-9-1979 to questions Nos. 11 and 12 answered thus :

Question	Answer
11. What is your view with regard to the suggestion that we should more frequently appoint a Judge from outside the State as Chief Justice of the High Court.	Yes
12. What is your view with regard to the suggestion that we should have a convention according to which one-third of the Judges in each High Court should be from another State.	Yes

360. In his speech on 26-2-1979 in the Lok Sabha Debates, Mr. P. Shiv

Shanker, who was then a Member of Parliament only and not even in the then-Ruling-Party, expressed his opinion thus :

"Various reports of the Law Commission with reference to recruitment policy and the policy on transfer of Judges from one High Court to the other have been only gathering dust. While I am one among those persons who will fight till the last for the independence of Judiciary, I would say that the policy as to the transfer of Judges as enunciated by the Law Commission in the year 1958, under the chairmanship of late Shri Setalvad, of which one of our very eminent members of the profession, viz., Shri Palkhivala was also a member, was salutary which opined that one-third of the Judges of a High Court must be from outside. This would have achieved a better national integration in the field of Judiciary. I am not one of those people who would support transfer if it is based on extraneous considerations."

(Lok Sabha Debates: Vol XXII No. 6, Sixth Series — Seventh session)

361. In a meeting of the Consultative Committee for the Law Ministry, held on 7-6-1980, where Members of Parliament belonging to opposition parties were also present, the unanimous view was :

"(2) the Chief Justice of a High Court should be from outside the State, and

(3) at least one-third of the Judges in a High Court should be appointed from outside the State."

362. Another meeting of the Consultative Committee for the Ministry of Law held on 24-7-1980 fully reiterated and affirmed the view taken by the earlier Committee mentioned above.

363. Another meeting of the Consultative Committee held on 17-12-1980 which consisted of Members of Parliament of the opposition parties including Bapusaheb Parulekar, also favoured outside appointments.

364. In its 80th Report, the Law Commission headed by an eminent Judge of this Court, Mr. Justice H. R. Khanna, in paras. 6.21 and 6.22 made the following observations :

"6.21.....Likewise, the Study Team on Centre-State Relation appointed by the

Administrative Reforms Commission also suggested that so far as practicable, one-third of the number of judges of a High Court should be from outside.

We have given the matter our earnest consideration and are in substantial agreement with the recommendations mentioned above. In our opinion, there should be a convention, according to which one-third of judges in each High Court should be from another State. This would normally have to be done through the process of initial appointments, and not by transfer. It would also in the very nature of things be a slow and gradual process and take some years before we reach the proportion.

6.22 Evolving such a convention would, in our opinion, not only help in the process of national integration but would also improve the functioning of various High Courts. It would secure on the Bench of each High Court the presence of a number of judges who would not be swayed by local considerations or affected by issues which may rouse local passion and emotions..... We in India are in the fortunate position of having a vast country. There can, therefore, be no difficulty in having a certain percentage of judges who hail from other States. The advantages gained by having persons from other States as judges would be much greater compared with any disadvantage which might result therefrom."

365. A national Seminar was held on judicial appointment between 17-19 October 1980 at Ahmedabad, in which various eminent speakers participated and freely expressed their views. The Seminar was organised by the Bar Council of India Trust and its deliberations may be extracted thus:

"The Seminar was of the view that the principle of transfer of Judges in all circumstances is not to be considered as violative of independence of judiciary. In fact, in certain situations transfer of a judge may be a very desirable course to follow for preserving independence of the judiciary, promoting national integration and avoiding balkanisation of the country on linguistic or other similar considerations.

The ideal of having one-third of High Court Judges from outside the State helps promotion of national integration

and the preservation of a unified judicial system. However, it is desirable that this composition of the High Court should be accomplished by way of initial appointments rather than by transfers."

366. Thus, the preponderance of opinion in the Seminar favoured the dominant aspects of the policy, viz., principle of transfer of Judges and that one-third judges should be from outside the State, in order to promote national integration and preservation of a unified judicial system.

367. Another meeting of the Consultative Committee of Members of Parliament for the Law Ministry was held on 3-9-81, in which Members belonging to the opposition parties were also present, and there also the preponderance which emerged was in favour of having CJs from outside the State and one-third of judges to be recruited in each High Court from outside. In this connection, it may be useful to extract certain relevant portions from the speeches of the Members. Shri Nanda (Congress (S)) observed thus:

"Participating in the discussion, Shri Nanda Congress (S) made particular reference to the Seminar organised by the Bar Council of India at Ahmedabad and the discussions held there on the issue of transfer of Judges and appointments from outside. He wanted to know Government's reaction to the various proposals made at the Conference on this aspect. He emphasized that on the question of appointments of outsiders and transfers, the Consultative Committee had made definite and positive recommendations and Government should implement them....."

(Emphasis ours)

367A. Shri S. C. Mohanta (LD) expressed his views thus:—

"Shri S. C. Mohanta (LD) said that initially he had reservation about supporting the policy of transfers but ever since the Law Minister had said that he would leave the mechanism and modalities to the Supreme Court, he was convinced that such a policy should be followed and pressed that those who were newly appointed, should be transferred to outside courts. There could be no status quo approach in the present

times. A suitable mechanism should be evolved and implementation left to the judiciary."

367B. Shri Jamil-ur-Rahman (Congress) observed thus:

"It would be in the national interest to transfer Judges from one High Court to other, and there should be no hesitation in doing this."

368. Shri Dandapani (DMK) supported the view and observed thus: "Shri Dandapani (DMK) supported the view that judges should be transferred from the High Courts in their own interest to other High Courts. He was of the view that in many cases, judges continuing in the High Courts of their own State were likely to develop vested interests.... Fresh appointments could certainly be made from outside the State. This should be done as a matter of policy so that there was no pick and choose."

369. Shri Hari Nath Mishra (Congress) was of the following view:

"Shri Hari Nath Mishra (Congress) mentioned that it had been agreed at earlier meetings that one-third of the judges and the Chief Justice should be from outside the State. The need for such a policy arose not from any theoretical consideration but from the reality of the situation. He wished to project this need to the Law Minister and through the Law Minister to the Chief Justice of India."

370. Shri Bhogendra Jha (CPI) observed thus:

"Shri Bhogendra Jha (CPI) supported the idea of transferring judges of High Courts outside their own State.... He also observed that while members of the Committee belonging to the different parties had agreed that transfer and appointments of outsiders should be made, the idea should be propagated amongst the respective parties."

(Emphasis supplied)

371. The Law Minister presiding over the deliberations of the Consultative Committee pointed out that the delay in evolving a policy was due to the fact that he was ascertaining the views of the Chief Justice of India but a final de-

cision was yet to be taken. In this connection, he observed thus:—

"The Law Minister mentioned that he had sought the views of the Chief Justice of India on the policy of having Chief Justices from outside, as that by itself would considerably improve the functioning of the High Courts. He apprised the members of the approach of the Chief Justice of India in the matter of transfers and appointments of outsiders. A final decision in the matter of a policy of transfers was still to be taken."

372. So far as the CJI is concerned, he was firmly opposed to the wholesale transfers of all CJs from one High Court to another without objective reasons though selective transfer could be made in appropriate cases for objective reasons. On 18-3-1981, the CJI observed that at least a few of the new appointments to every High Court were in fact made from outside the State. In April 1981 he opined that at least one-third of the new appointments to the High Court should be made from outside.

373. So far as the second limb of the Policy is concerned, viz., that each High Court should have one-third of its strength of Judges from outside the State, the CJI clearly concurred with this view but his main grievance seems to have been against the wholesale transfers of CJs so that each High Court had a CJ from outside. According to the CJI, such a policy was fraught with grave consequences and serious inconvenience which may be caused to most of the CJs. In spite of the stand taken by the CJI the Law Minister on behalf of the Central Government, tried his best to persuade him (CJI) to agree to a uniform policy of transfer of CJs—a policy which had found favour with eminent jurists, politicians, lawyers and parliamentarians, but the CJI seems to have posed stiff resistance to the afore-said Policy.

374. The Law Minister participating in the discussions in the Rajya Sabha on 30-7-80 on the question of transfer of CJs from one High Court to another spoke thus:

"Mr. Chagla and Mr. Palkhivala — they supported the approach that one-third of the Judges should be from outside so that it would be in the interest of national integration; regionalism will

not come in, and also it would be in the interest of a caste-ridden society. That was the approach they had taken,

...
I will go only into the recent past. Even my predecessor, Mr. Shanti Bhushan felt that a Chief Justice should be from outside on the same grounds which were urged by the Law Commission in its 14th Report..... The policy is whether a Chief Justice should be from outside or not, and if so, whether the seniormost person based on the all-India seniority should be appointed wherever the vacancies occur, or any other mechanism has to be evolved which should be in the best interest of the society..... This very Bar Council—except one or two members who have changed; otherwise, the personnel are the same—said: "Yes, the policy should be that the Chief Justice should be from outside." The other question that was posed by the Law Commission was question No. 12 which said: "What is your view with regard to the suggestion that we should have a convention according to which one-third of the Judges of each High Court should be from outside the State"? This very Bar Council answered in the affirmative."

(Rajya Sabha Debates: Vol. CXV. No. 6 dt. 30-7-80, pp. 219-221)

375. In his speech, the Law Minister also said a few things about the manner in which the mechanism to give effect to the policy may be devised. In a later speech on 24-7-1980 in the Lok Sabha while dealing with the question of mechanism for giving effect to the policy, the Law Minister observed as follows:—

"Mr. Deputy Speaker, Sir, on the first question of mechanism I must frankly bring to the notice of this Hon. House that even my predecessor Shri Shanti Bhushanji seems to be of the view that a Chief Justice should be from outside because of the various factors. And I am glad that the Hon. Member, Shri Agarwal, did support this approach. As I said we have not finally come to a conclusion..... The matter of mechanism is an affair where we have to necessarily seek the guidance of the Supreme Court. And in this matter I can assure you that as and when we come to a final conclusion, we will see to it that the least injustice is done to the

persons concerned. I am at the disposal of the Supreme Court to suggest any mechanism which they feel would be suitable in the interest of the independence of the judiciary.

I am prepared to leave everything to the Supreme Court to decide the mechanism of the whole approach.

(Emphasis ours)

376. In order, however, to be fair to the CJI for having expressed a strong view against the proposal for giving effect to a uniform policy of transfer of CJs, it may be necessary to go through the various letters exchanged between the CJI and the Law Minister to know the reasons and the circumstances under which the CJI had voiced his opposition.

377. To begin with, in a Note dated 15-5-80 (which is contained in one of the files disclosed under the majority Order of this Court), the Law Minister once more wanted to ascertain the final view of the CJI thus:

"While this file may be referred to the CJI for his advice, I feel that we should also examine about evolving the policy to appoint the Chief Justice of a High Court from the High Court other than the High Court to which the Chief Justice is to be appointed. I had passingly discussed this issue some time back with the C.J.I. The fact remains that in the various High Courts the problems of caste and regionalism, etc., are looming large."

378. In reply to this, the CJI drew the attention of the Law Minister to the following facts which may be extracted thus:

"It would become necessary in the very near future to evolve an All India policy for appointments of Chief Justices in the various High Courts. The difficulties in taking any ad hoc decision on that question are of such grave magnitude that it would be impossible at this stage to appoint an outsider as a Chief Justice either of the Delhi High Court or of the Andhra Pradesh High Court."

379. It would appear from the contents of the Note extracted above that the CJI was opposed only against any ad hoc decisions without evolving an All-India policy for appointment of CJs. He had deliberately remained silent on the question of the Policy regarding transfer of CJs.

380. In his minute dt. 31-7-80 while expressing his opposition to the uniform policy the CJI clearly stated that he had an open mind, the relevant portion may be extracted thus:

"The heart of the matter however is whether, as a general All India policy, a Judge of a High Court ought never to be appointed as the Chief Justice of that High Court. I am prepared to keep an open mind on this question because the pros and cons of the issue has still to be thrashed out. But the better view may be that transfers of sitting Chief Justices may be made only in appropriate cases, that is to say, when a strong case for the transfer has been made out."

At this stage it is unnecessary to say anything more on the subject except to clarify that though I recognise the need to evolve an All India policy for appointments of Chief Justices in the various High Courts, I do not think that it will be either feasible or proper to transfer each and every sitting Chief Justice of the High Court to another High Court, or to appoint an outside Judge as the Chief Justice whenever a vacancy of a Chief Justice arises."

(Emphasis supplied)

381. It appears that the CJI himself appears to be in two minds — whether or not to accept the uniform policy — and was weighing the merits and demerits in the balanced scales of justice. Ultimately, it seems that he appears to have finally made up his mind to oppose the policy of wholesale transfer of CJs. This would be clear from his letter dated 7-12-80 addressed to the Law Minister where he had expressed his opinion fairly, frankly and without any reservation thus:

"Though I am firmly opposed to wholesale transfer of the Chief Justices of High Courts, I take the view, which I have expressed from time to time that such transfers may be made in appropriate cases for strictly objective reasons. Personal considerations must in the matter of such transfers, be wholly kept out."

382. This, therefore, marks the end of the epoch so far as the CJI was concerned. After examining the entire history of the case, the various opinions expressed by top legal luminaries

statesmen, politicians and jurists right from 1958 to 1981, we are absolutely convinced that the idea of the Central Government of a uniform policy of transfer of CJs, so that each State has a CJ from outside, is a very essential, useful, sensible and a wise one which cuts at the roots of so many evils with which not only our country but even the higher judiciary is faced. Some of these aspects have been dealt with by the Law Minister and other legal luminaries in the various extracts quoted above.

383. Secondly, such a uniform policy will be in the better interest of the concerned Judge himself because however disinterested or independent he may be, he is bound to be influenced either consciously or unconsciously by interested persons who choose to exploit him even without his knowledge. A clear instance of this is to be found in the case of Justice K. B. N. Singh which has been fully clarified by the CJI in his counter-affidavit in Transferred Case No. 24 of 1981. As, however, this is a very sensitive matter we would not like to go into the details or comparative merit or demerit of the Policy but by and large we are absolutely confident that such a policy would enhance the prestige of the judiciary, ensure its independence and make the working of the head of the judiciary in the State more efficient and generate a greater confidence in the people of the new State where he is transferred.

384. The only objection which has been pointed out against this Policy is the language problem but that also does not appear to be an insurmountable obstacle because while laying down the policy the Government can start with transfers of CJs within the Zones as recommended by the Law Commission which will minimise the language difficulty. In making the transfers, there would be no serious objection if the CJ is allowed to indicate his choice regarding the State where he would be prepared to be transferred and the same may be accepted as far as practicable. So far as recruitment of one-third Judges at the initial stage is concerned, this will no doubt present some difficulties in the beginning because several constitutional authorities would have to

be consulted but this difficulty can be overcome either by the appropriate method adopted by the Circular or any mechanism similar to the same. We would like to suggest that the Chief Justice of each High Court should be asked to prepare a panel of suitable persons who are considered for appointment as High Court Judges both from the Bar and from the subordinate judiciary. Before including the name of the persons concerned their previous consent for being appointed outside the State may be obtained by the CJ. This can be done by determining the strength of the panel so that it may form one-third of the total strength of permanent Judges already fixed by the President or as may be fixed from time to time. The Civil List of Judges of the Supreme Court and High Courts gives the sanctioned strength of permanent and Additional Judges. One-third of the strength of the permanent Judges according to the vacancies that fall should be reserved for the persons found suitable and who are willing to serve outside the State. It would be better if the persons whose names are included in the panel are appointed outside the State as permanent Judges which would provide an attractive offer and give a better impetus to the persons aspiring for judgeship and would tempt them to serve outside the State.

385. This procedure should be continued without any break through a phased programme and the ultimate result would be that after a few years, the outside Judges in each High Court will pick up their seniority and would become eligible for being appointed as CJ of the High Court in which they were appointed. Thus, after the retirement of the present CJs or the transferee CJs a time may come when automatically every High Court will have a CJ from outside because the seniormost Judge who was initially recruited from outside would, if found suitable in all respects, be appointed Chief Justice of the said High Court. Such a scheme would be a continuous implementation of the Policy.

386. Moreover, once the Government takes a final decision considering the diverse views expressed by politicians, jurists, lawyers, parliamentarians

and respectable citizens, in respect of having a uniform policy by which every CJ should be from outside the State, the Government can lay down such a policy by Presidential order. If that is done, there would be no just or lawful cause for the CJI to withhold his consent to implement such a uniform policy because once a policy is evolved and given effect to, the idea of making selective transfers would lose its significance and value and would perhaps be violative of Art. 14 of the Constitution because selective transfers would always result in some sort of discrimination, for in each case, the CJI would have to justify the classification made by him.

387. It is true that neither the Law Commission set up in 1958 nor the one set up in 1978 had totally agreed with the first limb of the policy, i. e. transfer of CJs from one State to another so that each State has a CJ from outside although they did find in unequivocal terms that there was a sufficiently vocal section of the public favouring such a policy of transfers. This was perhaps because by that time all the various shades and aspects, mechanisms and methods of evolving such a policy had not been fully explored nor did the State policy till that time ripen into a wholesome policy after having considered the various facets of the matter with frankness, forthrightness and objectivity.

388. Indeed what had been noticed by the Law Commission in 1958, that is about more than two decades hence, has become absolutely essential today in view of the modern trends of casteism, nepotism and patronage in the higher echelons of judiciary. Furthermore, as a result of the insufficient emoluments and poor conditions of service, we are not able to muster men of high calibre and eminence for appointment to the High Courts. With great reluctance we have to observe that an atmosphere seems to prevail today in most of the High Courts Judges are being exploited and in some cases perhaps without their knowledge, which has brought the most sacred and sacrosanct institution of the judiciary into serious disrepute. The only honourable remedy for this malady is the implementation of the first limb of the Policy.

389. Nevertheless, regarding the second limb of the Policy in regard to recruitment of one-third Judges from outside the State, as far as possible at the initial stage; both the Commissions have unanimously acclaimed and approved such a step.

390. Brother Venkataramiah has taken the view that although the CJI was opposed to the wholesale transfers of all CJs, his opposition was only with respect to all these transfers being made at a particular time. In other words, Venkataramiah J., suggests that the CJI was quite agreeable to the Policy being carried out if the CJs are transferred not in a block but by stages and in due course of time. We are, however, unable to agree with this argument because this runs counter to the clear intention expressed by the CJI in the letters discussed above. Moreover, it will be rather unfair to the CJI also to say that he had merely opposed wholesale transfers made at one time but had agreed to the Policy of uniform transfers if made by stages. The view taken by the CJI may not appeal to us or perhaps to the majority of the jurists but it cannot be said that there is absolutely no substance in the stand taken by the CJI. His point of view is also quite understandable but, with greatest respect to him, what he has missed is the great public interest, the policy subserves by promoting national integration and curbing fissiparous tendencies that have started raising their heads and completely excludes discrimination which may result in cases of selective transfers.

391. Brother Venkataramiah has also expressed his view that the transfers proposed by the CJI, which were quite a number of them, were actually in aid and implementation of the policy formulated by the Government and, therefore, even if there was no effective consultation, the transfers would be valid. We regret that we are unable to accept this view because it is the common case of all the parties that although the suggestion to evolve a Policy has been mooted no such Policy has yet been evolved or finalised because even according to the Law Minister, the mechanism is yet to be determined which would have to be left to the Supreme Court. This is

further supported by the statements of the Law Minister which was produced by the Solicitor-General where the Law Minister merely says that the Policy view was put across to the CJI who expressed his opposition to all the CJs of the High Courts being from outside. The Government, however, acceded to the transfers proposed by the CJI as (1) it was felt that not agreeing to these transfers may be construed as though the Government was departing from its view of having CJs from outside, and (2) the policy aspect could still be pressed into service later.

392. Thus the statement of the Law Minister clinches the issue and establishes the fact beyond doubt that no uniform Policy has so far been evolved and the said Policy, if any, is still in the making. This being so, the question of the CJI proceeding to implement the Policy by proposing the transfers would not arise.

393. On other points, we entirely agree with Brother Venkataramiah and other Brother Judges that the Policy is good, reasonable, fruitful and constitutionally valid.

394. Thus, a close and careful scrutiny of the correspondence between the Law Minister and the CJI over a year on the issue of evolving a general policy of transfer of CJs so that each State has a CJ from outside could not be finalised and what happened was that only sporadic transfers were recommended by the CJI. As indicated above Brother Venkataramiah has in his lucid judgment seems to have construed the letter dated 7-12-1980 of the CJI to indicate merely that he was against wholesale transfers to be made at one stroke and what he suggested was that these transfers should be made in stages and not on a single day. In other words, Venkataramiah, J., is of the view that the transfers recommended in the CJI's letters dated 7-12-1980 and 20-12-1980 were merely in implementation of the general policy of transfer of CJs so that every High Court has a CJ from outside. With due respect, we are unable to spell out such an intention of the CJI from the clear contents of the letters which in fact and in purpose rejects the general policy of wholesale transfers of the CJs as suggested by the Law Minister. He has ultimately ex-

pressed himself very clearly and strongly that he was against such a universal policy of wholesale transfers and would be willing only to consider individual cases on their merits leaving apart, personal considerations and for objective reasons.

395. Secondly, since it is the admitted case of the Government that while they were thinking of evolving a general policy of transfer of CJs, the policy had not yet taken any final shape nor did the Government take any conclusive decision on this important matter. With due respect, therefore, we do not agree with the view taken by Brother Venkataramiah J. on this point.

396. As regards the Government's idea of evolving a general policy to effect transfers of CJs in a manner which puts every High Court under the CJ from outside the State, is undoubtedly a very sound and acceptable policy as found by us. We have pointed out from the various Reports discussed above that ever since the date of the Report of the SRC was given the idea of having Judges from outside the State was clearly mooted. Furthermore, while we are examining the Policy sought to be evolved by the Government, at the present moment we cannot shut our eyes to the stark and hard realities of life. Ever since the linguistic provinces came into existence as a result of the SRC Report, attempts have been made to see that the linguistic division of the State does not create disintegration of our big country which is the largest democracy in the world. In fact, lawyers, Judges, politicians, jurists, members of the Bar and other statesmen have applied their minds and expressed themselves strongly in favour of the policy sought to be evolved by the Government. In view, however, of the changed circumstances, in our opinion, such a policy is not only proper but essential as being the prime need of the hour. We cannot but take notice of the fissiparous and parochial tendencies that have started raising their heads threatening disintegration of the country. The dark clouds of separatism, conservatism and parochialism have started casting their shadows on the entire country and it is high time that such a sacred and sacrosanct institution like the High Courts should be protected

and kept aloof from such evil forces. It is manifest that a CJ from outside will apply an independent approach both in discharging his judicial duties as a Judge and in recommending appointment of members of the Bar or service to the High Court and his selection will not be inspired or tainted by any local or personal consideration because he would be an outsider in the High Court of a State where he presides. Further, even the litigant would have much greater confidence in such a CJ than in a local person.

397. We would like to reiterate at the risk of repetition that having regard to the inadequate emoluments of the High Court Judges and their conditions of service which leave much to be desired, there has been a fall in the standards of efficiency and competency. Lawyers possessing great calibre and eminence are extremely reluctant to accept judgeship of a High Court. Thus, the choice and selection of suitable persons has become extremely difficult and experience has shown that in a number of High Courts suitable persons have not been appointed.

398. It has been vehemently argued by Mr. Seervai as also by Mr. Sorabjee who followed him that their main concern is that independence of judiciary should be maintained at all costs. Indeed, if they are really concerned that we should build up an independent judiciary then it is absolutely essential that new talents from outside should be imported in every High Court either to man it or to head it so that they may generate much greater confidence in the people than the local Judges. The position of a CJ is indeed a very high constitutional position and our Constitution contains sufficient safeguards to protect both his decision making process and his tenure. It is a well-known saying that power corrupts and absolute power corrupts absolutely. As man is not infallible, so is a Chief Justice, though a person holding a high judicial post is likely to be incorruptible because of the quality of sobriety and restraint that the judicial method contains. Even so, if a CJ is from outside the State, the chances of his misusing his powers are reduced to the absolute minimum. We have pointed out that the power to formulate or evolve this

policy clearly lies within the four corners of Art. 222 itself which contains a very wide power conditioned only by consultation with CJI who is the highest judicial authority in the country. It is always open to the President, which in practice means the Central Government, to lay down a policy, norms and guidelines according to which the Presidential powers are to be exercised and once these norms are followed, the powers of the President would be beyond judicial review.

399. We might also mention that as against policy transfer selective transfers of CJs to High Courts other than the one where they are working or may be appointed, contains the colour of discrimination and arbitrariness because however careful the CJI may be if he starts picking and choosing CJs from outside the High Courts the element of discrimination or arbitrariness cannot be reasonably excluded. On the other hand, if a general policy applying to all and sundry (CJs) is evolved by which State would have a CJ from outside no complaint of discrimination can ever be made. In fact, the very foundation of discrimination would disappear. The view taken by the CJI, with greatest respect to him, does not appear to be correct or acceptable and perhaps in his own interest selective transfers should not be made because even if in one or two cases discrimination is made due to oversight or bona fide lapse, it will amount to a great slur on such a high position as the CJI holds. On the other hand, if a uniform policy of appointing or promoting CJs to High Courts outside the State is followed it will promote national integration and curb the fissiparous and parochial tendencies and preserve and protect the purity of judicial administration. We cannot conceive of any better policy which would be in greater public interest than the policy of having CJs in every State from outside. We have already observed that whenever a general policy or radical change of this kind is made it has to be subject to just exceptions and the formulation of such a policy would also have to take within its fold exceptional circumstances applicable to a particular CJ or CJs — a matter which we shall discuss hereafter.

400. Even as regards the constitutional validity of the general policy which may be evolved by the Central Government. This Court in Seth's case (AIR 1977 SC 2328) had clearly expressed the view that such a Policy would be in public interest. In this connection, Chandrachud J., (as he then was) speaking for the majority judgment observed as follows (at pp. 2344, 2347 of AIR 1977 SC):—

"As regards the first, no one can deny that whatever measures are required to be taken in order to achieve national integration would be in public interest. Whether it is necessary to transfer Judges from one High Court to another in the interests of national integration is a moot point. But that is a policy matter with which courts are not concerned directly.

Policy transfers on a wholesale basis which leave no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution."

401. Doubtless, there appears to be some apparent contradiction between the two passages extracted above from the judgment of Chandrachud J. On a closer scrutiny of these observations his view that policy transfers on wholesale basis would leave no scope for considering facts of each particular case cannot be read out of the context and have to be read in the light of the peculiar facts and circumstances of Seth's case (AIR 1977 SC 2328) in which transfers were made by the Government not in pursuance of a policy or public interest but purely with political motives to punish Judges for sharing a particular ideology. This is, however, not the case here and therefore as we read the observations of Chandrachud J. he has not held the policy of transfer to be not in public interest in order to promote national integration.

402. For the reasons that we have already given above, we are unable to agree with the observations where the learned Judge has said that interest of national integration is a moot point. We have already shown from the opinions expressed by high constitutional and legal authorities that a policy of having J in every High Court from outside is

in great national interest and perhaps very necessary in order to curb and crush the fissiparous tendencies which seem to sway our entire country. Bhagwati, J. while adverting to this aspect of the case observed as follows (AIR 1977 SC 2328 at p. 2352):—

"It was admittedly part of mass transfers of 16 High Court Judges and though a suggestion was made by the Government of India in its affidavit in reply that the transfers were made with a view to strengthening national integration but cutting at the barriers of regionalism and parochialism, the Government of India did not choose to disclose the principle on which these 16 High Court Judges were picked out for being transferred."

403. These observations show that Bhagwati, J., did not dispute the correctness of the Policy of National integration but found fault with the manner in which it was applied by justifying the transfers on a ground which was not supportable in law. It is obvious that if the transfers would have been made to strengthen national integration in order to cut the barriers of regionalism and parochialism, the Judge would have no hesitation in upholding the State Policy. Krishna Iyer, J. and one of us (Fazal Ali J.) also sounded a similar note and observed thus (AIR 1977 SC 2328 at p. 2377):—

"But to promote the community's concern for impeccable litigative justice policy-oriented transfer of Judges after compliance with constitutionally spelt-out protocols may not be ruled out.

Salutary safeguards to ensure judicial independence with concern for the All-India character of the superior Courts in the context of the paramount need of national unity and integrity and mindful of the advantages of inter-State crossfertilization and avoidance of provincial perviousness were all in the calculations of the framers of the Constitution."

404. Even Untwalia J. who had dissented from the majority judgment had admitted that the purpose of national integration was a good thing to be achieved and in this connection observed thus (AIR 1977 SC 2328 at p. 2388):

"The purpose of national integration if otherwise it is a good thing to be achieved....."

405. Thus, it would appear that even the judicial pronouncements of this Court in Seth's case (AIR 1977 SC 2328) extracted above fully favour the formulation of such a policy. Added to this the commitment made by the Law Minister that once the Policy of wholesale transfers of CJ is evolved the mechanism would be left to the Supreme Court and the Policy be started from the grass-root level by taking consent of the persons nominated for appointment of Additional Judges who have not yet been made permanent, the policy can be fully worked out without any hitch or hindrance.

406. The next question that arises for consideration is as to how the two limbs of the Policy, viz., (1) transfer of CJs from outside, and (2) recruitment of one-third of Judges from outside the State at the initial level, can be effectuated. Here, we do not find any difficulty whatsoever. Art. 222 confers an express power on the President to transfer a Judge (which includes the CJ) from one State to another. This power is not circumscribed or hedged by any conditions or stipulations excepting that the CJI has to be consulted. In determining as to how this power can be exercised, the President undoubtedly possesses an implied power to lay down the norms, the principles, the conditions and the circumstances under which the said power is to be exercised so long as he does not overstep the limits or confines of the power enshrined under Art. 222. Since the implied power lies with the President it is not at all necessary that this power should be regulated by a legislation or an Act or a Rule or a bye-law or any other instruction. A declaration by the President regarding the nature and terms of the policy which virtually means declaration by the Council of Ministers is quite sufficient and absolutely legal and constitutional to effectuate the policy decided upon.

407. Secondly, as the policy is a general one which applies to all and sundry without any discrimination or selections, it cannot be violative of Art. 14 of the Constitution because the policy will operate equally on all the Judges of the CJs without any difference or distinction.

408. Thirdly, it is necessary to put the policy beyond the charge of un-

reasonableness or arbitrariness that the State policy must be subject to just exceptions which may be very few, so that the exceptions do not become a rule or a ruse to destroy the effect of the main policy itself. For instance, while evolving or formulating a general policy the following exceptions can be made by the President—

(1) that where the personal circumstances of a Judge, purely on humanitarian grounds, are such as may endanger his life, e. g., he may be a heart patient and so he may not be transferred to a High Court which is situated in a hill station or at a particular height or he may be suffering from such disease which may imperil him there or such other circumstances of a very compelling or pressing nature,

(2) where the Judge or the CJ concerned is about to retire and is to serve only for a very short term before retirement, his transfer to some other Court would not serve any useful purpose and would be very inconvenient to him—such a period may vary from one day to six months but not more,

(3) where due to some physical infirmity the CJ concerned has become immobile and cannot be moved beyond his home State, this may be a just and humanitarian ground for bringing him under the exceptions to the policy, and

(4) such other circumstances, either similar to or identical with the circumstances mentioned above, which in the opinion of the CJI or the President requires due consideration on humanitarian grounds.

409. It is manifest that even if a Policy has been finally evolved and formulated and transfers are sought to be made in pursuance of the policy, the President has to consult the CJI or where the CJI initiates the proposal he is to consult the Judge concerned as also the President but the process of consultation would have to be confined to the four corners of the just exceptions indicated above and not beyond the same which form part of the Policy laid down by the President.

410. At the same time, the exceptions should not be so broadly construed as to destroy the effect and fruitfulness of the Policy.

411. Another aspect of the matter is as to whether or not the policy is legally justifiable and is in public interest, so as to be legal and constitutional. On this aspect of the matter unimpeachable materials have been placed before us to show that right from the framing of the Constitution up-to-date public opinion has always favoured the transfer of Judges as a matter of uniform policy. As late as 1949 when the Draft Constitution was made, Dr. Ambedkar, as already indicated, had expressed a pious wish that Judges should be transferred to other States so that they can apply an independent approach and generate more confidence being above all local or parochial interests.

412. We must hasten to add that The President before formulating the Policy should consult the CJI and have his views because the laying down of the Policy would be under Art. 222 and consultation with the CJI being necessary concomitant of the said power, even while laying down the Policy, the consultative process is essential. Although the CJI has at present shown his stiff opposition to the Policy we hope and trust that when the matter is reassessed and a Policy is finally formulated, the CJI would eschew his opposition in view of the various factors and circumstances indicated above as also in due deference to the view of some of the Judges of this Court who have decided these cases, which, as pointed out by us, is not only in great public interest but also in national interest of the country. Moreover, the Policy has been amply supported and sponsored not only by the Government but also by a very large body of publicmen including jurists, politicians, lawyers, parliamentarians and others. If despite these circumstances the CJI does not change his view and sticks to his opposition of the Policy, then we think this will be a fit and proper case where the President might overrule the CJI and enforce the Policy. We however solemnly hope and trust that such an eventuality would not arise.

413. Before closing this Chapter, we would like to say a few words about the mechanism of giving effect to this Policy. The Law Minister has already made a statement in the Parliament as indicated above that he is prepared to leave the

mechanism to be devised to the CJI or to the Supreme Court. If the Supreme Court, which represents cream of all legal and judicial master minds of 70 crores of the people of our country, is left to adopt the mechanism, viz., as to which CJ should be posted where and judge the suitability and the atmosphere of the place of posting, then we think that nobody can ever complain of any injustice or discrimination against the mechanism adopted by the Court. We might further state that only the mechanism is to be left to the Supreme Court which will require a small Constitutional amendment in Art. 222 which uses the word CJI alone. For the time being the mechanism could be left to the CJI who, we hope and trust, will consult his colleagues before adopting the mechanism in each case.

414. Before closing this chapter we should now say a few words about the legal and constitutional effect of the Circular said to have been written by the Union Law Minister. In order to understand the real import of the said Circular, the same may be extracted in full:

"D. O. No. 66/10/81/-Jus

Minister of Law, Justice &
Company Affairs, India
New Delhi-110 001.

March 18, 1981.

My dear

It has repeatedly been suggested to Government over the years by several bodies and forums including the States Reorganisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one-third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction. The feeling is strong, growing and justified that some effective steps should be taken very early in this direction.

2. (a) In this context, I would request you to obtain from all the Additional Judges working in the High Court of your State their consent to be appointed as Permanent Judges in any other High Court in the country. They could, in addition, be requested to name three

High Courts, in order of preference, to which they would prefer to be appointed as Permanent Judges, and

(b) Obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in paragraph 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given.

4. I would be grateful if action is initiated very early by you and the written consent and preferences of all Additional Judges as well as of persons recommended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also sending a copy of this letter to the Chief Justice of your High Court.

With regards

Yours Sincerely,

Sd/- (P. Shivshankar)

To:

1. Governor of Punjab.
2. Chief Ministers (by name) (except North-Eastern States)"

415. In the first place, the contents of the letter have to be understood against the background of the uniform policy sought to be evolved by the President which we have dealt above exhaustively. Before we make any comments it seems to us that what was purely a useful and innocuous, meaningful and pointed document has been described by the petitioners as a most mischievous act of the Law Minister which endangers and erodes the independence of the judiciary. In our opinion, with due respect to the counsel for the parties, the Circular neither does nor does it intend to do any such thing.

416. To begin with the preamble of the Circular clearly gives the reasons and the background why the letter was written, viz. that the unanimous view that has now emerged is that one-

third of the Judges should as far as possible be from outside the State in which that High Court is situated. From the elaborate discussions in respect of the various circumstances and documents to which we have referred while dealing with the question of Policy, it is manifest that nobody has ever objected to the second limb of the Policy, that is to say, taking one-third of the Judges in a High Court from outside the State. We have shown that even the CJI has expressed his entire agreement with this part of the Policy. The Circular merely seeks to provide an easy and practical, rough and ready, and an ingenious and scientific mechanism to achieve this end.

417. Let us assume that all parties agree that one-third of the Judges in each High Court should be taken from outside, which seems to be the absolute consensus that has emerged from the evidence produced by both the parties. The question is how is this objective to be achieved? One method may be as suggested by some Commissions that each High Court should maintain a panel of members of the Bar and the services who are suitable for appointment as Judges of the High Court and exchange these panels with the CJs of all High Courts. Before making the panel, it is manifest that the State Government also would have to be consulted, which is also the requirement of the statute. This is, however, a very complex and complicated procedure and will take quite a few years before the panel is formed.

418. So far as Mr. Seervai is concerned, he argued that this cannot be done. We are, however, unable to agree with him that merely because it may not be very easy to evolve this limb of the Policy, it should be rejected as being impossible of performance. After all, eminent jurists like Justice Saiyid Fazl Ali, Justice H. R. Khanna, Mr. M. C. Setalvad and lot of others must be given the credit of possessing great knowledge of law and if they thought that this was an idea which was most impracticable, they would never have suggested it.

419. The Law Minister by virtue of the Circular seeks to hit upon a device by which this limb of the Policy can be achieved. It is obvious that in almost all the High Courts apart from the permanent Judges, Additional

Judges are working according to the strength fixed by the President in each High Court. The Circular does not cover the permanent Judges of the High Court at all but it applies only to two kinds of Judges — (1) persons who are about to be appointed as Additional Judges, and (2) persons who are working as Additional Judges and whose term is likely to expire. The Circular merely says that the CJs may obtain the consent of the aforesaid additional Judges if they would like to be appointed as permanent Judges in any other High Court in the country and they could name three High Courts of their choice. There is no compulsion on the Judges to give their consent; it is merely an option or suggestion which they may or may not accept.

420. Secondly, consent is to be obtained from persons who had already been or may in future be proposed for initial appointment as Additional Judges to give their consent to be appointed in any other High Court. Here also, there is no element of compulsion. Clause (3) of the Circular, which has been severely criticised by Mr. Seervai and those who followed him, merely says that furnishing of the consent or indication of the preference would not imply any commitment on the part of the Government. While criticising this part of the Circular the counsel for the petitioners have however completely overlooked the most important circumstance that it was impossible for the Government to have made any commitment without ascertaining the views of the State Governments concerned, the CJs as also the CJI. It could only be after these functionaries would have intimated their option that the ball could be set rolling and the CJs of the High Courts where they were proposed to be sent could be sounded for consultation as also the Government. Furthermore, the CJI would come into the picture only after the proposal has passed through the High Court and the State Government concerned and it would be open to the CJI at this stage either to agree with this proposal or to drop it.

421. We, therefore, fail to see what harm is done to the Judges. On the other hand, the Circular provides an additional facility to the Judges who may like to go out of the State in accordance

with the Policy. It appears that in actual practice quite a few of the Judges have given their consent.

422. Mr. Seervai vehemently contended that the tone and tenor of the Circular amounts to pressurising the Judges and putting them under coercion to give their consent at the peril of their being dropped at the initial stage. The plea of coercion or undue influence is to be pleaded by the persons on whom undue influence or coercion is used. None of the Judges have either by any statement or affidavit complained that they had given their consent under duress.

423. Mr. Seervai submitted that Judges are not used to indulge in litigation and if they chose to remain silent, the lawyers can take up their cause and prove that duress and coercion has been practised on them. We are really amazed that such an argument has been advanced before us which completely ignores the elementary norms of law. Manifestly before the highest Court, a Judge of a High Court cannot be governed by a law or rule of evidence different from the one which applies to all citizens. It is now well settled by several authorities that allegations of coercion or undue influence must be expressly pleaded by the party who is the victim, and proved to the satisfaction of the Court.

424. In the instant case, there is neither any plea nor any proof by the so-called victims. A mere statement in the petition that undue influence or coercion or duress was practised on the Judges is not sufficient for this Court to come to the conclusion that the consent of the Judges was obtained under duress or coercion. Mr. Seervai contended that although there was a clear indication in the petition, none of the Judges has come forward to deny the same. This is indeed a most unusual way of proving a case of fraud or undue influence. Suppose today we accept the argument of Mr. Seervai and hold that by virtue of the Circular the Judges who have given their consent did so under coercion or duress and tomorrow the very Judges who had given consent come forward to this Court protesting against our finding and inform us that they had voluntarily given their consent, what shall be the answer of this Court! On

what principle of law or equity can we decide the plea of fraud, undue influence or coercion? This argument which is the sheet-anchor of Mr. Seervai, with due respect to him, cannot be accepted for a moment.

425. Another comment against the Circular was that by the indirect process of obtaining consent of the Judges concerned, the provisions of Art. 222 have been rendered otiose because when the matter goes to the CJI, he would be faced with a fait accompli and would have no discretion in the matter. This argument also, in our opinion, is wholly untenable. A person of the status and calibre of the Head of the judiciary in India would not be worth his salt if he exercises his constitutional power of consultation merely on the consent of a Judge without at all applying his mind. There is no question of presenting a fait accompli to the CJI because he has to consider all the shades, aspects and problems of the matter in its entirety and would also have to consult the Judge concerned and if he feels that a proper case for transferring the Additional Judge to other High Court has not been made out, he can refuse to give his consent in which case in all probability the proposal would die a natural death. We are, therefore, unable to accede to the contention that the Circular tries to interfere with the supreme authority of the CJI in the matter of consultation under Art. 222.

426. Another circumstance that furnishes a complete answer to this problem is that no question of transfer is involved in the mechanism sought to be devised by the Circular. The Additional Judges have only to be appointed for the first time in other High Courts and are not to be transferred. Even if the Judges concerned give their consent and are appointed in an outside High Court, they would not be transferee Judges and therefore not entitled to the facilities which are available to transferee Judges like compensatory allowance, visiting his home State every year, etc. Therefore, the entire argument stands on a pack of cards.

427. Lastly, the Circular issued by the Law Minister is not mandatory but purely directory. It is open to the Judges to refuse to answer the queries

made from them by the CJI in pursuance of the Circular and no adverse inference can be taken against them, though the law will take its own course.

428. We are clearly of the opinion that once the Policy is finally formulated and translated into action, it would enhance the image and independence of the judicial institutions and verily the judiciary would see its halcyon days where the Judges would be able to function with drive and dedication in a free and independent atmosphere without the fear of any local or parochial influence entering into their verdict either consciously or unconsciously. The grateful nation shall pay its homage to our grate Founding Fathers for giving unto this country a most ideal, flexible, sound and solid Constitution which has sustained the largest democracy in the world and has stood the test of times despite severe storms and crises like an impregnable rock.

429. For these reasons, therefore, we are unable to agree with the counsel for the petitioners that the Circular in any way tarnishes the image of the Judges or mars the independence of judiciary. This, therefore, disposes of Point No. 3 relating to policy of General Transfers and the question of validity of the Circular.

430. As regards the question of appointment of Additional Judges under Art. 224, the interpretation of Art. 217, the questions of locus and primacy, the exposition of the concomitants of consultative process, I generally agree with my Brothers Bhagwati, Desai and Venkataramiah JJ., who have elaborately dealt with these points.

431. So far as the question of privilege is concerned, the matter was argued with all its ramifications by counsel for the parties. All my Brother Judges after hearing the arguments passed an interim Order on 16-10-81 directing disclosure of the documents concerning the secret correspondence between various authorities. I, however, found myself, with due respect to my Brother Judges, unable to agree with the view taken by them and passed the following Order on the same date:

"I am afraid, I am unable to persuade myself to agree with and express my respectful dissent from the Order passed by Brother Bhagwati J. and other

Brother Judges directing disclosure of the contents of the documents. I am clearly of the opinion, after inspecting the documents and considering the pros and cons, various shades and aspects of the matter with all its ramifications that it is not in public interest to disclose the contents of the documents and I accordingly uphold the plea of privilege taken by the Union of India. I am aware that my voice is a lone dissent but I am satisfied that I am in good company with my judicial conscience.

Reasons for this Order will be given by me along with the judgment rendered in the cases."

432. I now set out to give the detailed reasons which led me to dissent from the views taken by my learned colleagues. I had mentioned in my interim Order that mine was a lone voice of dissent but I felt consoled that I was in good company with my judicial conscience.

433. To begin with, in dealing with the question of privilege, we cannot view this important branch of law divorced from the socio-economic conditions of our own country nor can we overlook the special conditions — political, economic and social — prevailing in the largest democracy of the world. Any judicial reform however radical or meaningful it may be, must like a sage counsel be slow and gradual because it is the last refuge for those who seek Justice from the courts of law. One of the most prominent distinctive features of the laws of our country on the question of privilege is that the doctrine of privilege is governed not merely by case law but by statute law as also by Constitutional provisions. These provisions are contained in Sections 123 and 124 of the Evidence Act, S. 162 of the Code of Criminal Procedure and Art. 74 (2) of the Constitution of India. In deciding the plea of privilege taken by the State or the party concerned, the provisions of the codified law, which have not been changed so far, must receive full and effective consideration at our hands. It is not for the first time that claim of privilege has been taken by the Government in this case but the law is now well settled by the decisions of this Court as also of various High Courts including the Privy Council. I would not like to burden

this judgment, which has already become unduly long, with the long course of decisions of the High Courts covering a period of more than a century, but would like to confine myself to the authorities of this Court and some English and American cases on which reliance has been placed by counsel for the petitioners.

434. Before proceeding to the decisions, it may be necessary to extract the relevant provisions of the codified law of our country, Art. 74 (2) which contains a constitutional mandate by preventing any inquiry into an advice tendered by the Minister to the President runs thus:

"74 (2). The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court."

435. Sections 123 and 124 of the Evidence Act may be extracted thus :

"123. Evidence as to affairs of State — No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

124. Official communications — No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure."

436. Section 162 (1) of the Code of Criminal Procedure runs thus:

"162 (1). No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

437. A plain reading of these provisions would show that these provisions are expressed in a negative form which is the clearest possible proof of the fact that the legislature has incorporated a direct prohibition against the use of documents mentioned in the aforesaid provisions,

438. Thus, a disclosure can be allowed only in exceptional circumstances where there is no injury to public interest because public interest is always paramount to private interest. In fact, these provisions clearly contain four important attributes of the doctrine of disclosure:—

- (1) public interest,
- (2) confidentiality,
- (3) candour, and
- (4) expediency.

439. A reading of these provisions would also show that the legislature seems to have laid the greatest possible emphasis on public interest and confidentiality aspects of these documents. I shall now refer to some of the leading decisions of this Court which have construed the doctrine of privilege as contained both in Section 162 of the Code of Criminal Procedure and Section 123 of the Evidence Act, and have laid down principles which should be adopted by courts in allowing disclosure or upholding the plea of privilege.

440. I would first refer to the case of *State of Punjab v. Sodhi Sukhdev Singh* (1961) 2 SCR 371: (AIR 1961 SC 493) which may justly be regarded as the locus classicus regarding the doctrine of disclosure where Gajendragadkar J., with whom Sinha C. J. and Wanchoo J. agreed, observed as follows (at p. 501):

".....A valid claim for privilege made under Section 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that, where a conflict arises between public and private interest, the latter must yield to the former."

441. It may be noticed here that Gajendragadkar J. was fully alive to the fact that even as a result of the non-production of the relevant material or documents, the litigant may feel dissatisfied but that will not affect the basic principle that public good and interest must override considerations of private good. Here this Court made a distinct departure from the view taken by the American Courts where the concern for the amount of prejudice caused to the litigant is so paramount as to form the bulwark and fundamental consideration for directing disclosure and in some cases even injury to public interest has

to yield to the requirements of the litigant.

It is, therefore, clear that this Court has not accepted and in my opinion rightly, the extreme view of the American courts. This Court in *Sodhi Sukhdev Singh's* case (AIR 1961 SC 493 at pp. 501, 504, 505) (supra) made the following observations:—

"Care has, however, to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provision of S. 123. Subject to this reservation the maxim *salus populi est suprema lex* which means that regard for public welfare is the highest law is the basis of the provisions contained in Sec. 123. Though Sec. 123 does not expressly refer to injury to public interest that principle is obviously implicit in it and indeed is its sole foundation.

..... Having regard to the notion about governmental function and duties which then obtained, affairs of State would have meant matters of political or administrative character relating, for instance, to national defence, public peace and security and good neighbourly relations. Thus, if the contents of the documents were such that their disclosure would affect either the national defence or public security or good neighbourly relations they could claim the character of a document relating to affairs of State. There may be another class of documents which could claim the said privilege not by reason of their contents as such but by reason of the fact that, if the said documents were disclosed, they would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies. In this class may legitimately be included notes and minutes made by the respective officers on the relevant files, opinions expressed or reports made, and gist of official decisions reached in the course of the determination of the said questions of policy.

..... In other words, if the proper functioning of the public service would be impaired by the disclosure of any document or class of documents such docu-

ment or such class of documents may also claim the status of documents relating to public affairs.

It is, however, necessary to remember that where the legislature has advisedly refrained from defining the expression "affairs of State" it would be expedient for judicial decisions to attempt to put the said expression into a strait-jacket of a definition judicially evolved. It must be clearly realised that the effect of the document on the ultimate course of litigation or its impact on the head of the department or the Minister in charge of the department or even the Government in power, has no relevance in making a claim for privilege under Sec. 123.

The sole and only test which should determine the decision of the head of the department is injury to public interest and nothing else.

Thus our conclusion is that reading Secs. 123 and 162 together the Court cannot hold an inquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the court is competent, and indeed is bound, to hold a preliminary inquiry and determine the validity of the objections to its production, and that necessarily involves an inquiry into the question as to whether the evidence relates to an affair of State under Section 123 or not." (Emphasis mine)

442. *Duncan v. Cammell, Laird & Co.*, (1942) AC 624 was also noticed by this Court and it was pointed out that it was not necessary to consider the true nature and effect of the principle as adumbrated in that case, because in India we are governed by the provisions of Sec. 162 of the Code of Criminal Procedure which clearly confers powers on the court to determine the validity of objections raised in Sec. 123 of the Evidence Act. Hence, there would be no occasion to exercise the inherent power of the Court. In this connection, this Court made the following observations in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493 at p. 511) (supra).

"Without knowing more about the contents of the said documents it is impossible to escape the conclusion that these documents would embody the minutes of the meetings of Council of Ministers and would indicate the advice which the Council ultimately gave to the Rajpramukh. It is hardly necessary to recall that advice given by the Cabinet to the Rajpramukh or the Governor is expressly saved by Art. 163, sub-art. (3) of the Constitution; and in the case of such advice no further question need to be considered. The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers."

443. These observations come very close to the matters in dispute contained in the secret correspondence sought to be disclosed because here also they dealt with the Minute of the meeting of the Ministers, viz., the Law Minister, the CJI and the CJ, Delhi which form the foundation, though not an actual part of the advice tendered to the President. These documents were held to be fully privileged. Kapoor J. in a concurrent judgment in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493 at p. 516) (supra), however, clarified the position thus:—

"Thus the documents, which are protected from production, are those the production of which would be prejudicial to the public interests or those which belong to that class which as a matter of practice, are kept secret for the proper maintenance of the efficient working of the public service."

(Emphasis supplied)

444. The learned Judge after summing up the entire English law on the subject observed as follows: (at p. 516)

"Thus the law as stated in these old English cases shows that what was injurious to the public interest or prejudicial to the proper functioning of the public services was not to be disclosed and if the objection was based on these grounds it must prevail."

445. Construing the provisions of Sec. 123 of the Evidence Act, the learned Judge observed thus ((1961) 2 SCR 371 : (AIR 1961 SC 493 at p. 525):

"The words of Sec. 123 are very wide, and the discretion to produce or

not to produce a document is given to the head of the department and the court is prohibited from permitting any evidence to be given which is derived from any unpublished documents relating to affairs of State."

446. Subba Rao J. also in a concurring judgment while maintaining the claim of privilege pointed out that the earlier decisions of English courts indicate that the ground of privilege was sustained only in regard to the documents pertaining to matters of administration, defence or foreign relations whose disclosure would be against public interest. In the instant case, the documents in question undoubtedly relate to matters of administration of high-powered constitutional functionaries and would, therefore, fall within the ambit of the Rule of law laid down by the English courts. Subba Rao J. (as he then was) took care to point out that the Evidence Act was enacted when the concept of a Welfare State had not arisen but even after independence the interpretation of the words 'affairs of the State' cannot be given a separate meaning but have to be construed on the basis that our Constitution aims at setting up of a Welfare State. In this connection, the learned Judge observed as follows (at p. 527 of AIR 1961 SC):

"But when the words are elastic there is no reason why they should not be so construed as to include such activities also, provided the condition of public injury is also satisfied. It is, therefore, clear that the words "affairs of State" have acquired a secondary meaning, namely those matters of State whose disclosure would cause injury to the public interest.

447. Stressing that the cardinal test for upholding the plea of privilege should be that the disclosure of the documents would be injurious to the public interest the learned Judge observed as follows (at p. 527 of AIR 1961 SC):

"I cannot, therefore, give a wide meaning to the words 'records relating to affairs of State' so as to take in every unpublished document pertaining to the entire business of State, but confine them only to such of the documents whose disclosure would be injurious to public interest.

448. The learned Judge further pointed out that there was no conflict between Secs. 123 and 162 of the Evidence Act even on the interpretation sought to be put on the doctrine of privilege by the learned Judge. In this connection he observed thus (at p. 530 of AIR 1961 SC):

"There is no conflict between S. 123 and Sec. 162 of the Act: the former confers a power on a head of a department to withhold permission from the stand-point of State Administration, whereas Sec. 162 recognises the overriding power of a court in the interest of higher public interest to overrule the objection of privilege."

449. Finally, while laying down the working rules of guidance regarding matters of privilege, the learned Judge laid down the following guidelines (at p. 532 of AIR 1961 SC):—

"Subject to the overriding power of the court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for the courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State: (a) "records relating to affairs of State" mean documents of State whose production would endanger the public interest; (b) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State; (c) unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relating to affairs of State; but in special circumstances they may partake of that character; (d) in cases of documents mentioned in (c) supra, it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer."

450. In *Amar Chand Butail v. Union of India* AIR 1964 SC 1658 another Constitution Bench adopted the same view which was taken in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493) (supra). Gajendragadkar CJ speaking for the Court observed thus (at p. 1661 of AIR 1964 SC):

"In view of the fact that S. 123 confers wide powers on the head of the department, this Court took the precau-

tion of sounding a warning that the heads of departments should act with scrupulous care in exercising their right under S. 123 and should never claim privilege only or even mainly on the ground that the disclosure of the document in question may defeat the defence placed by the State. Considerations which are relevant in claiming privilege on the ground that the affairs of the State may be prejudiced by disclosure must always be distinguished from considerations of expediency which may persuade the head of the department to raise a plea of privilege on the ground that if the document is produced, the document will defeat the defence made by the State."

451. In this case, a clear distinction was sought to be drawn between the doctrine of confidentiality and that of expediency. In other words, this Court decided that where a particular document did not relate to affairs of the State as such, but if the document was produced it may defeat the defence taken by the State, that alone would not be sufficient to uphold the plea of privilege. In the instant case, however, this doctrine does not apply at all.

452. In *State of U. P. v. Raj Narain*, (1975) 4 SCC 428 : (AIR 1975 SC 865), another Constitution Bench of this Court observed thus (at Pp. 872, 875) :

"A witness, though competent generally to give evidence, may in certain cases claim privilege as a ground for refusing to disclose matter which is relevant to the issue. Secrets of State. State papers, confidential official documents and communication between the government and its officers or between such officers are privileged from production on the ground of public policy or as being detrimental to the public interest or service." (Emphasis supplied).

"The several decisions to which reference has already been made establish that the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is

to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The Court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contained material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection." (Emphasis mine).

453. The aforesaid observations of Ray CJ appear to be on all fours with the facts and circumstances of the present case because the documents consisting of the secret correspondence, amply answer the description of the documents which were being dealt with in that case.

454. Mathew J. in his concurring judgement expressed a similar view and after dealing with a large number of English cases observed as follows (at p. 883 of AIR 1975 SC) :

"In other words, if injury to public interest is the foundation of this so called privilege, when once the Court has enquired into the question and found that the disclosure of the document will injure public interest and therefore it is a document relating to affairs of State, it would be a futile exercise for the minister or the head of the department to consider and decide whether its disclosure should be permitted as he would be making an enquiry into the identical question. It is difficult to imagine that a head of the department would take the responsibility to come to a conclusion different from that arrived at by a court as regards the effect of the disclosure of the document on public interest unless he has or can have a different concept of public interest."

455. The learned Judge, however, was prepared to make exceptions in cases of documents which related to

common routine business which had no relation to interests of the public. The Judge pointed out that a mere veil of secrecy put on such documents would not prevent the court from directing disclosure and observed thus (at p. 884):

"To justify a privilege, secrecy must be indispensable to induce freedom of official communication or efficiency in the transaction of official business and it must be further a secrecy which has remained or would have remained inviolable but for the compulsory disclosure."

456. The documents in question fall squarely within the test laid down by Mathew J.

457. The Privy Council in *Henry Greer Robinson v. State of South Australia*, (1931) AC 704 held that the foundation upon which the protection against disclosure of official record is based is that the information cannot be disclosed without injury to the public interest, and Lord Blanesburgh observed as follows:

"As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production."

458. Thus, in the instant case the twofold tests laid down by Lord Blanesburgh are fully satisfied because (1) the papers are in the nature of public official documents of administrative character, and (2) the disclosure of these documents will lead to serious injury to the public.

459. In *Duncan's case* ((1942) AC 624) (supra) the following observations were made:

".....but the rule that the interest of the State must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interest or claims of the particular parties in litigation and, indeed, is a rule on which the Judge should, if necessary, insist, even though no objection is taken at all."

"The minister in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified for example, where disclosure would be injurious to national defence, or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration." (Emphasis supplied).

460. This case goes even to the extent that if the Minister does not claim the plea of privilege, it is for the Court itself not to allow disclosure where the disclosure would be injurious to national defence, good diplomatic relations or proper functioning of the public service. This decision, therefore, is fully in accordance with the principles enunciated by this Court as referred to above.

461. It was contended that the validity of *Duncan's case* ((1942) AC 624) has been considerably weakened by a later English decision in *Conway v. Rimmer*, (1968) AC 910 and therefore no reliance should be placed on *Duncan's case*. We are, however, unable to agree with this argument because *Conway's case* has not only not overruled *Duncan's case* but has held that it was rightly decided. In this connection Lord Reid made the following observations:

"I have no doubt that the case of *Duncan v. Cammell, Laird & Co. Ltd.* was rightly decided."

462. Lord Reid reiterated the same principle which has been enunciated by the English courts and followed by this Court and observed thus:

"It is universally recognised that there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."

463. The twin tests which flow from these observations fully apply to the facts and circumstances of this case. We are, therefore, unable to regard Conway's case ((1968) AC 910) as having overruled the ratio in Duncan's case. ((1942) AC 624). On the other hand, even on the authority of Conway's case, the disclosure of the documents in question ought not to be allowed. Moreover, these observations clearly show that the principles enunciated by Lord Simon in Duncan's case were approved. It is true that the ratio in Duncan's case after having been approved was explained away and limited to cases where disclosure of documents was not in public interest and disclosure could be permitted only by striking a just balance between the public and the private interest.

464. Thus, Conway's case does not fully support the contention of Mr. Sorabjee. So far as this Court is concerned, it has not gone to the extreme limit to which Conway's case goes and, therefore, I would like to prefer the decisions of this Court to that of Conway's case where the law appears to have been somewhat overstated by Lord Reid.

465. Reliance was also placed by Mr. Sorabjee on the case of Rogers v. Home Secretary, (1973) AC 388 and particularly on the observations of Lord Pearson which may be extracted thus :

"The court has to balance the detriment to the public interest on the administrative or executive side, which would result from the disclosure of the document or information, against the detriment to the public interest on the judicial side, which would result from non-disclosure of a document or information which is relevant to an issue in legal proceedings. Therefore, the court, though naturally giving great weight to the opinion of the appropriate minister conveyed through the Attorney General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed."

466. Another passage which explains the ratio in clear terms may be extracted thus :

"It is true that the public interest which demands that the evidence be withheld, has to be weighed against the

public interest in the administration of justice that courts should have the fullest possible access to all relevant material (Rex v. Hardy (1794) 24 State Tr. 199, 808; Marks v. Beyfus (1890) 25 QBD 494. Conway v. Rimmer, 1968 AC 910), but once the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted."

467. Ultimately while taking a broad and practical view on the question, Lord Salmon observed thus :

"In my view, any document or information that comes to the board from whatever source and by whatever means should be immune from discovery. It is only thus that the board will obtain all the material it requires in order to carry out its task efficiently. Unless this immunity exists many persons, reputable or disreputable, would be discouraged from communicating all they know to the board. They might well be in fear not only of libel actions or prosecutions for libel but also for their safety and may be their lives."

468. Taking the facts of this case at their face value, I do not see how it can help the argument of Mr. Sorabjee on the question of disclosure of the documents. In fact, this case also does not depart from the previous views taken by the House of Lords and the Privy Council regarding the importance of public interest or injury to public interest in respect of the documents sought to be disclosed. This case, however, takes a step forward by insisting that the principles enunciated in Conway's case ((1968) AC 910) would show that a just balance should be struck between the ground on which the Union of India claims privilege and the claim of the petitioners for disclosure. Applying the ratio of this case to the facts of the present case, it would be seen that if the documents are not disclosed, the petitioners would not suffer serious prejudice because the undisputed facts show that the Chief Justice of Delhi High Court had for reasons given by him opined that the term of Justice Kumar ought not be extended. The CJI, however, expressed a contrary view. It was, therefore, for the President to choose any of the two views. Thus, disclosure of details would have undoubtedly caused serious damage to public interest

by exposing not only the petitioner-Kumar but also the C.J. Delhi High Court and the CJI to public gaze and criticism which would be highly derogatory to the high position that these high constitutional functionaries hold and would in future deter them from expressing any opinion on the merit of future appointments which might result in an insoluble stalemate. Thus, balancing the two factors, there can be no doubt that the weight is on the side of the Union of India.

469. Strong reliance was placed by Mr. Sorabjee in *Sankey v. Whitlam*, 21 Australian LR 505 where Stephen J. relying on Rogers' case ((1973) AC 388) (supra) and other cases dwelt on the doctrine of balancing process and observed as follows :

"If in the balancing process the circumstances of a particular case can affect the relative weight to be given to each of the respective public interests when placed in the scales, the outcome in the present case seems to me to be clear."

* * * *

"The affidavits sworn by members of the present ministry and by senior public servants make it clear that all the claims to Crown privilege are class claims, not contents claim; it is not suggested that to disclose the contents of any of the documents, the Loan Council documents apart, will of itself result in detriment to the public interest flowing directly from the nature of what is disclosed." (Emphasis mine).

470. A perusal of the facts of this case would show that in the said case the documents were really not of a secret nature so as to fall within the contours of the claim of privilege. There was also a finding given by the court that the documents would not result in any detriment to public interest flowing directly from the nature of what is disclosed. Contrary appears to be the case so far as the documents, which are the subject matter of disclosure, in the instant petitions are concerned. These observations do not help the petitioners because they are based on a clear finding of fact that there was nothing remarkable about the documents in order to tilt the scales in favour of non-disclosure. It was also held that the

affidavits did not clarify whether the claim of privilege was class-claim and not contents-claim. As already indicated, the documents in this case pertain to high official secrets revealed in the documents of high constitutional functionaries regarding matters which if disclosed would doubtless cause serious injury to the public and has in fact caused the most colossal damage not only to the Government but also to the judicial institution itself.

471. In *Sankey's* case (21 Aug. LR 505) the following observations were made :

"An explanatory memorandum and schedule relating to a meeting of the Executive Council held on 7 January, 1975. It should be explained that when a matter is brought before a meeting of the Executive Council a minute paper is prepared; it sets out the advice tendered to His Excellency the Governor-General in Council and is signed by the minister concerned. Each minute is accompanied by an explanatory memorandum which usually sets out the reasons for the advice. All minutes to be submitted to the Executive Council are listed on a schedule, which is signed by those present at the meeting. If the Governor-General is not present at the meeting the minutes and schedule are later submitted to him for signature. The Commonwealth did not claim privilege for the minute paper to which the explanatory memorandum and schedule now in question related."

472. Gibbs, ACJ upholding the claim of privilege observed as follows :

"Privilege was claimed for the documents in category 1 by the affidavit of Mr. Carmody, which stated that all members of the Executive Council are required to make an oath or affirmation of secrecy. The affidavit contained the following : "The documents referred to relate to advice given and recommendations made to the Federal Executive Council and the deliberations and decisions of that Council as to the inner workings of the Executive Government of the Commonwealth of Australia. In my opinion such documents belong to a class of documents which public interest requires should not be disclosed. Further, disclosure of such documents would inhibit the proper functioning of the Executive Government and non-disclosure of such documents is necessary for

the proper functioning of the public service."

473. In *Marconi's Wireless Telegraph Co. Ltd. v. The Commonwealth*, 13 Commonwealth LR 178, Isaacs, J. observed as follows :

"Now, when that 'State paper', or, as here, a 'State wireless instrument' is sought to be produced, and, its official character is unquestioned, the plaintiff's contention is, as I have already said, the court must still in some way and to some extent satisfy, itself by some further inquiry, that the object is within a privileged class, I suppose by reason of its being of a nature that may require concealment, before it can accept the minister's assurance as to public prejudice."

474. In this case also, the Court merely held that where an instrument is judged by the court to be of an official character the Minister's plea of public prejudice must be upheld. Even so, the facts of this case are clearly distinguishable from the facts of the present case.

475. In *Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Commissioners* (1974) AC 405. Lord Cross of Chelsea while dwelling on the nature of confidentiality which is doubtless one of the aspects of privilege, observed as follows:

"'Confidentiality' is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the document in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other."

476. Here also it was held that while dealing with the question of confidentiality the most material consideration would be whether privilege was claimed on the ground of public interest and the duty of the court is to balance the considerations of public interest against the injury which may be caused by disclosure and if it finds that the injury to public interest would be minimal, disclosure can be allowed. This case also does not in any way seem to be of any assistance to the petitioners,

477. Mr. Sorabjee strongly relied on the famous American case of *United States v. Richard M. Nixon*, (1974) 41 L Ed 2d 1309 and particularly on the following observations made by the court:

"Neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute unqualified presidential privilege of immunity from judicial process under all circumstances;"

478. These observations must be read in the light of the peculiar provisions of the American Constitution contained in Articles 2 and 3. The doctrine of absolute candour so as to prevail over the unqualified privilege of immunity from judicial process is absolutely foreign to the nature and character of the provisions enshrined in Art. 74 (2) of our Constitution and Ss. 123 and 131 of the Evidence Act. Therefore, these observations cannot be called into aid by our courts in dealing with the question of privilege. I have already pointed out that this Court has clearly held that we ought not to be guided by American decisions because in framing our Constitution, we have chosen to select the English pattern even though the American Constitution was available and was in fact considered by the Founding Fathers of our Constitution.

479. Thus, the United States decision referred to above must be understood in the light of its own facts and the special provisions of the American Constitutional law under which there is a complete separation of powers unlike our Constitution where to some extent there is separation of power but by and large all the powers of the appointment of the higher judiciary and their transfer vests in the executive, viz., the President of India. In these circumstances, therefore, the doctrine of 'candour' or 'confidentiality' propounded by the American Supreme Court cannot be blindly applied to the provisions of the Indian Constitution which has features of its own substantially different from those of the American Constitution as indicated while dealing with interpretation of Art. 222. The extreme limit to which the U. S. Supreme Court appears to have gone is directly opposed to the scope of Ss. 123 and 124 of the Evidence Act as interpreted by this Court in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493) (supra),

480. This Court in Shyam Lal Mohan Lal's case (AIR 1965 SC 1251) (supra) has clearly held that the plea of privilege cannot be determined on the principles enunciated by the American Judges which could not apply to our country. This is particularly so, when the habits and tempers of our people, their outlook and vision, and their concepts and way of life are quite different from the ways of life of the American people.

481. In Shyam Lal Mohan Lal v. State of Gujarat (AIR 1965 SC 1251 at p. 1253) (supra) this Court observed thus :

"In the United States of America where the immunity against self-incrimination is constitutional, the Fifth Amendment provides :

"No person.....shall be compelled in any criminal case, to be a witness against himself."

By judicial interpretation the rule has received a much wider application. The privilege is held to apply to witnesses as well as parties in proceedings civil and criminal; it covers documentary evidence and oral evidence, and extends to all disclosures including answers which by themselves support a criminal conviction, or furnish a link in the chain of evidence, and to production of chattel sought by legal process.

The rule of protection against self-incrimination prevailing in the United Kingdom, or as interpreted by Courts in the United States of America has never been accepted in India. Scattered through the main body of the statute law of India are provisions which establish beyond doubt that the rule has received no countenance in India. Section 132 of the Evidence Act enacts in no uncertain terms that a witness shall not be excused from answering any questions as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind. This provision runs directly contrary to the protection against self-incrimination as understood in the common law in the United Kingdom," (Emphasis mine).

482. On a parity of reasoning it can be safely concluded that the statutory provisions of Ss. 123 and 124 of the Evidence Act as also those of Art. 74 (2) of the Constitution have fully safeguarded high Government and official secrets and disclosure is prohibited in public interest unless the Court is fully satisfied that disclosure will not harm the public interest. Thus, this Court has clearly pointed out that on this aspect of the matter, the rule of protection against self-incrimination as prevalent in the United Kingdom or U.S.A. has never been accepted in India. This is yet an additional reason why I am not in a position to rely on the American doctrine of candour or the recent decisions of the English courts referred to above.

483. Cross on Evidence (6th Edition) clearly states that documents may be withheld in public interest on account of their contents. In this connection the author observes as follows :—

"The judgment shows that the production of a document may be withheld in the public interest either on account of its contents, or else because it belongs to a class which, on ground of public policy, must as a class be withheld from production (e. g. cabinet minutes)." (p. 307).

484. Wigmore on Evidence (Third Edition-Vol. VIII) at page 801 summarises the conclusions regarding State secrets and official documents derived from American decisions on the question of privilege thus :

"The privilege, when recognized, should therefore be subjected to the following limitation :

(1) Any executive or administrative regulation purporting in general terms to authorize refusal to disclose official records in a particular department when duly requested as evidence in a court of justice should be deemed void.

(2) Any statute declaring in general terms that official records are confidential should be liberally construed to have an implied exception for disclosure when needed in court of justice.

(3) The procedure in such cases should be : A letter of request (like a letter rogatory) from the head of the Court to the head of the Department (accompanying the subpoena to the actual custodian), stating the circumstances of the litigation creating the need for

the document followed (in case of refusal) by a reply from the Departmental head stating the circumstances deemed to justify the refusal; and then a ruling by the Court, this ruling to be appealable and determinative of the privilege."

485. The view of the author, therefore, fully reflects the summary of the decisions given by the American Courts on the question of privilege. It may be noticed that clause 2 particularly recognises that where official records are declared to be confidential by a statute, the statute should be liberally construed to have an implied exception for disclosure when needed in a court of justice. The principle contained in clause (2) of the aforesaid extracts is clearly enshrined in Ss. 123 and 124 of the Evidence Act without the exceptions which have been carved out by American decisions. On the other hand, the position under the Evidence Act is that official or confidential records or documents cannot be disclosed unless the court comes to the conclusion that the disclosure will not cause any injury to public interest. The American doctrine of candour, as already stated, cannot be applied to the conditions in India in view of our own statute laws containing express provisions contrary to the principles enunciated by the American courts.

486. David Foulkes in his book 'Introduction to Administrative Law' has observed thus:

"It laid it down that Crown privilege can be claimed for a document on two alternative grounds: (a) that the disclosure of the contents of a particular document would injure the public interest, for example, by endangering national security or prejudicing good diplomatic relations; (b) that the document falls within a class which must be withheld from production to ensure the proper functioning of the public service." (p. 228)

487. It appears that whereas the English, Australian and our own courts have consistently and without any exception categorically held that military or defence secrets are absolutely privileged and the contents of the documents containing these secrets can never be divulged under any circumstances, the American courts seem to have taken a contrary view and while leaning on the side of non-disclosure even in the

case of military secrets they have not excluded the possibility of allowing disclosure under certain circumstances. This is clearly spelt out by the decision of U. S. Supreme Court in *United States of America v. Patricia J. Reynolds* (1952) 345 US 1. The American courts do not seem to follow the three-fold tests laid down by our courts as also the English courts in judging the plea of privilege, viz.,

(1) documents containing military or defence secrets,

(2) the direct conflict between public interest and individual interest; and

(3) the doctrine of expediency regarding affairs of the State and injury to public interest or national interest.

488. In fact, the correct legal position seems to be that whereas mere expediency may not be a ground to claim privilege so as to avoid production of a document which, if produced, may defeat the defence, where the documents consist of highly confidential matters in respect of constitutional functionaries like Chief Justices or High Court Judges, the Law Minister, the President of India, C. B. I., I. B. and such other Departments are concerned, the question of public injury, which may be caused, becomes a decisive factor in upholding the plea of privilege. The court is, however, not powerless to hold its own enquiry in order to test the bona fide of the plea of privilege. One form of such an enquiry may be, as pointed out in the cases referred to above, the inspection of the documents themselves by the court before disclosure. If after inspection the court finds that the plea of privilege is well-grounded and its disclosure will lead to great public injury, it will be justified in upholding the plea of privilege.

489. It is true that recent English decisions have made a slight departure from the consistent and somewhat conservative view taken by them in the earlier cases, but despite this change, the central theme and the contours and parameters within which the plea of privilege can be allowed have not been totally discarded.

490. As far back as 1916 the Court of Appeal in England while dealing with the question of privilege clearly held that the protection of documents from discovery was not only based on the broad principles of State policy or pub-

lic convenience but extended to public confidential documents of a political or administrative character. In this connection in *Asiatic Petroleum Co. Ltd. v. Anglo-Persian Oil Co. Ltd.*, (1916) 1 KB 822 at p. 829. Lord Swinfen Eady observed as follows :

"Although the instances in which documents have been held to be protected from discovery on the broad principle of State policy and public convenience have usually been cases of public official documents of a political or administrative character, yet the rule is not limited to these documents. The foundation of the rule is that the information cannot be disclosed without injury to the public interest, and not that the documents are confidential or official, which alone is no reason for their non-production."

491. In taking this view the court had relied on an earlier decision in *Hennessey v. Wright*. (1888) 21 QBD 509.

492. In the *Corporation of the City of Glasgow v. The Central Land Board*, 1956 SC (HL) 1, at p. 18 Lord Radcliffe observed thus :

"I do not understand that the existence of the power involves that in Scotland, any more than in England, it is open to the Court to dispute with the Minister whether his view that production would be contrary to the public interest is well founded, or to arrive at a view, contradictory of his, that production would not in fact be at all injurious to that interest."

.....

"The power reserved to the Court is therefore a power to order production even though the public interest is to some extent affected prejudicially."

493. This decision clearly spells out the proposition that though normally the claim of privilege made by the Minister should be accepted by the Court but at the same time some aspects of public interest may be considered where withholding disclosure of a document may defeat the very claim of the plaintiff. Lord Radcliffe has, however, made it very clear that documents containing matters of high politics, diplomatic relations or such secrets would undoubtedly be privileged. Thus, so far as this case is concerned it fully supports the position taken by the Union of India in claiming the plea of privilege in respect of the documents concerned:

494. In *D. v. National Society for the Prevention of Cruelty to Children* (1977) 1 All. ER 589 it was held that the administration of justice was a fundamental public interest though not an exclusive public interest.

495. Although the facts of this case are quite different from the facts of the present case, yet the case cited above undoubtedly recognised administration of justice as a fundamental public interest. Once this is so, then by the force of Section 123 of the Act, disclosure cannot be permitted and the Government would be entitled to take the plea of privilege.

496. In none of these cases, the document in respect of which privilege was claimed related to top secrets of high officers involving Government decisions on important policy matters relating to higher judiciary as in the present case. In these circumstances, these cases are not of much assistance to the petitioners.

497. In *Science Research Council v. Nasse*, 1980 AC 1028 a complaint was filed with the Industrial Tribunal alleging discrimination on grounds of sex and marital status. At the hearing a prayer was made for the petitioners for inspection and discovery of certain documents which were in the nature of confidential assessments of each employee. The Tribunal ordered the disclosure and the Appellate tribunal also confirmed it. On appeal to the court of Appeal, a fresh affidavit was filed showing the nature of the confidentiality of the documents. The appellate court held that if the documents were disclosed it would amount to breach of faith and could lead to industrial trouble thus causing injury to public interest. The appellate court, however, set aside the order allowing the plea of privilege and held that the documents were not entitled to privilege. The decision of the appellate court was confirmed by the House of Lords in appeal where it was held that no principle of public interest immunity protected such confidential documents and they were not immune from disclosure on the basis of confidentiality alone. Great reliance has been placed by the petitioners on this aspect of the matter decided by the House of Lords. It is true that the plea of privilege on the ground of confidentiality was overruled but the decision given by the House of Lords cannot be divorced from the facts before them. What was sought to be disclosed were merely con-

fidential reports of the employees concerned. No great constitutional or legal importance was attached to the documents as such or for that matter the documents as we have in the instant case. In this connection, Lord Edmund-Davies observed as follows:

"Whether a tribunal or court should decide that they themselves should inspect must always depend on the particular facts and issues, though it is difficult to see how they can ever properly conclude that discovery is "necessary" without such inspection. But where a court inspection is decided upon, there can be no hard and fast rule as to when it should take place.

.....
The Court of Appeal rightly held that discovery should not have been ordered in either of these two cases without the respective industrial tribunals or the appellate courts first inspecting the withheld documents. That unfortunately not having been done, it follows that both appeals should be dismissed."

Lord Fraser spoke in the same strain and held that confidentiality was not a separate head of privilege but may be a very material consideration to bear in mind when the question of privilege is raised.

498. Thus, what the House of Lords held was that the element of confidentiality in the documents was not so acute or sensitive as to create any public interest. On the other hand, public interest itself in the circumstances required disclosure. This case, therefore is of no assistance to the petitioners because the facts of the present case are essentially different from the facts of that case. In the instant case, after inspection of the documents it cannot be said that only private interests were involved and that there was no injury to public interest. The disclosure of the confidential notes and correspondence between three very high constitutional functionaries, viz., CJI, Law Minister and the CJ, Delhi High Court containing matters on which no public debate could be allowed were undoubtedly matters of great public interest. On the other hand, the interest of Justice Kumar was a purely individual interest which must yield to public interest. On the face, therefore, of the ratio of this case, the plea of privilege would have to be upheld straightway.

499. In *Burmah Oil Co. Ltd. v. Bank of England*, 1980 AC 1090 the following

observations were made by Lord Wilberforce:

"It is, in my opinion, necessary for the proper functioning of the public service that the documents in Category A and Category B should be withheld from production. They are all documents falling within the class of documents relating to the formulation of Government policy. Such policy was decided at a very high level, involving as it did matters of major economic importance to the United Kingdom. The documents in question cannot properly be described as routine documents. Those in Category A are all documents passing at a very high level, including communications intended for the guidance and recording the views of the Prime Minister or recording discussions at a very high level.

.....
The basis for an immunity claim, then, having been laid, it is next necessary to consider whether there is any other element of public interest telling in favour of production. The interest of the proper and fair administration of justice falls under this description. It is hardly necessary to state that the mere fact that the documents are or may be 'relevant' to the issues, within the extended meaning of relevance in relation to discovery, is not material. The question of privilege or immunity only arises in relation to 'relevant' documents and itself depends on other considerations viz., whether production of these documents (admittedly relevant) is necessary for the due administration of justice."

.....
It may well be arguable whether, when one is faced with a claim for immunity from production on 'public interest' grounds, and when the relevant public interest is shown to be of a high, or the highest, level of importance, that fact is of itself conclusive, and nothing which relates to the interest in the administration of justice can prevail against it.

.....
A claim for public interest immunity having been made, on manifestly solid grounds, it is necessary for those who seek to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of particular documents. When this is demonstrated, but only then, may the court proceed to a balancing process."

500. It was thus held that the documents should be produced for inspection

by the House of Lords. As the said case was not one where without inspection of documents it was possible to decide whether the balance of interest lay for or against disclosure after inspecting the documents the majority of the Lords arrived at a finding of fact that none of the documents contained such confidential matters as could form the basis of a plea of privilege. Lord Wilberforce, however, dissented and held that the Minister's certificate would amount to public interest immunity, and the documents could not be inspected.

501. This case also has absolutely no application to the facts of the present case because this Court after hearing the arguments of the parties on the issue of privilege by an interim order held that the court was entitled to inspect the documents and after inspecting the documents I am clearly of the view that having regard to the magnitude of the matter, the heavy stakes involved, the disclosure would amount to denigration of not only the judiciary but also the other constitutional functionaries who have figured in the case resulting in the gravest possible injury to public interest and to the running of public services.

502. In the aforesaid case, Lord Edmund Davies classed the documents into three categories, which may be extracted thus:

"Category A

These consist of communications between, to and from ministers (including ministers' personal secretaries acting on behalf of ministers) and minutes and briefs for ministers and memoranda of meetings attended by ministers. All such documents relate to the formulation of the policy of the government....." The minister thereafter sets out various aspects of government policy in relation to the financial difficulties of Burma.

Category B

These consist of communications between, to and from senior officials of the Department of Energy, of the Treasury, and of the bank including memoranda of meetings of and discussions between such officials and drafts prepared by such officials (including drafts of minutes and briefs comprised in category A), all such communications and drafts relating to the formulation of one or more aspects of the policy described in category A."

Category C

These consist of memoranda of telephone conversations and meetings between senior representatives of major companies and other businessmen on the one hand and a minister or senior officials of government departments and of the bank on the other and memoranda of meetings of such officials and briefs for ministers and drafts of such briefs, all recording or otherwise referring to commercial or financial information communicated in confidence by such company representatives and businessmen."

After mentioning the categories, Lord Davies observed as follows:—

"There can be no doubt that the court has power to inspect the documents privately. This much clearly laid down in *Conway v. Rimmer* (1968 AC 910). I do not consider that existence of such power, in cases responsibly regarded by the court as doubtful, can be treated as itself detrimental to the public interest. Indeed, I am of opinion that it is calculated to promote the public interest, by adding to public confidence in the administration of justice."

503. It is true that the majority opinion was that the plea of privilege should be overruled but although the categories mentioned above, consisted of confidential documents, they all related to purely commercial transactions and did not contain any constitutional colour or any element of affairs of the State. The same cannot be said so far as the documents in the instant case are concerned. These documents are not only of great public importance but are directly concerned with the affairs of the State in that the Council of Ministers while giving advice to the President for not extending the term of Justice Kumar had expressly relied on these documents though it has not been shown to our satisfaction that these documents form part of the Memo. of Advice tendered to the President. In such a case, the documents would have been beyond any enquiry under Art. 74 (2), apart from the question of the application of Ss. 123 and 124 of the Evidence Act.

504. Another case relied upon by the petitioners was *Neilson v. Laugharne* (1981) 1 All ER 829. Lord Denning approached the question with the usual ingenuity and observed as follows:—

"This modern development shows that, on a question of discovery, the court can consider the competing public interests

involved. The case is decided by the court holding the balance between the two sides. One of them is asserting that, in the interest of justice, the documents should be disclosed. The other is asserting that, in the public interest, they should not be disclosed. Confidentiality is often to be considered. So is the need for candour and frankness.

Once it is decided that the public interest is in favour of non-disclosure, the decision is regarded as a precedent for later situations of the same kind."

Lord Denning ultimately held that in his opinion the documents were privileged. It may be noted that the documents in respect of which privilege was sought were merely statements before the police. Thus, even though the documents were doubtless confidential, a possible view could be taken that the plea of privilege should not be allowed. In spite of these facts, the majority of the law Lords agreed with Lord Denning and held that there was a real danger to public interest if disclosure was made. In this connection Lord Oliver observed thus:

"Taking all these considerations into account, I think that there is a very real danger that the prospect of disclosure on discovery of material gathered in the course of such an inquiry will inhibit the proper conduct of the inquiry and thus frustrate the purpose of the legislature in making statutory provision for it. In my judgement, therefore, the public interest requires that these documents should be protected as a class, and I accordingly concur in the conclusion of Lord Denning M. R. I agree that the appeal should be dismissed."

505. Thus, although this case makes a slight departure from the view taken by the earlier cases it has not favoured the extreme position which seems to have been taken by the petitioners on the plea of privilege and which has been clearly negatived by the decisions of our court.

506. Reliance was also placed by Mr. Sorabjee on a book 'Public Law' (1980), by I. G. Eagles where at page 275 the author makes the following observations regarding Cabinet papers:

"If the reason for excluding cabinet or related documents is to safeguard the proper functioning of the higher organs of the state, then that reason is wholly inappropriate where what is charged is the grossly improper functioning of these

very organs. The interest of the wider community in getting to the bottom of such charges is so great that it should not be impeded by a mere rule of evidence. Nor can the decision to admit or exclude be safely left to those who are themselves charged with misconduct; (nor for that matter can it be left to their political associates or even their opponents)."

507. With due respect to the learned author, the principles have been rather broadly stated and do not fit in either with the democratic set-up of our country or with the spirit of our Constitution. For instance, Cabinet decisions, however wrong or proper they may be, are undoubtedly secret documents and if any such document forms part of the advice tendered to the President then there is a clear constitutional mandate by virtue of Art. 74 (2) preventing the court from embarking on any inquiry into these documents. Thus, the question of disclosure cannot arise in such cases and the observations of the author become wholly inapplicable to the situations contemplated by our Constitution and the statutory laws. In these circumstances, therefore, I cannot accept the view of the author, extracted above.

508. It would thus be seen that even from English decisions, it is clear that the Court itself should prevent disclosure of documents whose production will be contrary to public interest even if no claim is made by a Minister or other high official on his behalf. This was held, as we have pointed out, in *Sankey's case* (21 Australian LR 505) (supra) as also in *Conway's case* ((1968) AC 910) (supra) where Lord Reid has clearly stated that it is the duty of the Court to prevent disclosure of documents even without the intervention of a Minister, where serious injuries to the national interest is apparent. Thus both the leading cases of England and Australia have not accepted the liberal doctrine of candour expounded by the American authors. In the instant case, it is manifest that the Union of India has not taken the plea of privilege merely to hide the truth or to prevent the court from knowing the truth. In fact, both the Attorney-General and the Solicitor-General had frankly conceded and voluntarily produced the documents before the court for inspection in order to judge whether the disclosure of the documents would injure the public interest. This shows the bona fide of the

stand taken by the Union of India. As, however, my Brother Judges after inspection decided to disclose the documents, the Union of India gracefully accepted the decision. I might mention that this is not one of those cases where a litigant is trying to conceal a document which may destroy his case or scuttle his defence. This seems to be the cardinal principle behind the doctrine of candour adumbrated by the American decisions.

509. I have summarised the opinions of the English, American and Australian courts on the question of privilege. While applying the law to Indian conditions which are essentially different from those prevailing in England, America or Australia, two important factors have to be borne in mind—

(1) That so far as our country is concerned we have chosen to base it on the British pattern with some additions, alterations or innovations to suit our own local, social and economic conditions because our ways of living and thinking, our attitude towards life and its various phases and above all, the mode of governance of the country are very different from and have nothing in common with the United States of America. Whereas in America there is mass education, illiteracy is the common feature of the masses of our country. We are no doubt making fast progress but it will require quite sometime before we become as advanced as the United States of America.

Even though the recently decided English cases may have taken a much broader and a more liberal view, the founding fathers of our Constitution had before them the old view and this Court has consistently followed the English decisions so far as the question of privilege is concerned.

(2) While neither in England, Australia or America there is any codified law laying down the principles and the grounds on which privilege can be claimed, in India we have Ss. 123 and 124 of the Evidence Act which govern the conditions under which a plea of privilege can be allowed or disallowed.

Another law which affects the question of privilege is S. 162 of the Code of Criminal Procedure which has also to be read in conjunction with Ss. 123 and 124 of the Evidence Act.

510. Apart from these two sections there is also a constitutional provision which is enshrined in Art. 74 (2) under

which no enquiry can be made by any Court in respect of the advice tendered by the Council of Ministers to the President. In the instant case, the order impugned has been passed by the President on the advice of the Council of Ministers. Although it has been alleged in the note of arguments that the contents of the documents were part of the material on the basis of which advice was given to the President, it has not been shown to our satisfaction that the correspondence contained in the documents formed part of the actual Memo. of advice sent to the President. If such evidence was produced before us then the matter would have been put beyond controversy because apart from the question of privilege arising under Ss. 123 and 124 of the Evidence Act, the enquiry or disclosure would be barred by the constitutional mandate contained in Art. 74 (2).

511. In view of these circumstances, therefore, before importing the doctrines or the liberal trend of modern cases across the seven seas, we cannot overlook the mandatory provisions of the Evidence Act and the Code of Criminal Procedure. Furthermore, while in England and America the democratic system of Government has been existing for more than two or three centuries, our democracy is only three decades old, which is a very small period in the life of a nation and we have yet to develop our law by a process of adaptation and accommodation, rejection or modification or by a trial-and-error method. This Court while construing Sections 123 and 124 of the Evidence Act was fully alive to the conditions prevailing in our country and the manner in which the public services were run and the Central Government or the State Governments took important decisions. Any revolutionary decisions so as to expose high confidential matters to public gaze by following a policy of liberal disclosure of documents ignoring the provisions of Ss. 123 and 124 of the Act would not only be detrimental to our progress but may cause serious obstruction in the practical running of day-to-day affairs of the Government or for that matter the governance of the country itself.

512. For these reasons, therefore, while I have referred to the foreign decisions I would like to confine my decision mainly to those English cases which apply to our present day conditions and to the principles laid down by our own courts in their leading judgments which

have been discussed and analysed in this judgment. While I am prepared to take a liberal view having regard to the fact that we have by our recent decisions widened the horizon of Art. 21 so far as the inspection of the documents by the Court is concerned, but if after inspection of the documents the Court is satisfied that the tests laid down by this Court in several cases are not fulfilled then the plea of privilege must be upheld.

513. Thus, after a full and complete analysis of the various factors indicated above, it is established beyond doubt that so far as this Court is concerned it has chosen to follow the principle of English law with suitable adjustments and modifications in determining the plea of privilege under Ss. 123 and 124 of the Act. This is, as it should be, because as pointed by Kapoor J. in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493) (supra) that since the Evidence Act was enacted during the British rule and we have generally adopted the English system in procedural matters, we should not depart from the basic and essential principles of interpretation as laid down by the English law. I, however, respectfully agree with Subba Rao, J. that while construing Sections 123 and 124 and applying the principles of English law, we must do so against the background of the Socialist State and the egalitarian society which is the goal of our Constitution instead of confining the contours of privilege in a strait-jacket; in suitable cases a liberal view can be taken by this Court without violating the express language or the general spirit of the statutory provisions of the Evidence Act. I might mention that so far no case has ever held that Ss. 123 and 124 are unconstitutional and this could not be so because these provisions deal with matters relating to great public interest. Even in the course of arguments before us it has not been suggested that these sections are violative of any of the Articles of the Constitution. Mr. Garg appearing in Tarkunde's case had hinted that the aforesaid sections should be interpreted in the light of Art. 21 but he has not categorically contended that the aforesaid sections are violative of any of the provisions of the Constitution.

514. Another important circumstance that has to be taken into consideration is that even after more than three decades of our independence, the Parliament des-

pite so many socio-economic changes all over the world has not thought it advisable or necessary to amend the provisions of the Evidence Act so as to liberalise or widen the scope of the policy of privilege contained in Ss. 123 and 124 of the Act by incorporating the principles laid down in the recent English or American cases. This intrinsic circumstance demonstrably proves that the view taken by the Supreme Court over the years is correct and does not call for any amendment of the Evidence Act by the Parliament. On a parity of reasoning, the irresistible conclusion that follows and the natural presumption that arises is that our legislature did not intend to make a departure from the earlier English decisions either by incorporating or adapting the principles of American law on the subject. I might even go to the extent of saying that it will not be unreasonable to presume that the Founding Fathers of the Constitution and the Parliament thereafter having been fully aware of the view taken by the American courts in recent decisions has affirmatively chosen to reject the liberal and somewhat dangerous doctrine of candour. For instance, as discussed above one of the American cases has gone to the extent of holding that even military secrets can be disclosed in suitable cases. Our courts have clearly held that so far as Defence secrets or good neighbourly relations with other countries are concerned, there is complete bar to the disclosure of these matters or documents relating to these matters which are clearly covered by Section 123 or S. 124 of the Act.

515. There is another fact of life which, however unpleasant, cannot be denied and this is that precious little are our masses or litigants concerned with which Judge is appointed or not appointed or which one is continued or not continued. The high sounding concept of independence of judiciary or primacy of one or the other of the Constitutional functionaries or the mode of effective consultation are matters of academic interest in which our masses are least interested. On the other hand, they are mainly concerned with dangerous forces at work and evils reflected in economic pressures, inflationary tendencies, grueling poverty, emancipation of women, maintenance of law and order, food and clothing, bread and butter, and above all the serious problem of unemployment.

516. It is only a sizeable section of the intellectuals consisting of the press and the lawyers who have made a prestigious issue of the independence of judiciary. I can fully understand that lawyers or other persons directly connected with the administration of justice may have a grievance however ill-founded that proper selection of Judges or interference with the appointment of Judges strictly according to constitutional provisions may mar the institution of judiciary and therefore they may to some extent be justified in vindicating their rights. But at the same time, however biting or bitter, distasteful and diabolical it may seem to be, the fact remains that the masses in general are not at all concerned with these legal niceties and so far as administration of justice is concerned they merely want that their cases should be decided quickly by Judges who generate confidence. They are least concerned with individual Judges or the mode or manner of their appointment. Carried away by the stormy and emotional debate of the lawyers appearing for the petitioners and their egotistic slogan that independence of judiciary was in danger, this Court ought not to have broken the age-old solid and sacrosanct tradition of upholding the plea of privilege which caused serious injury to the public interest. But lo and behold! the result of the disclosure has revealed widespread dangers and ills, for anybody in the street without appreciating the niceties of law looks upon the judiciary as suspect. Did we disclose the documents to produce such disastrous results? It is difficult to construct an edifice but very easy to demolish the same. But, alas! we have demolished it and caused irreparable damage for which our future generation will never forgive us. Whether I was right in upholding the plea of privilege, or my Brothers in ordering disclosure of documents, only time will tell.

517. Coming to the practical side of the dangerous consequences of disclosure which might highlight my view that after inspecting the documents, it was not in public interest to order disclosure of the contents of the documents, the following considerations have swayed with me:

(a) appointment of High Court judges are highly confidential matters containing frank and free legal views expressed by the CJ of the High Court, CJI and the Central Government represented by the

Law Minister and the Council of Ministers. These authorities have expressed their views in the secret correspondence on the distinct assurance and belief that for the last two centuries such documents have always been treated as secret, confidential and privileged and until to-day no disclosure of such documents has ever been allowed by any Court. Thus, in my opinion, any disclosure of the contents of the documents would be extremely derogatory to the High constitutional position that these Constitutional functionaries enjoy and would in the long run prove counter-productive and destroy the sacrosanct consultative process as envisaged by the Constitution.

(b) If disclosure is allowed, it will bring into disrepute the judicial institution itself and lead to a continual process of washing of dirty linen and perpetual mudslinging by allowing the so called wronged persons to make allegations and counter-allegations against the Government and the CJ concerned as was sought to be done in this very case. It is true that even after the contents of the documents are disclosed, the petitioners cannot be allowed to travel beyond the material disclosed by the documents but even that material could be exploited and affect the secrecy of such high constitutional officers and raise a controversy which will ultimately lead to opening a Pandora's box which is neither in the interest of the judiciary nor even of the lawyers. I fail to see how in the long run the disclosure benefits the Judge. In the ultimate analysis such a course of action apart from involving the CJI and CJ, Delhi High Court and Law Minister into serious controversy would destroy the reputation of the judge himself howsoever loudly he might proclaim his innocence. Taking the case of the petitioner, Kumar, at the highest and assuming that the petitioner is reinstated and he ultimately gets the satisfaction of his right having been vindicated, can he deny that in view of the serious differences of opinion between the CJ, Delhi High Court under whom he had worked and the CJI, a sizeable section of the people might still believe that the integrity of the Judge was not beyond doubt which may have prompted the CJ under whom he worked not to recommend his case for extension. Even if this impression is carried by a small section of the people, it will be a great slur on the functioning of the Judge. My personal conception of

a Judge is that he should be above all criticism and controversy; he should be blameless and spotless, full of virtues and free from vices like a 'diamond in the sky' like Caesar's wife above reproach. It is in my opinion better not to be a Judge at all than to be a controversial Judge.

(c) It is not that for the first time that the term of an Additional Judge has not been extended or a Judge has been dropped. The various schedules given by the respondents show quite a few instances where Addl. Judges were sent back after their period was over without any protest or objection.

(d) Indeed, if a really conscientious judge would have been in the position of petitioner, Kumar, he would have silently walked out of the show in the larger interests of the great and sacrosanct institution which he was serving instead of insisting on disclosure and thereby drawing himself into a serious controversy to vindicate his supposed right. I have already pointed out that it is not for the first time that the term of an Additional Judge has not been extended; in the past also Judges have been dropped and one of the schedules given by the Solicitor-General is full of such instances. Such Judges never raised any controversy regarding their not being reappointed and got reconciled themselves without any protest or objection perhaps in due deference to the maintenance of the purity of the great institution of justice.

I cannot help commending the conduct of Justice Ismail who actually resigned and chose to quit his office instead of pursuing the matter further in the larger interest of the purity of administration of justice. The life of a judge is that of a hermit and he must inculcate a spirit of self-sacrifice and should take his profession in this holy spirit.

(e) The subsequent events following the disclosure of the documents which have been fully published by the press and other media clearly show that there has been a serious character assassination of a high constitutional functionary for merely expressing his opinion in a very frank and honest manner and that too behind his back. The contents of confidential notes and letters have been exploited for their personal ends by interested parties. Thus, the apprehension and danger which I had predicted from disclosure has come to be true and hence-

forward there would be hardly any Head of a Department who can function properly or effectively with the sword of Damocles hanging over his head. No high authority would now venture to record adverse annual confidential reports on the conduct of his subordinates or express his honest opinion howsoever unsatisfactory the conduct of the subordinate may be.

There is yet another distressing feature of the disclosure of documents. It would appear that the CJ, Delhi High Court was castigated as being dishonest and prejudiced against Justice Kumar for having refused to recommend his extension or reappointment. The same is being openly said in the Press regarding the CJI in respect of his adverse comments on Mufti Bahauddin, Acting Chief Justice of J & K High Court.

While CJ, Delhi has given cogent reasons for not recommending the reappointment of Justice Kumar in his proposal to the Law Minister (a copy of which was sent to the CJI) which was by a full and frank discussion between CJ, Delhi and CJI, there is nothing to show that the materials or the data on which the CJI formed his opinion against Justice Mufti Bahauddin and as he says in his proposal found some substance in the complaints yet all this was done when Justice Bahauddin was neither a party to the present proceedings, nor was he ever heard in his defence and yet he has been publicly condemned, thanks to the disclosure. However, in the instant case, we are not at all concerned with the case of Justice Mufti Bahauddin but I have given this instance to show that if disclosure of confidential documents are liberally allowed by throwing public interest to the winds, what dangerous consequences can follow which may injure innocent constitutional functionaries. In the case of Justice Kumar C. J. Delhi High Court and the CJI have not revealed the source of their information and in my opinion rightly because anyone who gave them the information must have done so in confidence and according to the correspondence, it appears that senior colleagues of the CJ, Delhi High Court and eminent lawyers had supplied the information to him and similar authorities had given some counter-information to the CJI.

518. Thus, such an awkward and embarrassing situation is bound to develop if disclosures are liberally made as a result of which serious injury is caused to

public interest. The most unfortunate part of the disclosure in this case is that persons who are not before the Court have been involved in serious legal and political controversy which has, in my opinion, caused serious damage to the high judicial institutions of the country, posing a very serious problem to the Central Government and the public services.

519. The Solicitor-General made a feeble attempt to argue before me that since I have dissented from the majority view and upheld the plea of privilege I should not deal with the contents of the documents in my judgment. This argument, which appears to me to be somewhat extraordinary, cannot be accepted because the decision of the majority amounts to the law laid down for the whole country under Art. 141 of the Constitution and is as such binding on me as on others. As a result of the majority decision, the documents disclosed form part of the record and if I shut my eyes to these documents merely because I have dissented from the majority view, it would perilously amount to being subversive of judicial discipline. I have, however, carefully waded through the documents and I do not think that much can be made of the contents and recitals in the documents. These are my reasons for upholding the plea of privilege taken by the Union in the cases of Mr. Kumar and Mr. K. B. N. Singh.

520. A careful perusal of the letters written by the CJ, Delhi High Court to the Government as also to the CJI would reveal that the stand taken by CJ, Delhi has been consistent throughout. He has honestly and frankly taken the stand that in his view as the reputation of Justice Kumar was not above board and his performance was rather slow, he was not prepared to recommend his reappointment after the expiry of his term. He has disclosed in his letter the grounds for coming to this conclusion which were derived partly from knowledge which he got from senior lawyers or senior colleagues and partly from certain facts. After sending the letter he had a full discussion with the CJI on all the points which are contained in the first letter which the CJ, Delhi wrote to the Law Minister. The CJI, however, took the stand that on his inquiry made from the lawyers and Judges of the High Court, he had no reason to doubt the integrity or honesty

of Justice Kumar. It is also admitted that the CJ, Delhi had no animus against Justice Kumar and there was no reason why he should have expressed his opinion refusing to recommend his reappointment, without any sufficient reasons or due to enmity. The only argument advanced against the CJ, Delhi was that he had sent a letter to the Law Minister in which he had disclosed some data and details and had requested him to keep them secret, and had also prayed that the letter may not be shown to anybody else as it was meant for him. The argument was that there is no evidence to show that the materials disclosed to the Law Minister were shown to the CJI. It is, however, not disputed that the CJ, Delhi wrote such a letter to the Law Minister after his discussion with the CJI and the possibility that he may have discussed all matters including the materials put in writing to the Law Minister with the CJI cannot be excluded.

521. At any rate, without going into further details as several constitutional functionaries were involved, two facts emerge:—

(1) That CJ, Delhi who had undoubtedly a better chance of observing the performance and the functioning of Justice Kumar, was in a position to get first hand knowledge of his reputation, has honestly believed that Kumar's reputation of integrity was doubtful. He has not revealed the sources from which he came to know about the reputation of Justice Kumar. The CJI, however, took a contrary view but he has also not disclosed the names of the lawyers or Judges who had given him a contrary version.

In my opinion both of them did not disclose the names because the Judges or the lawyers concerned must have given the information in confidence and they would have been seriously embarrassed if their names were disclosed.

(2) These views were put before the Central Government and it was open to the President to accept one view or the other. The President chose to accept the view taken by the CJ, Delhi more particularly because he was in a position to have first-hand information both regarding the reputation and working of the Additional Judge.

522. In these circumstances, it cannot be said that the action of the President was tainted by malice or that there was no effective consultation. This aspect of

the matter has been elaborately dealt with by my Brothers Bhagwati, Desai and Venkataramiah, JJ with whom I am in general agreement.

523. I might just state that even if the documents were not disclosed, the conclusion would have been the same because in the affidavits it was not disputed that the two CJs had taken a contrary view regarding the doubtful reputation of Justice Kumar, nor was it suggested that CJ, Delhi had any ill-will or animus against Kumar. The disclosure of the documents, however, unfortunately resulted in grave and serious consequences of far-reaching effect on the future of not only the judicial institutions but also almost all the Government departments.

524. While agreeing with Brothers Bhagwati, Desai and Venkataramiah, JJ. regarding the interpretation of Art. 224, I would, however, express my short opinion on the subject. Although it is true that by fixing the strength of permanent and Additional Judges of each High Court, the Central Government appears to have created two parallel lines of recruitment so that the appointment of an Additional Judge was a sort of training ground for being appointed as a permanent Judge whenever a permanent vacancy arose. It has already been pointed out by Brother Venkataramiah J. that this procedure was against the very spirit and tenor of Art. 224 which is extracted thus:—

"224. Appointment of additional and acting Judges. — (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be Additional Judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty-two years."

525. If properly read, this Article envisages certain conditions precedent before an appointment under Art. 224 can be made and also prescribes the nature and the term of the Judge appointed. In the first place, it requires that an Additional Judge can be appointed only if—

(1) there is any temporary increase in the business of a High Court, for instance, where by virtue of some new temporary law passed, a spate of litigation crops up but that ends with the duration of the Act or with the completion of the temporary reforms, etc., contemplated by the statute. Such an appointment is a kind of an emergency appointment which is to last until the temporary increase or arrears are disposed of,

(2) where by reasons of heavy arrears of work it becomes necessary to appoint an Additional Judge, the appointment is made under Art. 224.

526. The Article, therefore, contemplates only a tenure appointment to meet a particular contingency and is not meant to be a permanent feature so as to form a training base for recruiting Judges from the training base to the permanent cadre. This point need not detain us any further in view of the statement made by Mr. Mridul on behalf of the Law Minister that it has now been decided as a matter of policy by the Government not to appoint Additional Judges for a period of less than one year in special cases and two years normally. If this is done in future, then the spirit of the Constitution would be amply fulfilled and the controversy would be set at rest.

527. A more important feature is that the nature of the appointment under Article 224 is a pure tenure appointment for a fixed period and once the period expires, there is no question of extension of that period or reappointment. In other words, once the time for which a Judge has been appointed expires, the appointment of the Judge ceases to exist. That being so, whenever a Judge is sought to be appointed afresh, the constitutional functionary will have to go back to Art. 217 even if a Judge is to be appointed under Art. 224 and the question of suitability would be the first criterion. As in the case of initial appointment under Art. 217, so in the case of a fresh appointment after the period mentioned in Art. 224 expires, there is no legal right to be appointed nor does non-appointment give rise to any legal or constitutional infirmity so as

to be the subject of a judicial review. It is a different matter that if an Additional Judge is considered for a permanent appointment afresh, the fact that he has acquired some experience would undoubtedly be an important factor to be taken into consideration while judging the suitability of the candidate concerned. At the same time, the constitutional functionaries cannot shut their eyes to the facts which may have come to their knowledge either against the Additional Judge or in his favour.

528. Thus, the position is that even if an Additional Judge is not appointed afresh and somebody else is appointed, there is no question of judicial review nor is there any question of the non-appointment of an Additional Judge afresh casting any reflection or aspersion on the reputation or character of an Additional Judge because he was appointed only for a particular period and for a particular purpose and is not on probation. Both Brother Desai and Brother Venkataramiah, JJ. have stressed this aspect of the matter in their own way and I agree with their views.

529. While dealing with the facts of Justice Kumar's case, Brother Venkataramiah, J. has observed that although there was full and effective consultation between the CJ, Delhi, CJI and the Law Minister, therefore the non-appointment of Mr. Kumar is not vitiated by any constitutional infirmity. At one place, however, Brother Venkataramiah has observed as follows:—

"Perhaps it would have been acceptable if the case was that the Prime Minister was favourably disposed towards Shri S. N. Kumar but the Law Minister had tried to mislead her."

(Emphasis mine)

530. With due respect to my learned Brother I am unable to agree with these observations which cannot be spelt out from the correspondence between the constitutional functionaries mentioned above. In fact, a close and careful perusal of the correspondence between all the constitutional functionaries, (CJ, Delhi, CJI and the Law Minister) would clearly show that the rôle of the Law Minister has been very fair and just from start to finish. The Law Minister insisted on the materials before taking a decision against Mr. Kumar. These materials were supplied to the Law Minister by the CJ, Delhi. He had also discussions with the

CJI. Even thereafter the Law Minister wanted to plug all loopholes in order to satisfy himself fully before taking a final decision in the matter, and that is why he wrote to the CJ, Delhi to furnish a complete data and better particulars which was done by him (CJ, Delhi), through his letter D/- 7-5-81.

531. It is obvious that the CJ, Delhi expressed his desire that the full material which was supplied to the Law Minister may not be sent to the CJI but that was perhaps because the CJ, Delhi had oral discussions with the CJI in respect of all relevant material. The Law Minister also took care to ignore the CBI reports against Mr. Kumar because he wanted to proceed purely on legal and relevant materials before him. This shows the objectivity and the fairness of his attitude in coming to a final decision. Merely because he had advised the Prime Minister to accept the opinion of the Chief Justice of Delhi, it cannot be said that he tried to mislead the Prime Minister. In my opinion, to suggest even indirectly that the Law Minister attempted to mislead the Prime Minister, in view of the circumstances mentioned above, would be to make a most uncharitable remark against him amounting to inflicting an 'unkind cut indeed'. My Brother Bhagwati, J. has demonstrably shown that there is not a shred of evidence nor any reasonable basis for holding that there was a conspiracy between CJ, Delhi and Law Minister to oust Mr. Kumar. The allegation of the alleged conspiracy is totally unfounded and smacks of absolute recklessness. Indeed if the Law Minister wanted to drop Mr. Kumar without any further inquiry he could have used the I. B. Reports — that he completely ignored them, proves his honesty of purpose. Merely because while exercising a constitutional function the Law Minister preferred the opinion of CJ, Delhi to that of CJI, no motive could be imputed to him, particularly when we have rejected the doctrine of primacy of CJI, as dealt with by Desai, J. with whom I fully agree.

532. I entirely agree with the very clear and adroit exposition of the constitutional aspect of the Art. 224 by Brothers Bhagwati and Desai, JJ. as also with the most elaborate, careful and detailed analysis of Kumar's case in the light of the correspondence disclosed. I also agree with the opinion expressed by

Brother Venkataramiah, J. but would like to add a few lines to highlight some aspects of the reasons given by Brothers Bhagwati and Venkataramiah, JJ. which seem to me to be either inconsistent with the stand taken by them or do not accord with my view. Hence, I find myself bound to express my short opinion on these matters only.

533. Brother Bhagwati, J. after carefully analysing the facts of Kumar's case as spelt out from the correspondence disclosed and the affidavit filed by Mr. Kumar has returned a clear finding that the conduct of CJ, Delhi was throughout honest and bona fide and he had acted as a responsible and honest CJ. I fully agree with this conclusion but Brother Bhagwati, J. appears to have found fault with the CJ, Delhi for expressing his desire to the Law Minister to keep the contents of his letter dated 7-5-81 secret and not to place the same before the CJI. Brother Bhagwati, J. has himself pointed out that CJ, Delhi had given cogent reasons for requesting the Law Minister not to disclose the contents to CJI and yet in his concluding portion while not doubting the bona fide of the CJ, Delhi, he seems to suggest that he (CJ, Delhi) ought to have shown greater courage of conviction so as not to have been cowed down by the apprehension that CJI might feel offended and in this connection observed as follows:—

"We must of course, observe that in our opinion howsoever strong and cogent might be the three reasons given by him, the Chief Justice of Delhi should never have asked the Law Minister not to place his letter dated 7th May, 1981 before the Chief Justice of India..... He should not have bothered whether by his action in putting the facts on record in the letter dated 7th May, 1981 the Chief Justice of India would be offended and his relations with the Chief Justice of India would be spoilt."

534. Perhaps in making these observations with great respect, Brother Bhagwati, J., did not fully appreciate the substantial and compelling reasons why CJ, Delhi had made a somewhat unusual though fully justifiable request to the Law Minister not to place the letter before the CJI. As the data and material supplied to the Law Minister in the letter dated 7-5-81 had already been supplied to the CJI or at any rate, orally

discussed with him, it was not necessary for the Law Minister to have disclosed the contents of the said letter which would be more or less a surplusage and would have naturally embittered the relations between the two high constitutional functionaries (CJ, Delhi and CJI).

535. Secondly, if we put ourselves in the place of CJ, Delhi we would have done the same in the circumstances. Here was a Chief Justice who was only recently made permanent and was to continue as CJ for quite some time and so was the CJI. In these circumstances, it is natural and obvious that CJ, Delhi would not like to join issue with CJI at any stage or at every step which would create difficulties in the smooth running of the High Court.

536. Thirdly, since CJ, Delhi was frank, forthright and firm to stick to his stand despite pressures till the last, disclosure of contents to CJI was wholly unnecessary and, in my opinion, CJ, Delhi rightly thought that there was no use entering in an endless controversy and a consistent legal tug of war with CJI for whom not only he but every Judge has the greatest respect.

537. Finally CJ, Delhi at the time when he made the request could hardly imagine or conceive that the majority of our Brother Judges would permit disclosure of the documents leading to a public debate in respect of high official secrets which for the last two centuries had never been disclosed. CJ, Delhi may have thought that if the matter leaked out, it was likely to be exploited by Mr. Kumar and his friends which would bring his Court to serious disrepute.

538. I feel that in view of the prospectus of the circumstances mentioned above and those detailed by Brother Bhagwati, J., CJ, Delhi was fully justified in requesting the Law Minister not to reveal the contents of his letter dated 7-5-81 and to let the matter rest where it was. It is true that occasions may arise when a Judge in the discharge of his judicial functions has sometimes to perform an unpleasant duty but where awkward situations can be avoided with tact and wisdom the exercise of power is most laudable and beyond criticism.

539. For these reasons, therefore, I am unable to agree with the observations made by Brother Bhagwati, J. on this aspect of the matter only.

540. As regards the documents pertaining to Justice K. B. N. Singh's case which have been disclosed I shall discuss them while dealing with Transferred Case No. 24 of 1981.

Transferred Case No. 24 of 1981:

541. We now propose to deal with the case of D. N. Pandey and others in which Justice K. B. N. Singh, Chief Justice of Patna High Court has now been transposed as petitioner No. 3. All the connected petitions in respect of the transfer of Justice K. B. N. Singh from Patna to Madras High Court involve common points. The petitioner, Justice K. B. N. Singh was a practising Advocate of the Patna High Court and was appointed a Judge of the said High Court on September 15, 1966 and was made permanent Judge from March 21, 1968. Thereafter, he was appointed Acting Chief Justice of the Patna High Court for a short while and as permanent Chief Justice on July, 6, 1976. He was administered the oath of office on July 19, 1976. Since then, the petitioner continues to be the permanent CJ of Patna High Court.

542. By virtue of a notification dated January 19, 1981, the petitioner was informed that the President, after consultation with the CJI, was pleased to transfer him to Madras High Court as Chief Justice with effect from the date he assumes charge of that office. A similar notification was issued by which Justice M. M. K. Ismail, C. J. Madras High Court was transferred as CJ of the Kerala High Court but as Justice Ismail proceeded on leave and ultimately retired from service the petition which was filed against the order transferring him to Kerala no longer survives. Miss Lily Thomas who appeared on behalf of Justice Ismail, however, confined her arguments only to the question that the petitioner (Justice K. B. N. Singh) should not have been transferred to Madras.

543. It appears that after the notification, Mr. M. G. Ramachandran, Chief Minister of Tamil Nadu took great exception to the appointment of the petitioner as CJ, Madras High Court mainly on the ground that he was not conversant with Tamil language and, therefore, he would not be able to function properly in the Madras High Court. We are, however, not concerned with these matters at the present moment.

544. Coming now to the facts which are germane for the purpose of deciding these petitions, the same may be summarised thus. The petitioner was appointed acting Governor of Bihar from 31st January, 1979 to 31st September, 1979. The CJI, who is respondent No. 2 in T. C. 24/81 visited Patna in February, 1980, according to the petitioner, for inaugurating the International Rotary Conference. The petitioner met the CJI in Patna and accompanied him to Nalanda and Rajgir. It was alleged by the petitioner that during his visit to Bihar the Hon'ble CJI did not give him any inkling of his transfer to Madras or for that matter to any other place. It was for the first time on January 5, 1981 that he received a telephone call from the CJI informing him that Justice Ismail was being transferred to Kerala and the petitioner would have to go to Madras. He then asked the CJI why he had decided to send him to Madras to which the CJI replied that it was the Government's policy that had necessitated his transfer from Patna to Madras. The petitioner states that he was quite upset and told the CJI that his mother who lives with him was seriously ill and bed-ridden and was not in a position to leave Patna without the risk of her life and also mentioned other circumstances and difficulties and requested that his transfer may not be insisted upon. The CJI is alleged to have told him that he was making a note of these circumstances. Three-four days later the petitioner came to Delhi and called on the CJI and told him of his acute and insurmountable personal difficulties to which reference had been made by him during his telephonic talk with the CJI. The petitioner was with him (CJI) for about 10-15 minutes at his residence but he found the CJI absolutely non-committal in respect of his transfer. The petitioner informed the CJI that he might be given a chance to remove any wrong impression that may have been created in his mind. The CJI, however, did not put any question or material to the petitioner.

545. The petitioner alleges that his transfer was notified without his previous consent nor did he give his consent, nor was he even consulted in any manner about his transfer to Madras. The petitioner further submits that no reasons, grounds or material necessitating or justifying his transfer from Patna to Madras were even disclosed to him or

discussed by the President or the Government of India or anyone acting on their behalf or even by the CJI. He also denies that the transfer was necessary in public interest. This matter is a question of law for the Courts to examine. His main grievance was that had he been given a chance to express his opinion he would have pointed out his compelling personal circumstances and difficulties, more particularly the advanced age of his mother who was more than 85 years and was bed-ridden for two years.

546. The petitioner took the plea that he was not conversant with Tamil language, which was the official language of the State of Tamil Nadu, and this would therefore be a serious impediment in his functioning as the Head of judiciary in that State. He further alleged that his transfer was made without any effective consultation between the Government of India and the CJI and that it was based on irrelevant and non-existent factors which were never disclosed to him. Thereafter, he took some legal pleas regarding the validity of the transfer, which as pure questions of law we have already dealt with while dealing with other cases. Then, he laid great stress on the statement made by CJI at Jaipur on January 19, 1981 that the Judges who were recruited with the understanding that they would not be transferred to other States should not be asked after their appointment to go to other States and according to the petitioner the CJI said that in such transfers the problem of language, education of their children could not be brushed aside. The petitioner seems to suggest that by agreeing or sponsoring his transfer to Madras, the CJI completely overlooked the observations made by him in Jaipur.

547. Another technical objection taken by the petitioner was that the transfer order was bad because no notification had been issued by the President determining the compensatory allowance until a Parliamentary legislation was passed as required by the provisions of Art. 222. He then made reference to the recommendations of various Chief Justices Conferences held before his appointment. A number of other pleas were taken by the petitioner, but Dr. Shinghvi appearing for him, in view of the delicate and sensitive questions that arose, very rightly decided to argue the case on the convergence rather than divergence of

the issues raised by the petitioner in his petition or in his affidavits.

548. As a plea for disclosure of the documents in the nature of correspondence which led to the transfer of the petitioner from Patna to Madras was also prayed for, a counter-affidavit was filed by Shri T. N. Chaturvedi, Home Secretary opposing the disclosure and taking the plea of privilege under Sections 123 and 124 of the Evidence Act. The Court by a majority of 6:1, as in other cases, in this case also overruled the plea of privilege and directed disclosure of the documents concerning the correspondence but omitting the notes and some minutes which fell within the ambit of Art. 74 (2) of the Constitution. The Hon'ble CJI, who is respondent No. 2, filed his counter-affidavit on 29-9-81, as directed by us, where he denied or rebutted most of the allegations of fact made by the petitioner in his affidavit. The petitioner filed another rejoinder on 16-10-81 to the counter-affidavit of the CJI.

549. So far as the CJI is concerned, he admitted the fact that he visited Patna in Feb., 1980 but denied that he had gone there only for the purpose of inaugurating the Rotary International Conference. He averred that he visited Patna in the exercise of his official duties particularly in order to meet the Judges and the members of the Bar and had informed the petitioner regarding his visit to Patna on 23-2-1980. According to the CJI, inauguration of the Rotary International Conference was merely an incidental matter which he did during his presence at Patna. He has also stated that even before his visit to Patna he had received a letter from the petitioner enclosing a list of some senior Advocates whom he would like to meet individually but the CJI asked him to add names of five more Advocates.

550. On reaching Patna, the CJI met the members of the Bar individually on 24-2-81 and on the next day in the evening he met the members of the Advocates Association in the High Court premises. He also admitted his visits to Nalanda and Rajgir. He further states that during his visit to Patna he did not give the petitioner any inkling about his proposed transfer to Madras because in Feb., 1980 there was no proposal to transfer him anywhere. The proposal of his transfer matured almost one year after.

551. The CJI further states that he did have a talk over the telephone with

the petitioner on 5-1-81 and apprised him of the likelihood of his being transferred to Madras and asked him if he had anything to say. The CJI denied that he merely said that the petitioner was being sent to Madras in view of the Government policy but added that apart from the Government policy he had expressly told him that it was proposed to transfer him to Madras because he was an experienced and senior Chief Justice. The CJI admits that the petitioner had informed him that his mother was bed-ridden and not in a position to go to Madras but he did not tell him (CJI) about any other difficulty. The CJI further states that the petitioner had hinted that if his transfer was insisted upon he would prefer to resign. Thereupon, he (CJI) requested him not to act in haste and to give the matter a close thought. He also informed the petitioner that he was making a note of the difficulty expressed by him. He also requested him to come to Delhi and discuss the question of his transfer. The CJI further states that the petitioner met him in Delhi 3-4 days later and was with him for 10-15 minutes and acquainted him (CJI) of his acute and insurmountable personal difficulties in the event of his transfer to Madras. The CJI further admitted that the petitioner was at his residence on 8-1-81 at 7.30 p. m. and during their discussion the question of his mother's advanced age and illness also came up which was the only personal difficulty stressed by him (petitioner). The CJI told him that he was unable to agree with him because there were other dependable persons in the family, including his brother S. B. N. Singh, who could look after his mother. The CJI also states that the petitioner gave him an impression that perhaps some complaints may have been made against him to the CJI which he would like to remove, on which the CJI assured him that he did not believe that his conduct was in any way blameworthy but certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. Other matters were also mentioned by the petitioner to the CJI which have no direct bearing on the issue.

552. In para 5 of his counter-affidavit the CJI has averred that there was full and effective consultation between him and the President on the question of the transfer of the petitioner from Patna to

Madras and that every relevant aspect of that question was discussed by him fully with the President both before and after he proposed the transfer. The other allegations made by the petitioner were denied. The CJI also stated that he was personally aware since Feb., 1980 that his (petitioner's) mother was advanced in age and was not in a good state of health. Admitting the allegation of the petitioner regarding his speech at Jaipur, the CJI mentioned in his affidavit that he had given thoughtful consideration to the personal difficulty narrated by the petitioner during his meeting.

553. Lastly, the CJI mentioned that as the petitioner was one of the senior most High Court CJs, he could function efficiently even despite the language difficulty.

554. The petitioner filed a rejoinder affidavit on 16-10-81 (hereafter referred to as the 'second affidavit') where he reiterated the allegations made in his first affidavit and denied some of the facts mentioned by the CJI. In his second affidavit he stated that the CJI had said that it was the Government's policy to effect transfers in batches of 2 or 3 Judges. This statement is a little inconsistent with his previous statement in his first affidavit where he had mentioned that he was informed by the CJI that it was the Government's policy. In that affidavit he did not say about the transfer in batches of 2 or 3, which seems to have been added in the second affidavit.

554-A. This is a most difficult and delicate situation where two high constitutional functionaries are involved and have given affidavits and counter-affidavits. In a matter of such a serious magnitude, the Court has to make a very careful and cautious approach having regard to the respectability of the persons who have sworn the affidavits. We would, therefore, like to avoid unnecessary details and, as rightly contended by Dr. Singhvi, confine our attention only to the points of convergence without touching the issues of divergence. Before, however, we deal with the admitted facts which emerge from the affidavits concerned, it may be necessary to refer to the well settled law on the subject of effective consultation which is a necessary concomitant of a valid and constitutional order of transfer passed by the President.

555. Article 222 constitutes a clear mandate that the transfer of a Judge from one High Court to another can be made only in consultation with the CJI. As the connotation of the word 'consultation' has now been well-settled by a long course of decisions of this Court, it is not necessary for us to multiply authorities on this issue. We shall, therefore, refer only to those decisions which lay down complete and objective test for determining what constitutes effective consultation in a particular case. To begin with, we shall start with Seth's case (AIR 1977 SC 2328) which is the only decision directly in point and where the matter was discussed fully covering all shades and aspects of this important question. Before referring to that case a few introductory remarks may be necessary.

556. We have already indicated above that on an interpretation of Art. 222 the proposal for transfer of a Judge (which includes Chief Justice) from one High Court to another may emanate either from the President or from the CJI. Although according to the Memo, which was produced before us, the practice is that the proposal is to emanate from the President through the Law Minister but, as we have already pointed out that the Memo cannot override the provisions of Art. 222 being only in the form of a guideline, there is nothing to prevent the proposal emanating from the CJI. In either case, however the process of effective consultation is to be gone through according to the principles laid down and directions given by this Court. In the instant case, the admitted position is that the proposal for transfer of the petitioner for the first time emanated from the CJI by virtue of his letter dated 7-12-80. At that time of the recommendation of the CJI was to transfer the petitioner to Rajasthan which was later changed and by a subsequent letter dated 20-12-80 the CJI proposed that the petitioner be transferred to Madras and Justice Ismail from Madras to Kerala. This is the proposal which is in dispute in the present case.

557. In Seth's case (AIR 1977 SC 2328) this Court proceeded on the footing that the proposal had emanated from the President and laid down detailed guidelines and principles which should be followed in order to make consultation effective. It is obvious that where the proposal emanates from the CJI the same principles would apply though in the re-

verse process. In other words, what the President is required to do under Article 222 if the proposal emanates from him as to be done by the CJI if he is the author of the proposal of transfer. The present CJI in his majority judgment has considered the matter fully and exhaustively and his judgment contains the most brilliant and scientific exposition of the doctrine of consultation. While dwelling on the attributes of effective consultation, Chandrachud, J. (as he then was) observed as follows (at pp. 2346, 2347, 2348):

"It casts an absolute obligation on the President to consult the Chief Justice of India before transferring a Judge from one High Court to another. The word 'may' in Art. 222 (1) qualifies the last clause which refers to the transfer of a Judge and not the intervening clause which refers to consultation with the Chief Justice of India. The President may or may not transfer a Judge from one High Court to another. He is not compelled to do so. But if he proposes to transfer a Judge, he must consult the Chief Justice of India before transferring the Judge. That is in the nature of a condition precedent to the actual transfer of the Judge. In other words, the transfer of a High Court Judge to another High Court cannot become effective unless the Chief Justice of India is consulted by the President in behalf of the proposed transfer. Indeed, it is euphemistic to talk in terms of effectiveness, because the transfer of a High Court Judge to another High Court is unconstitutional unless, before transferring the Judge, the President consults the Chief Justice of India.

xxx xxx xxx xxx

But there can be no purposeful consideration of a matter, in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and the right decision taken. It must, therefore, follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President the obligation to consult the Chief Justice,

the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter, of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Art. 222 (1) therefore, means full and effective, not formal or unproductive consultation.

Thus, deliberation is the quintessence of consultation. That implies that each individual case must be considered separately on the basis of its own facts.

... ..

The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least a satisfactory solution. In order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision."

(Emphasis mine).

558. Similarly, Krishna Iyer, J. speaking for himself and one of us (Fazal Ali, J.) described the consultative process thus :—

"The consultation, in order to fulfil its normative function in Art. 222 (1), must be a real, substantial and effective consultation based on full and proper material placed before the Chief Justice by the Government. Before giving his opinion the Chief Justice of India would naturally take into consideration all relevant factors and may informally ascertain from the Judge concerned if he has any real personal difficulty or any humanitarian ground on which his transfer may not be directed. Such grounds may be of a wide range including his health or extreme family factors. It is not necessary for the Chief Justice to issue formal notice to the Judge concern-

ed but it is sufficient — although it is not obligatory — if he ascertains these facts either from the Chief Justice of the High Court or from his own colleagues or through any other means which the Chief Justice thinks safe, fair and reasonable. Where a proposal of transfer of a Judge is made the Government must forward every possible material to the Chief Justice so that he is in a position to give an effective opinion."

559. Bhagwati, J. (one of us) agreed entirely with the observations extracted above.

560. In an earlier Constitution Bench decision of this Court in Chandramouleswar Prasad v. Patna High Court, (1970) 2 SCR 666 : (AIR 1970 SC 370) while dealing with the intent and purpose of Art. 233, the principles of which equally apply to consultation under Art. 222, Mitter, J. observed thus at p. 375) :

"Consultation with the High Court under Art. 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion..... Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits or their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter-proposal without anything more, cannot be said to have been issued after consultation."

(Emphasis mine)

561. This case was followed both by Chandrachud, J. and Krishna Iyer, J. and one of us (Fazal Ali J.) in Sheth's case (AIR 1977 SC 2328) where it was held that the observations made in this case constitute the true meaning and content of consultation as envisaged by Art. 222 (1) of the Constitution.

562. In Chandra Mohan's case (AIR 1966 SC 1987) (supra) this Court made the following observations regarding the process and purport of consultation :

"That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution wherever the Constitu-

tion intended to provide more than one consultant, it has said so: See Arts. 124 (2) and 217 (1). Wherever the Constitution provided for consultation of a single body or individual it said so; see Art. 222, Art. 124 (2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein."

563. Analysing the ratio of the decisions in Sheth's case (AIR 1977 SC 2328) and Chandramouleshwar Prasad's case (AIR 1970 SC 370) (supra) the following necessary concomitants of an effective consultation may be stated:

(1) That the consultation contemplated by Art. 222 must be full and effective and is an essential ingredient of the exercise of power under Art. 222.

(2) That once when the President decides to transfer a Judge, he must consult the CJI before transfer; the consultation before transferring a Judge is, as it were, a condition precedent to the actual transfer of the Judge.

(3) If the consultation with the CJI has not been done before transferring a Judge, the transfer becomes unconstitutional.

(4) The President must make the relevant data and the necessary facts available to the CJI so that he (CJI) may arrive at a proper conclusion. In case any facts are wanting the same should be supplied to the CJI and this is an imperative duty or obligation cast on the President who initiates the proposal.

(5) The fulfilment by the President of his constitutional obligation and performance of his duty by the CJI are parts of the same process and after this process is fully complied with the consultation becomes full and effective and not formal or unproductive.

(6) That sufficient opportunity should be given to the authorities concerned to express their views so as to tender advice as deliberation is the quintessence of consultation.

(7) After the data, facts or materials are placed before the consultee and the consultant, there should be a full and complete application of minds in respect of the subject to enable them to

reach a satisfactory conclusion. In other words, the two minds must be able to confer and produce a mutual impact on the identical facts which would constitute both the source and the foundation of the final decision.

(8) The CJI owes a corresponding duty both to the President and to the Judge who is proposed to be transferred to consider every relevant fact before tendering his opinion to the President.

(9) Before giving his opinion the CJI must take into consideration all relevant facts and should informally ascertain from the Judge if he has any personal difficulty or any humanitarian ground on which his transfer is proposed to be made and having done so must forward the same to the President. (These principles were laid down in Sheth's case)

(10) Consultation or deliberation is not complete until the parties make their points of view known to the other or others and discuss and examine the relative merit of their views. If one party makes a proposal to the other who has a counter proposal which is not communicated to the proposer, the direction to give effect to the counter-proposal without anything more will not amount to consultation. This was held in Chandramouleshwar's case (AIR 1970 SC 370) (supra).

564. We shall now state the admitted facts which emerge from the two affidavits of the petitioner and the counter-affidavit of the CJI to show whether the tests mentioned above have been fully satisfied or not. It is clearly established both from the petitioner's affidavit and the counter-affidavit of CJI that during his (CJI) visit to Patna there was absolutely no suggestion or proposal to transfer the petitioner from Patna to Madras. The petitioner categorically states this in para 8 of his first affidavit (filed on 16-9-81). This fact is endorsed and admitted by the CJI in para 2 (e) of his counter-affidavit where he says thus :

"it is true that I did not tell him then that he was to be transferred from Patna. That was because in Feb., 1980 there was no proposal to transfer him. He was transferred nearly one year later."

565. Thus, the first fact on which there is no controversy or divergence is that during his visit to Patna in Feb., 1980 the CJI did not give any indication to the petitioner regarding his transfer to Madras as there was no such proposal.

566. A perusal of the two affidavits would clearly show that there is no averment either by the petitioner or by the CJI that they ever met at any other place between Feb., 1980 and January 5, 1981. It must, therefore, be taken to be established that after his visit in Feb., 1980 the first time CJI had a talk with the petitioner was only on 5-1-1981. In this connection, averments are to be found in para 8 of petitioner's first affidavit and in para 2 (f) of CJI's counter-affidavit where he states thus :

"It is true, as stated by Shri K. B. N. Singh in paragraph 8 of his affidavit, that I conveyed to him on the evening of January 5, 1981 over the telephone that it was proposed to transfer Shri Justice M. M. Ismail to Kerala and that he, Shri K. B. N. Singh, may have to go to Madras".

567. Another conclusive fact which inevitably follows from the aforesaid two averments is that even when the CJI sent the proposal D/- 20-12-80 of the transfer of the petitioner from Patna to Madras and that of Justice Ismail from Madras to Kerala, there was neither any talk or discussion nor any consultation with the petitioner. We have highlighted this important fact because from the observations extracted above one of the essential ingredients emphasised by this Court and even by the CJI himself was that there should be a communication of ideas before the proposal of transfer emanates. We shall elaborate this aspect a little later.

568. According to the petitioner he was told by the CJI on telephone that he was to be sent to Madras in pursuance of a Government policy. The CJI in his counter-affidavit in para 2 (g) stated that he did not merely indicate Government policy but also stated that it was necessary to appoint an experienced and senior CJ in place of Justice Ismail. In the circumstances, therefore, we would prefer the statement of the CJI to that of the petitioner particularly in view of the fact that in his second affidavit the petitioner has introduced an additional fact to the effect that the CJI had told him that it was the Government policy to effect transfers in batches of two or three. This minor contradiction is, however, not of much value because the fact remains that the petitioner was sounded by the CJI for the first time on 5-1-81 over the telephone.

569. The petitioner states that he explained to the CJI that his mother was seriously ill and bed-ridden and was not in a position to be moved and added that if his transfer was insisted upon, he might be compelled to resign. This statement is to be found in para 8 of the petitioner's first affidavit. This fact is admitted by the CJI in para 2 (h) of his counter-affidavit which runs thus :

"It is true that Shri K. B. N. Singh told me over the telephone that his mother was bed-ridden and was not in a position to go with him to Madras."

570. The CJI however denies that the petitioner told him of any other personal circumstance by reasons of which he was unable to go to Madras. We will accept this statement of the CJI also in preference to the statement made by the petitioner. The CJI admits that the petitioner had indicated his intention to resign if his transfer was insisted upon but he cautioned him to consider the matter more thoroughly before taking a final decision. On this point also there does not appear to be any controversy as there is a large measure of agreement in the statements contained in the affidavits of the petitioner and the CJI.

571. We then come to the finale of the drama which is the most important factor to determine as to whether or not there was an effective consultation as contemplated by Art. 222. Before however we deal with this aspect of the matter we might mention that in the present case the letter dated 7-12-1980 sent by the CJI to the Law Minister clearly shows that it was the CJI who had initiated the proposal unlike in Sheth's case (AIR 1977 SC 2328) where the proposal was initiated by the President through the Law Minister. If this was the position then the formalities and the duties that the President had to comply were now to be observed by the CJI, that is to say, it was for the CJI to consult the Judge concerned, consider his difficulties and then come to a final conclusion. Further, it was also for the CJI to have placed the entire facts, data, difficulties and viewpoints mentioned to him by the petitioner, before the President. Even if the CJI was not impressed by the difficulties expressed by the petitioner the materials and data given to him either orally or in writing had to be communicated to the President because the possibility of the President taking a different view cannot be reasonably excluded.

572. According to the averments made by the petitioner in para 8 of his second affidavit, he was not with the CJI for a period of more than 15 minutes. He further denied that apart from his mother's advanced age and illness no other facts were mentioned before the CJI. According to him, he had told the CJI that being the eldest son it was a sacred obligation to keep his mother with him and having regard to the close attachment with her, he could not leave her with any of his brothers or other members of the family which was divided and partitioned. It may be relevant to note that in para 9 of his first affidavit the petitioner merely stated that he told the CJI of his acute and insurmountable personal difficulties without detailing them. He also admits that he was with the CJI at his residence on 8-1-81 for 10-15 minutes. He further mentioned that the CJI might have received complaints against him and he wanted to remove the wrong impression created against him. Para 9 of his first affidavit which contains details of the discussions he had with the CJI, does not at all mention the further facts which the petitioner has mentioned in para 8 of his second affidavit about the sacred obligation, his mother's illness, inability of other members of her family to look after her. In view of this omission we would accept the affidavit of the CJI which is fully corroborated by what the petitioner himself stated in his first affidavit. Although we may not go to the extent of saying that the subsequent statement of the petitioner made in para 8 of his second affidavit was an afterthought but in the circumstances it is sufficient to state that we would prefer to rely on the affidavit of the CJI as the subsequent facts were not indicated in the first affidavit of the petitioner. On the other hand, the CJI in Para. 3 of his counter-affidavit replying to the statement of the petitioner that he (CJI) may have received baseless complaints, averred that he tried his best to convince him (petitioner) that he did not believe this his (petitioner's) conduct was blameworthy and left him free to explain any matter which according to him had created dissatisfaction about the working of the High Court. Thereupon the petitioner narrated to him that there were number of persons inspired by communal and other extraneous considerations who tried to influence him (petitioner) administratively or judicially. The CJI however assured him that certain

persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. These details mentioned by the CJI, have not been contradicted or denied by the petitioner and we fully accept what the CJI had said in para 3 of his counter-affidavit.

573. As regards other matters, the CJI does say that other issues were also discussed on the evening of January 8, 1981 but they had no bearing on the matter in issue. In para. 4 of his counter-affidavit the CJI admitted the statement of the petitioner, made in para 10 of his first affidavit, that he did not convey his consent to the proposal of his transfer, but the CJI added that he was consulted about his transfer to Madras. The consultation referred to by the CJI is obviously to the telephonic talk on 5-1-81 and the personal meeting between them on the evening of 8-1-1981.

574. These are the points of convergence on which by and large there does not appear to be any serious controversy and even if there is any, we have preferred to rely on the affidavit of the CJI as in the normal course of business we must, so long as the law permits.

575. The most crucial averment by the CJI which forms the bulwark of the essential ingredient of effective consultation is to be found in para 5 of his counter-affidavit which runs thus :

"I deny the statement in paragraph 11 of the affidavit of Shri K. B. N. Singh that his transfer to Madras was made without effective consultation between me and the Government of India. There was full and effective consultation between me and the President of India on the question of Shri K. B. N. Singh's transfer from Patna to Madras as the Chief Justice of the Madras High Court. Every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer Every relevant circumstance, including the personal difficulty mentioned by Shri K. B. N. Singh, was considered by me carefully and objectively before coming to the conclusion that he should be transferred to Madras. I was personally aware since February 1980 that his mother was advanced in age and was not in a good state of health."

576. So far as the first part of the affidavit is concerned that is a pure question of law, viz., whether on the facts effective consultation was proved or not

The CJI categorically states that every relevant aspect of the question was discussed by him fully with the President both before and after he proposed the transfer. It may be noticed that the name of the petitioner figures in the first proposal sent by the CJI to the Law Minister on 7-12-80 wherein he had clearly recommended that the petitioner be transferred as CJ, Rajasthan High Court. This proposal was, therefore, not merely an information but a regular proposal by which the CJI had recommended Justice K. B. N. Singh to be transferred to Rajasthan. We have already pointed out that between February 1980 and January 5, 1981 there is no evidence at all, nor any allegation or averment either in the affidavits of the petitioner or of the CJI to indicate that he had either orally or in writing ascertained the views of the petitioner when he (CJI) by his aforesaid proposal recommended the transfer of Justice K. B. N. Singh to Rajasthan as Chief Justice. It must, therefore, taken to be established that there was no discussion at all nor any consultation between them when for the first time the ball was set in motion through the proposal of recommendation sent by the CJI to the Law Minister on 7-12-80. Even so we may not attach much significance to this fact because this proposal ultimately fell through and was substituted by a later proposal sent on 20-12-80. In his letter dated 20-12-80 the CJI wrote to the Law Minister that in view of the fact that a vacancy would occur in the office of CJ, Madras High Court he proposed that Justice K. B. N. Singh be transferred as CJ, Madras High Court. This is the proposal which is in dispute in the present case. It is common ground that even between 7th and 20th December 1980, there was no talk or consultation between the petitioner and the CJI. The position is that until 5-1-81 the petitioner was not given any idea or inkling about his being transferred to Madras High Court. Admittedly, for the first time the petitioner was informed by the CJI over the telephone on 5-1-81. This was followed by a meeting and detailed discussion by the CJI with the petitioner at the former's residence in Delhi on 8-1-81 at about 8.00 p. m.

577. The fact that before the proposal recommending the transfer of Justice K. B. N. Singh to Rajasthan or to Madras,

there was no consultation between the CJI and the petitioner, conclusively proves that one of the first ingredients of the consultative process, viz., consultation by the CJI with the proposed transferee should always be held as a first step towards making the consultation constitutionally effective was not observed. This was held, as extracted above, by CJI in Seth's case (AIR 1977 SC 2328) where he has gone to the extent of holding that if there is no such consultation before the transfer, then the transfer becomes unconstitutional. This, therefore, appears to be the first constitutional infirmity in the consultative process as contemplated by Art. 222.

578. This now brings us to January 8, 1981 when there was a full discussion between the petitioner and the CJI. We shall accept the statement of the CJI made in his counter-affidavit, in toto that he had discussed the matter threadbare with the petitioner and considered his difficulties. This limb of the consultative process was no doubt fully complied with as required by the Constitution.

579. Then we come to the third aspect of the consultative process. According to the CJI he had met the President and discussed every aspect of the matter, disclosed to him by the petitioner. Unfortunately, the CJI does not disclose the exact constitutional authority with whom he had discussed these matters, although it would have been much better if he had done so and that would have put the entire matter beyond any controversy. On this point, Dr. Singhvi as also Mr. B. C. Ghosh appearing for one of the petitioners vehemently contended that as the CJI was making a statement in an affidavit before a court of law, there was no justification for him to use the word 'President' and he should have mentioned the name of the exact authority with whom he had discussed the matter, failing which this part of the affidavit should be rejected as being vague. Having regard to the very high position that the CJI occupies, his word is entitled to the greatest weight and respect, we would draw all presumptions within the bounds of law in favour of the CJI and presume that by using the word 'President', the CJI obviously tended the constitutional authority, who was being consulted generally before or after the proposals for transfers were made viz., the Law Minister. We will also go even to the extent of holding that

perhaps he may have had some discussion with the Law Minister also. What facts he may have revealed and in what way he put forward the point of view of the petitioner we are not able to say, because the affidavit of the CJI is absolutely silent on this point. Giving however the widest possible connotation to the words used by the CJI, viz., 'every relevant aspect of the question', would include all the personal difficulties which were mentioned to him by the petitioner, we are yet faced with another serious difficulty. In Seth's case (AIR 1977 SC 2328) the CJI has himself clearly held that deliberation is the quintessence of consultation. Thus, according to the CJI himself even if he had disclosed or placed all the materials before the Law Minister, he ought to have been given sufficient time for deliberation over the matters so as to be able to make up his mind, whether to agree or disagree with the CJI, and to advise the President accordingly. It may be that the personal difficulties may not have weighed with the CJI but the possibility of the Law Minister being impressed by them cannot be excluded. But as things stood, we find that the Prime Minister had already signed the file relating to transfer on 9-1-81 and it can safely be presumed that the file must have been sent by the Law Minister to the Prime Minister either sometime in the morning of 9th or late at night on 8th. This would leave no time at all to the Law Minister or the Prime Minister to deliberate on the various personal issues raised by the petitioner in his discussion with the CJI. Indeed, if prior to sending the formal proposal recommending the transfer of the petitioner the CJI would have taken the precaution of ascertaining his views there would have been sufficient time for the Law Minister or the President to deliberate.

580. It was strongly urged by the petitioner that from the statement of the Law Minister produced by the Solicitor-General before us it would appear that no minutes were recorded and the CJI had only mentioned to the Law Minister about his proposal to transfer the petitioner. Thus, from these facts it should be inferred that there was no discussion between the CJI and the Law Minister about the personal difficulties of the petitioner. It is true that from the file produced before us no minutes seems to have been recorded about the discussion which the CJI had with the Law Minister either

on the 8th night or before that but that by itself would not exclude oral discussions having taken place after the detailed talk the CJI had with the petitioner on the evening of 8th. This, therefore, does not advance the case of the petitioner any further.

581. Applying the ratio of Chandramouleshwar's case (AIR 1970 SC 370) (supra) to the facts of this case, the position may be stated thus—here the CJI made a proposal for transfer of the petitioner to Madras but this proposal was not communicated to the petitioner who may have had a counter-proposal in his mind which also was not communicated to the President who was the person who decided the matter finally.

582. Thus, even though we may not disbelieve every letter and every word contained in the counter-affidavit of CJI and give him the full benefit of all possible legal presumptions, we come to the inescapable conclusion that the constitutional requirements of an effective consultation have not been proved beyond reasonable doubt inasmuch as—

(1) the petitioner was not consulted before the formal proposal recommending him for transfer to Rajasthan and then to Madras, was sent to the Government,

(2) that there is no mention at all in any of the proposals dated 7-12-80 or 20-12-80 regarding any discussion having been held with the petitioner,

(3) that there is nothing to show that the President or the concerned constitutional authority had sufficient time to deliberate over the pros and cons of the transfer particularly in view of the difficulties placed by the petitioner.

(4) the case squarely falls within the ratio laid down in Chandramouleshwar's case (AIR 1970 SC 370) (supra) discussed above which had been approved by the CJI himself and Krishna Iyer J. and one of us (Fazal Ali J) in Seth's case (AIR 1977 SC 2328).

583. In view of the circumstances discussed above the consultative process as contemplated by Art. 222 is clearly vitiated which renders the order impugned passed by the President constitutionally invalid.

584. We must hasten to add that we have taken the greatest possible care to see that no finding is given or observations made by us which may either directly or indirectly cast any kind of as-

persion on the recitals in the counter-affidavit of the CJI nor is there any circumstance proved in this case which may amount to such an aspersion. As already observed by us we have accepted the affidavit of the CJI in toto giving the due respect that it deserves. We have decided this case purely on the constitutional infirmities present in the consultative process and that too on the basis of the observations made and the decision given by the CJI himself in Seth's case.

585. The last point of law that was urged by the petitioner was that the transfer was constitutionally invalid because one of the essential conditions of Art. 222 had not been fulfilled in this particular case. It was argued that Art. 222 (2), which is extracted below, requires a Presidential Order by which the transferee Judge would be entitled to such compensatory allowance as the President may by order fix:

"222 (2). When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix."

586. It was contended that this mandatory provision of Art. 222 (2) has not been complied with. We, however, find absolutely no substance in this argument because while Art. 222 (2) does require that on transfer from one High Court to another, compensatory allowance may be paid; it does not state that the Presidential order should issue *pari passu* the order of transfer. Such an order could follow the transfer. Moreover, as the C. J. of Patna High Court who was transferred to Madras High Court petitioner never cared to join his new assignment and before he could do so the writ petitions were filed and proceedings were stayed, there was no occasion for the President to pass the order directing compensatory allowance to be paid to him until the validity of the transfer of the petitioner was finally adjudged by this Court. This is not a case where a Judge or a C. J. having been transferred had joined his new assignment and started working and still no order of compensatory allowance was made by the President.

587. Before finally closing this Chapter we might mention that another reason given by Brother Venkataramiah, J. for upholding the impugned Order was that under S. 114 (e) of the Evidence Act there is a presumption that official acts must be deemed to have been actually done, this Court must presume that if there was any infirmity in the consultation the same must have been complied with. With great respect to our learned Brother, we are however unable to agree with this argument. The presumption applies only where there is no challenge to the constitutional validity of an official act. Where an act is found to be *per se* unconstitutional, the question of raising a presumption does not arise because once it is held, as found in this case, that the consultation did not fulfil the constitutional requirements, the order impugned would become void *ab initio* and non est.

588. We are fortified in our view by a decision of this Court in *Collector of Customs, Baroda v. Digvijaysinhji Spinning and Weaving Mills Ltd.* (1962) 1 SCR 896 : (AIR 1961 SC 1549). Where Subba Rao J. (as he then was) made the following observations (at p. 1553):—

"The High Court in effect drew a presumption in favour of the regular performance of an official act. But this presumption is only optional. In a case like this when the validity of an order depends upon the fulfilment of a condition, the party relying upon, the presumption should at least show that the order on the face of it is regular and is in conformity with the provisions of the statute."

589. An identical view was taken in an earlier case reported in AIR 1943 FC 75. In the instant case in view of our clear finding that the essential ingredients of effective consultation as required by Art. 222 not being proved, the question of drawing a presumption under Section 114 (e) of the Evidence Act does not arise.

590. For the reasons given above we hold that the Order of the President transferring the petitioner, Justice K. B. N. Singh from Patna to Madras is constitutionally invalid and we hereby quash the notification dated 19-1-81 passed by the President.

591. The fact that the Order of transfer in this particular case has been held to be invalid and quashed, will not preclude the Government from making fresh

orders of transfers after formulating a general policy of transfers on the lines and the manner indicated by us so that every High Court has a Chief Justice from outside and at the initial stage one-third of the strength of the Judges is recruited from outside the State.

592. Thus, the position is that while I have expressed my separate opinions on Art. 222 (T. C. No. 22/81), the Circular and the Policy of Transfer, question of Privilege and Transferred Case No. 24/81 and have made some observations on other questions also but subject to the observations made I would entirely agree with brothers Bhagwati, Desai and Venkataramiah JJ, in respect of Arts. 217 and 224, on Primacy with brother Desai, J. and regarding Kumar's case (T. C. No. 20/81) and the question of locus with Brother Bhagwati J.

593. The result is that petitions arising out of transferred cases Nos. 19, 20, 21 and 22 of 1981 are accordingly dismissed. Writ petition No. 274 of 1981, Transferred Case Nos. 2 and 6 of 1981 are accordingly disposed of. Special Leave Petition (Civil) No. 1509/81 has already been dismissed as withdrawn before the hearing closed.

594. Petitions arising out of Transferred Case No. 24/81 are allowed but without any order as to costs.

TULZAPURKAR, J.:— 595. On March 18, 1981 Hon'ble Shri P. Shivshankar, Minister for Law, Justice and Company Affairs, Government of India addressed the following Circular letter to the (1) Governor of Punjab and (2) Chief Ministers (by name) (except North-Eastern States):

"D. O. No. 66 /10/81-Jus

Minister of Law,
Justice & Company Affairs,
India, New Delhi-110 001.
March 18, 1981

My dear

It has repeatedly been suggested to Government over the years by several bodies and forums including the State Re-organisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one-third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction.

The feeling is strong, growing and justified that some effective steps should be taken very early in this direction.

2. In this context, I would request you to—

(a) obtain from all the Additional Judges working in the High Court of your State their consent to be appointed as Permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of preference, to which they would prefer to be appointed as Permanent Judges; and

(b) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in para 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of Government either in regard to their appointment or in regard to accommodation in accordance with the preferences given.

4. I would be grateful if action is initiated very early by you and the written consent and preferences of all Additional Judges as well as of persons recommended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also sending a copy of this letter to the Chief Justice of your High Court.

With regards,

Yours sincerely,

Sd/-

(P. Shivshankar)"

It further appears that prior to as well as after the issuance of the aforesaid Circular letter by the Union Law Minister on March 18, 1981, in several High Courts, including High Courts of Allahabad, Bombay and Delhi, the President of India acting under Art. 224 granted short-term extensions for three months, six months or a year to sitting Additional Judges whose initial terms were about to expire but since such short-term extensions became a frequent phenomenon, particularly after the issuance of the aforesaid Circular letter, it created great consternation in the legal and judicial circles in the country. These two actions of the Union Government, namely, the issuance of the Circular letter dated March 18, 1981 and the grant of short-term extensions led to legal action being taken challenging the same which is the subject matter of the instant adjudication.

596. Having regard to their High position as a constitutional functionary all the sitting Additional Judges in various High Courts, though agitated by these two actions of the Union Government understandably felt reluctant to adopt legal steps against the same (barring the exception of Mr. Justice S. N. Kumar who as a party-respondent to the writ petition filed in Delhi High Court has actively supported the challenge to these actions and has also challenged the further action of dropping him out-right that occurred during the pendency of the petition) but the legal profession which was vitally interested in the maintenance of an independent and fearless Judiciary — with its concomitant power of judicial review — a basic feature of our Constitution and also a necessary postulate for the legal profession, felt terribly disturbed and thought of taking action challenging the same and the sequel was the filing of four writ petitions one in Allahabad High Court, two in Delhi High Court and one in the Bombay High Court, all of which were transferred to this Court, being Transferred Case No. 19 of 1981 (Shri Gupta's Writ Petition No. 4845/81 in the Allahabad High Court), Transferred Case No. 20 of 1981 (Shri Tarkunde's Writ Petition No. 882/81 in Delhi High Court), Transferred Case No. 21 of 1981 (Shri Kalra's Writ Petn. No. 636/81 in Delhi High Court) and Transferred Case No. 22 of 1981 (Shri Iqbal Chagla's Writ Petition No. 527/81 in the Bombay High Court). Excepting the Transferred Case No. 21 of 1981 where only short-term extensions are challenged, in the other three cases both the actions have been challenged.

597. According to the petitioners both the aforesaid actions of the Union Government forming part of a scheme constitute a direct attack on the independence of the Judiciary, which is a basic feature of our Constitution, and being illegal and unconstitutional are liable to be and deserve to be quashed or struck down. As regards Circular letter it is pointed out that it is in two parts; (i) in relation to sitting Additional Judges in all the States of India (except North-Eastern States) it seeks to obtain their consent in substance to their transfer as Permanent Judges to States other than their own and (ii) in relation to the proposed appointees (either from the Bar or Services) for initial appointment (either as Additional or Permanent Judges) it seeks to obtain their consent for being appointed to any other High Court in the country (meaning other than their home-State High Court);

and in this behalf it also seeks from them their choice by naming three High Courts in order of preference to which they would prefer to go; and this is being done with a view to implement the policy of having one-third of the Judges of a High Court, as far as possible, from outside the State in which that High Court is situated on grounds of furthering national integration and combating narrow parochial tendencies, bred by caste, kinship and other local links and affiliations. According to the petitioners this Circular letter seeks to effect, in substance and reality, a mass transfer of sitting Additional Judges as also of the proposed appointees based on a policy decision unilaterally taken by the Law Minister/Union Government and as such violates the requirements of Art. 222 (1) of the Constitution as laid down by this Court in *Sankalchand Sheth's case*, (1978) 1 SCR 423 : (AIR 1977 SC 2328) inasmuch as such mass transfers on alleged grounds of policy are outside its scope and further it reduces the efficacy of the consultation with the Chief Justice of India contemplated therein to a meaningless formality by presenting a transfer proposal to him as a fait accompli, the same being backed by the consent of the concerned Judge or the proposed appointee to his transfer. It is also contended that the Circular letter is illegal as being without authority of law. Thirdly, as far as the sitting Additional Judges are concerned, it is contended that inasmuch as para 3 of the Circular letter makes it clear that even if consent is given and preference is indicated there is no commitment on the part of the Government either to appoint them as Permanent Judges or accept their preference, the said letter contains, by implication, a threat to them that if they do not give their consent they will not be either continued as Additional Judges or confirmed as Permanent Judges; the said statement in para 3, by necessary implication, also contains a threat that the Government would watch their performance in matters to which the Government, Government Bodies and Corporations are parties before them and would appoint them as Permanent Judges only if they were found to toe the Government line and as such it constitutes gross interference with administration of justice and is subversive of judicial independence; moreover, the consent is sought to be obtained under threat, coercion and duress and also in advance and in abstract and the same would be no consent in law. As regards the proposed appointees it introduces an additional qualification for being appointed as Additional or Permanent

Judge not warranted by the Constitution. Fourthly, it is contended that the said statement in para 3 of the Circular letter also shows that there was no justification for writing the said letter at all and the same was written mala fide for a collateral purpose, namely, to by-pass Art. 222 and confront the Chief Justice of India with a fait accompli when the proposal to transfer such Judge would be forwarded to him; further to exercise the power of appointing Additional Judges not for the purpose for which that power has been conferred but for the purpose of carrying out the so-called "policy" of the Government is also mala fide in the sense that the power is being exercised for a collateral purpose foreign to the purpose indicated in Art. 224. Fifthly, the petitioners have contended that the Circular letter, under which absolute power and discretion is claimed to the effect that there is no obligation on the part of the Union Government to continue the sitting Additional Judges after the expiry of their initial term notwithstanding pendency of arrears of work or to make them permanent as and when permanent vacancies become available and to appoint different persons for different periods as Additional Judges in the vacancies of sitting Additional Judges after their initial terms have expired, is a clear abuse of the power conferred by Art. 224 (1) of the Constitution, because the power being purposive is coupled with a duty to exercise the same when the conditions precedent mentioned in the provision exist and the Circular letter which claims such absolute power is violative of the provisions of Art. 224; in any case the course proposed in the said Circular letter in exercise of such absolute power claimed thereunder is contrary to the established constitutional convention and practice (specified later) that has grown over the years in the matter of appointment of Additional Judges and confirming them as Permanent Judges and, therefore, bad in law inasmuch as Art. 224 (1) has been interpreted and worked having regard to the said convention and practice. Sixthly, the petitioners have contended that the Circular letter is violative of Art. 14 inasmuch as it makes invidious discrimination against those who would be refusing to furnish their consent as they will suffer a disadvantage, while those who would be furnishing their consent will be at an advantage and even within the class of those who would be furnishing their consent it gives to the Government unfettered and unguided power or discretion to pick and choose i.e. select some for being shifted to High Courts other than their home-

State High Courts and to retain and appoint others in their home-State High Courts — which power can be exercised either by way of punishment or by way of favouritism; and in this behalf reliance is placed on the Law Minister's statement made in Parliament in response to a Calling Attention Motion by some Hon'ble Members on 16th April, 1981 to the effect "it is not the intention of the Government to appoint all Additional Judges to outside Courts". Without prejudice to these contentions, it is lastly contended by the petitioners that in the appointment of Additional Judges of one High Court as Permanent Judges of another High Court or in the appointments of the Members of the Bar practising in one High Court as Additional or Permanent Judges of another High Court pursuant to the consent obtained under the said Circular letter, the consultation with the Governor of that other State and particularly with the Chief Justice of that other High Court would be illusory and an empty formality and as such the said Circular letter is violative of the Art. 217 of the Constitution. For these reasons the petitioners have prayed for the quashing of the said Circular letter as also of the consent, if any, obtained thereunder, as being illegal, unconstitutional and void and its withdrawal, non-use and non-implementation by the Government.

598. As regards short-term extensions for three months, six months or a year granted to sitting Additional Judges upon the expiry of their initial term, which have become a frequent phenomenon after the issuance of the Circular letter dated March 18, 1981, the petitioners have contended that such short-term extensions are directly subversive of the independence of Judiciary and not contemplated by the Constitution. According to the petitioners the power to appoint an Additional Judge "for such period not exceeding two years as the President may specify" in Art. 224 (1) has invariably been exercised by appointing Additional Judges initially for a period of two years, which has come to be regarded as the 'normal term', that when the said period is about to expire if there is no vacancy of a Permanent Judge in that Court it has been the practice to continue such Judges for a further term of two years and if a permanent vacancy arises to confirm the seniormost among them as a Judge of that High Court. The petitioners have contended that such a constitutional convention and practice has grown over the years and the provisions of Article 224 (1) have been worked in accordance

with such convention and practice. It is further pointed out that when a member of the Bar is appointed as an Additional Judge of a High Court an undertaking is usually given by him to the Chief Justice that if and when a Permanent Judgeship of the Court is offered to him he will accept it but if he declines to do so he will not practice before that High Court or any Court or Tribunal subordinate to it; (at any rate, such an undertaking is obtained in the Bombay High Court); the postulate of such undertaking is that an Additional Judge appointed from the Bar should not be allowed to revert to the Bar and, far from being dropped, will be offered a permanent vacancy as and when it arises in that Court. In other words a member of the Bar who accepts the appointment of an Additional Judge has legitimate expectation that he will be confirmed as Permanent Judge of that High Court when a vacancy occurs and in the past he has been confirmed except in the rarest of cases. According to the petitioners the power claimed under Art. 224 (1) not to continue the Additional Judge, even if temporary increase in the Court's business persists or pendency of arrears justifies such continuance, after the expiry of the initial term and not to make him permanent even if a vacancy of permanent post occurs and to appoint another person as Additional Judge by ignoring the legitimate expectancy of the sitting incumbent whose initial term has expired, apart from involving an unjustified departure from the well recognised and established practice, amounts to breach of faith with the concerned Judge and further to ask such Additional Judge who has given such undertaking to agree in advance to a transfer (or even to accept fresh appointment) to other High Courts as a Permanent Judge also involves similar breach of faith with that Judge; such departure and breach of faith amounts to a clear abuse of power and the purported exercise of the power in that manner would be illegal and void. So also the claim made by the Government that Art. 224 (1) only fixes the maximum period of two years at a time, that the Article does not limit the discretion of the Government in the matter of the period for which an Additional Judge can be appointed except in regard to the ceiling of two years, and that the appointment can be for a shorter period and that period is not justiciable is untenable in law and clearly wrong because, apart from involving an unjustified departure from the well recognised and established practice, it introduces an element of insecurity of tenure having serious repercussions on the independence of

Judiciary and also undermines people's confidence and faith in it.

599. It may be stated that the petitioners have cited specific instances of Additional Judges having been granted short-term extensions for three months, six months or a year in Allahabad, Bombay and Delhi High Courts and have also cited instances of Additional Judges being dropped in the purported exercise of such absolute power claimed under Art. 224 (1). Grievance has specifically been made in respect of the individual cases of three Judges of the Delhi High Court, (a) Mr. Justice O. N. Vohra (as he then was), (b) Mr. Justice S. N. Kumar (as he then was) and (c) Mr. Justice S. B. Wad. It is pointed out that these three Judges were initially appointed with effect from 7-3-1979 as Additional Judges in the Delhi High Court for a term of two years but on the expiry of the said initial term each one of them was granted a short-term extension of three months with effect from 7-3-1981 and at the expiry of their said period of three months on 6-6-1981 the first two have been dropped outright and Mr. Justice Wad has been granted an extension for a further period of one year with effect from 7-6-1981. Such short-term extensions for three months granted to all the three after the expiry of their initial term of two years, as also the short-term extension of one year granted to Justice Wad with effect from 7-6-1981 have been challenged as being illegal and unconstitutional and the outright dropping of the first two Judges has been challenged also on the ground of mala fides both legal and factual in Transferred Case No. 20 of 1981; however, relief is claimed only in respect of the dropping of Mr. S. N. Kumar and not of Mr. O. N. Vohra.

600. In the context of their challenge to short-term extensions the petitioners have submitted that Art. 216 of the Constitution casts a primary obligation upon the President mandatorily to provide adequate strength of Permanent Judges to cope with the normal business in every High Court so as to ensure its disposal within reasonable time and to review such strength from time to time so that arrears do not accumulate and justice to litigants is not unduly delayed, while the power to appoint Additional Judges under Art. 224 (1) (a provision substituted in its present form by the Constitution Seventh Amendment Act, 1956) and the exercise thereof are only dependent upon the fulfilment of either of the two conditions mentioned therein, namely, (a) temporary in-

crease in the business of a High Court or (b) arrears of work therein; and it is only upon the fulfilment of either one or the other or both the conditions in a High Court that the President can appoint duly qualified persons to be Additional Judges of that Court for such period not exceeding two years as he may specify, but if the said conditions are not fulfilled and the objective facts unmistakably demonstrate that the increase of business is not of a temporary character but is a permanent increase every year or that the arrears have increased and accumulated to an appreciably disturbing level with no reasonable prospects of substantially reducing the same over a period of years, the President cannot resort to Article 224 (1) but has to increase the permanent strength by making permanent appointments under Art. 217. In any case Additional Judges cannot be appointed while keeping permanent posts vacant as is happening at present frequently. The petitioners have further submitted that in view of undisputed data of the regular increase in the normal business of almost all High Courts and the mounting arrears therein — a reality being within the knowledge of the President — the decision to keep a large number of sitting Judges as Additional Judges would be arbitrary and unconstitutional and a clear case exists for declaring them to be deemed to have become permanent or directing the President to make them permanent by appropriately increasing permanent strength in the concerned High Courts and this Court should pass appropriate orders in this behalf.

601. The contesting respondents (who are mainly the Union of India and the Union Law Minister) through Counter-Affidavits filed by Shri K. C. Kankar, Deputy Secretary, Department of Justice, Ministry of Law, Justice and Company Affairs, have resisted the writ petitions on several grounds. In the first place it is contended that the petitioners (barring Shri S. N. Kumar who as party-respondent in Transfer Case No. 20 of 1981 has supported the challenge and sought reliefs) who are legal practitioners have no direct interest in the subject-matter of the writ petitions and cannot be regarded as the persons aggrieved by the impugned actions of the Government and therefore have no locus standi and as such the petitions are liable to be dismissed. Secondly, it is contended that though Shri S. N. Kumar could be regarded as a person aggrieved by the impugned actions of the Government, he

being a sitting Additional Judge from whom consent under the Circular letter was sought and was granted a short-term extension, his tenure having come to an end by efflux of the period for which he was appointed he is no longer concerned with the impugned Circular letter nor with the short-term that had been granted to him and after he has ceased to be a Judge of the Delhi High Court he does not have any vested or enforceable right against the President or the Union Government in the matter of either continuation as an Additional Judge or appointment as a Permanent Judge and; therefore, his challenge as a party-respondent to the governmental action is not maintainable; in other words, even on the assumption that the Government's actions are not warranted by the constitutional provisions, the invalidity or unconstitutionality thereof does not give any corresponding right to him to sustain the petition; in any event the tenure fixed by the warrant of his appointment as an Additional Judge having expired Shri S. N. Kumar has no enforceable right either to continue as an Additional Judge or to be appointed as permanent Judge inasmuch as the power to appoint a person a Judge of a High Court is discretionary with the President and such discretion cannot be controlled by judicial review by issuance of a mandamus and he is not entitled to any relief.

602. As regards the impugned Circular letter it is contended that it does not deal with transfer of sitting Additional Judges or of the proposed appointees from one High Court to another nor does it seek to obtain consent for such transfer but in relation to sitting Additional Judges it seeks to obtain their consent for being appointed as a Permanent Judge to another High Court and in relation to the proposed appointees it seeks to obtain their consent for their initial appointment (either as Additional or Permanent) to a High Court other than their home-State High Court and the action proposed to be taken thereunder is for purposes of Art. 217 of the Constitution; it is the case of the contesting respondents that when an Additional Judge on the expiry of his initial term or extended term is appointed as a Permanent Judge it is a fresh appointment by warrant under Art. 217 and there is no question of any transfer being involved in such a case and obviously in the case of a proposed appointee (either from the Bar or Services) when he is being initially appointed there is no question of any transfer in his case; either, in other words, according to the

contesting respondents Art. 222 (1) of the Constitution is not attracted at all and as such there is no question of the Circular letter violating the requirements of the said article, much less there being any intention on the part of the contesting respondents either to by-pass Art. 222 (1) or to reduce the efficacy of consultation of the Chief Justice of India contemplated therein in any manner. It is emphatically denied that any mass transfers or individual transfers based on any policy decision are being effected under the impugned Circular letter. It is denied that the Circular letter is intended to affect the independence of the judiciary in any manner or that the Circular letter contains any threat of the type suggested or at all to the sitting Additional Judges while seeking their consent. It is also denied that the consent that is sought to be obtained under the Circular letter is being obtained under threat, coercion or duress or that the same is in abstract and it is pointed out that for making fresh appointments of sitting Additional Judges, after the expiry of their term, to another High Court and for making initial appointments of the proposed appointees to a High Court other than their home-State High Court, their consent would naturally be required under Art. 217 and it is such consent that is being obtained from them under the Circular letter. It is further denied that the statement contained in paragraph 3 of the Circular letter shows that there is no justification for writing the said letter at all or that the same was written mala fide for collateral purposes as suggested or otherwise; it is pointed out that the legal and constitutional position even before the sending of the Circular letter was that there was no commitment on the part of the Government to appoint every Additional Judge as the Permanent Judge and the true purport of para 3 of the said letter is that the furnishing of consent will not change that position and will not now imply a commitment and it was necessary to make the legal and constitutional position clear lest a different impression was created as also to avoid any legal arguments based on the theory of promissory estoppel. According to the contesting respondents it is for the purpose of implementing the policy of having one-third of the Judges of a High Court from outside that the Circular letter has been issued and it is a preliminary step in the direction of obtaining and collecting data and information from persons who would be willing to get appointed in other High Courts so that such information could be made available to the Chief Justice of India as also to the

State authorities and the Chief Justices of the concerned High Courts for effective consultation as envisaged in Art. 217 and as such the Circular letter is perfectly legal and within the authority of law. It is denied that the Circular letter confers unbridled or unguided power on the Executive to pick and choose certain Judges for being transferred or shifted to other High Courts; it is pointed out that such a contention is wholly mis-conceived for two reasons, namely, that the letter does not speak of transfers at all but appointments to other High Courts and secondly it cannot arm the Executive with any powers, for whatever powers the Executive has are derived from the provisions of the Constitution and that the Law Minister's statement in the Parliament on 16th April, 1981 has to be understood in the context in which it was made. It is further denied that in appointing Additional Judges of one High Court as Permanent Judges of another High Court or in appointing Members of the Bar practising in one High Court as Additional or Permanent Judges of another High Court pursuant to the consent given under the Circular letter, the consultation with the Governor of that other State or with the Chief Justice of that other High Court would become illusory or an empty formality because the data and particulars of the person proposed to be appointed collected from other sources can and would be made available to the Governor of that other State as also to the Chief Justice of that other High Court and it is not the requirement of Article 217 that the constitutional functionaries mentioned therein should be aware of such data and particulars of their personal knowledge; in fact, even the Chief Justice of the home-State High Court; it is conceivable, may not have personal knowledge in that behalf and may have to collect the data and particulars from other sources. In other words, it is contended that if the data and particulars of the person proposed to be appointed is collected by a Chief Justice from other sources, his advice does not become illusory or an empty formality and as such the Circular letter cannot be said to be violative of Art. 217.

603. As regards short-term extensions for three months, six months, or a year granted to sitting Additional Judges upon the expiry of the initial term and the other submissions made by the petitioners in regard to the President's power under Arts. 216, 217 and 224 (1) the contesting respondents have relied upon the provisions of these Articles for their true and proper construction; ac-

cording to them reading Arts. 217 (1) and 224 (1) together the position in law is clear that no Additional Judge has any legal or constitutional right to be continued as an Additional Judge on the expiry of his initial or extended term or to be made a Permanent Judge even if a vacancy occurs in a permanent post in his High Court. Strictly speaking, the tenure of an Additional Judge is fixed by the warrant of his appointment and on the expiry of the period mentioned in the warrant he ceases to be a Judge of the High Court and in either extending him for a further term as an Additional Judge in the same High Court or in making him permanent in the vacancy in a permanent post, a fresh appointment is involved, and the consultative process envisaged in Article 217 (1) is attracted; in other words he is in the same position as a proposed appointee for initial appointment and the same position obtains if it is intended to make him a Permanent Judge in some other High Court. It is further contended that the provisions of the concerned Articles being very clear and unambiguous no convention or practice that might have grown in the matter of appointment of Additional Judges and confirming them as Permanent Judges (which is denied) can alter or affect the interpretation of the said provisions. Even an undertaking of the type indicated by the petitioners if obtained from a member of the Bar while appointing him as an Additional Judge cannot affect the true meaning and construction of the concerned provisions. It is further contended that assuming (without admitting) that an Additional Judge of a High Court gives the kind of undertaking mentioned by the petitioners, particularly of the type that is said to be usually obtained from him in the Bombay High Court, no illegality takes place in asking him if he would agree to be appointed as a Permanent Judge in any other High Court, as he shall be so appointed only in pursuance of his consent. It is further contended that if on true construction of these two Articles it is clear that an Additional Judge has no vested legal or constitutional right to be continued or to become permanent then it must be open to the President to appoint different persons, who are fully qualified, to be Additional Judges during different periods for disposing of the arrears, though such appointments will have to be necessarily made in accordance with the constitutional requirements of Article 217. The contesting respondents have contended that the volume of work in a High Court is of relevance in deciding whether Additional Judges

should be appointed and the same is of no relevance with regard to a particular person to be appointed. Regarding short-term extensions that were granted it is explained that they become necessary pending completion of inquiries into the complaints that had been received against the concerned Additional Judges and the constitutional functionaries desired to satisfy themselves in that behalf before taking a final view. As regards the individual cases of the three Judges of the Delhi High Court it is pointed out that so far as Justice Wad is concerned he has now been granted a long term of one year with effect from 7-6-1981 and he can have no grievance and as regards the out-right dropping of Shri O. N. Vohra and Shri S. N. Kumar it is denied that the same is illegal or unconstitutional or mala fide either in law or in fact; and it is pointed out that since Shri Vohra is not seeking any relief before the Court the action of dropping him need not be pronounced upon by this Court and so far as Shri S. N. Kumar is concerned, action being proper no relief can be granted to him. It is disputed that this Court can grant the relief by way of declaring the sitting Additional Judges to be deemed to have become permanent or by directing the President to make them permanent by appropriately increasing the permanent strength in the concerned High Courts.

604. As stated at the outset by these writ petitions filed under Art. 226 of the Constitution the legality or constitutionality of the two actions of the Union Government, namely, the issuance of the Circular letter dated March 18, 1981 and the grant of short-term extensions to sitting Additional Judges in various High Courts, is being challenged and the first question raised by the contesting respondents relates to the locus standi of the petitioners, who are legal practitioners in Allahabad, Bombay and Delhi High Courts, to maintain their petitions seeking relief against these two impugned actions. In my view the question of locus standi of the petitioners in these cases has become academic inasmuch as admittedly in the writ petition filed by Shri Tarkunde in Delhi High Court (being Writ Petition No. 882/81) Mr. Justice S. N. Kumar (as he then was), impleaded as a party-respondent, has supported the challenge and sought reliefs in respect of these impugned actions and as such the challenges made will have to be gone into and decided by this Court. In the case of Dwarkadas Srinivas v. Sholapur Spinning & Weaving Co. Ltd., 1954 SCR 674 : (AIR 1954 SC 119), the constitutionality

of the impugned Ordinance II of 1950 as well as of the Act XXVIII of 1950 which replaced it, whereunder the management of the Mills was taken over and run by the Directors appointed by the Central Government, was challenged by Shri Dwarkadas Srinivas (plaintiff), a preference share-holder of the Company and he also sought relief by quashing the demand made for calls in respect of unpaid share capital by the nominated Directors; a contention was raised about the locus standi of the plaintiff to maintain the suit on the ground that it was the Company who ought to have filed the suit as it was affected by the impugned Ordinance and the Act. This Court took the view that the contention was of no avail because the Company had been impleaded as a defendant to the suit and its old Directors had made an application to the Court supporting the case of the plaintiff on the ground that the Ordinance and the Act were void as they infringed the Company's fundamental right under Art. 31 (2) of the Constitution. At page 714 (of SCR) (at p. 132 of AIR) of the report Justice Mahajan (as he then was), who delivered the main judgment of the Court, observed thus:

"I am further of the opinion that the question of the locus standi of the plaintiff to raise the plea that the Ordinance being void against the Company the Directors had no authority to make the call, is really of academic interest in this case because here the company has been impleaded as a defendant. Its old directors have made an application to this Court supporting the case of the plaintiff on the ground that the Ordinance is void as it infringes the Company's fundamental right under Art. 31 (2)."

In view of this legal position the learned Attorney-General for the Union of India made a statement at the Bar that he would not be pressing the contention relating to locus standi of the petitioners. However, Counsel for the Union Law Minister, one of the contesting respondents, argued the contention at great length, by referring to a large number of decided cases English, American and Indian as well as by relying on passages and extracts from treatises of well-known authors, on the ground that in the other three writ petitions none of the concerned sitting Additional Judges had come forward to support the challenge and the maintainability of these writ petitions will have to be decided by this Court. Since the said contention has been fully and elaborately discussed and dealt with by my brother

Bhagwati in his judgment, I propose to deal with it very briefly:

605. Counsel for the Union Law Minister has urged that the petitioners who are legal practitioners have no direct interest in the subject-matter of the writ petitions and cannot be regarded as 'person aggrieved' by the two impugned actions, which really affect, if at all, the sitting Additional Judges, who would be the aggrieved persons and it is not as if they are under any disability to approach the Court for redress, as is shown by the fact that one of them has done so and supported the challenge. It is contended that though as practising lawyers either in their individual capacity or as representing some of the Lawyers Associations the petitioners may be professionally interested in having a fearless and independent Judiciary for proper administration of justice that by itself is not sufficient to give them the 'standing' to prosecute the petitions for the reliefs sought, which really concern the sitting Additional Judges and not the lawyers. It is further submitted that even in 'public interest litigations', (usually called 'public injury cases') though a liberal approach is adopted by the Courts to reach all forms of injustice, the personal injury test is not ruled out but at times the test of 'sufficient connection' or 'special interest' is applied but in the instant case the petitioners neither qualitatively nor quantitatively have sufficient connection or special interest to prosecute the petitions, the result of which would not affect them either directly or even indirectly.

606. Since several decisions cited at the Bar on the question of locus standi show that the attitudes of the Courts in England, United States and this country have not been uniform but have varied from case to case any attempt at laying down a general principle for universal application would be futile. I would, however, prefer to confine my attention to a few decisions of this Court, which, according to me, throw sufficient light on this issue. It may be stated that in two decisions, namely, *Adi P. Gandhi's case*, (1971) 1 SCR 863 : (AIR 1971 SC 385) and *Dabholkar's case*, (1976) 1 SCR 306 : (AIR 1975 SC 2092), the question of locus standi was considered in the context of the interpretation of the expression "person aggrieved" occurring in Ss. 37 and 38 of the Advocates Act of 1961. In the former case, in relation to certain disciplinary proceedings which had ended in no action being taken against the advocate concerned, the question was whether the Advocate General, of the

State was an "aggrieved person" within the meaning of S. 37 of the Act for the purpose of preferring an appeal under that section and this Court by majority held that he was not and his appeal was incompetent while the minority took a contrary view. After this decision had been rendered, Ss. 37 and 38 (which provided for an appeal to the Bar Council of India and an appeal to the Supreme Court respectively) of the Act were amended by expressly giving the right of appeal to the Advocate General and the Attorney General suggesting by implication a legislative approval and acceptance of the minority view in that case. In the latter case, the errant advocate having succeeded before the Bar Council of India, the State Bar Council preferred an appeal to this Court under S. 38 and the question arose whether the State Bar Council was a 'person aggrieved' within the meaning of S. 38 and a Bench of 7 Judges of this Court held upon a survey of the provisions of the Act and its scheme and purpose that the State Bar Council was a 'person aggrieved'. Krishna Iyer, J. while delivering a concurring judgment quoted with approval Lord Denning's observations in the Attorney General's standing in the well-known case of the Attorney-General of the Gambia v. N'Jie (1961 AC 617), to the following effect:

"..... The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busy-body who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the Attorney-General a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the Judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action."

Thereafter he proceeded to plead for a wider view being taken of locus standi in public interest litigations and derived support for his plea from certain observations of Professor S. A. de Smith and Professor H. W. R. Wade, which he quoted, and then went on to observe thus:

"The possible apprehension that widening legal standing with a public connotation may unloose a flood of litigation which may overwhelm the Judges is misplaced because public resort to Court to suppress public

mischief is a tribute to the justice system. In this very case, to grant an exclusionary wind-fall on the respondents is to cripple the Bar Council in its search for justice and insistence on standards."

607. In *Municipal Council, Ratlam v. Vardhichand*, (1981) 1 SCR 97 (AIR 1980 SC 1622), this Court upheld the right of the residents of a certain locality in Ratlam town to adopt proceedings under S. 133 of the Criminal Procedure Code against the Municipal Council compelling it to provide certain basic amenities like sanitary facilities on the roads, public conveniences for slum dwellers who were using the road for that purpose and to abate nuisance by constructing drain pipes with flow of water to wash the filth and stop the stench. While permitting such legal action ventilating public grievances Krishna Iyer, J. observed thus (at p. 1623 of AIR):—

"The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage. If the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered. In that sense, the case before us between the Ratlam Municipality and the citizens of a ward, is a path-finder in the field of people's involvement in the justicing process, sans which as Prof. Sikes points out (Melvyn P. Sikes, *Administration of Justice*), the system may 'crumble under the burden of its own insensitivity'. The key question we have to answer is whether by affirmative action a Court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue is the coming of age of that branch of public law bearing on community actions and the Court's power to force public bodies under public duties to implement specific plans in response to public grievances."

608. In the *Fertilizer Corporation Kamgar Union's case*, (1981) 2 SCR 52 (AIR 1981 SC 344) the question for consideration was whether the workers in a factory owned by Government could question the legality and/or validity of the sale of certain plants and equipment of the factory by the management and though the Court ultimately did not interfere because it did not find the sale

to be unjust and unfair or mala fide, on the maintainability of the challenge the Court has made certain observations having a bearing on the aspect of the workers' locus standi. Chief Justice Chandrachud at p. 65 (of SCR): (at p. 350 of AIR) of the Report has observed thus:

"But, we feel concerned to point out that the maintainability of a writ petition which is correlated to the existence and violation of a fundamental right is not always to be confused with the locus to bring a proceeding under Art. 32. These two matters often mingle and coalesce with the result that it becomes difficult to consider them in water-tight compartments. The question whether a person has the locus to file a proceeding depends mostly and often on whether he possesses a legal right and that right is violated. But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus to initiate a proceeding, be it under Art. 226 or under Art. 32 of the Constitution. If public property is dissipated, it would require a strong argument to convince the Court that representative segments of the public or at least a section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations. Public enterprises are owned by the people and those who run them are accountable to the people. The accountability of the public sector to the Parliament is ineffective because the Parliamentary control of public enterprises is "diffuse and haphazard". We are not too sure if we would have refused relief to the workers if we had found that the sale was unjust, unfair or mala fide."

Since the question as regards 'access to justice', particularly under Art. 226 of the Constitution, was dealt with by Krishna Iyer, J. at some length, Chief Justice Chandrachud did not consider it necessary to dwell upon that topic. On that aspect Krishna Iyer, J. has at p. 74 (of SCR): (at p. 355 of AIR) of the Report made the following observations:

"Public interest litigation is part of the process of participate justice and 'standing' in Civil litigation of that pattern must have liberal reception at the judicial doorsteps. The floodgates argument has been nailed by the Australian Law Reforms Commission:

"The idle and whimsical plaintiff, a diletante who litigates for a lark, is a spector which haunts the legal literature, not the court room." (Prof. K. E. Scott: "Standing

in the Supreme Court: A Functional Analysis" (1973) 86.)

Again at p. 77 (of SCR): (at p. 356 of AIR) of the Report this is what he has observed:

"If a citizen is no more than a way-farer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country the door of the Court will not be ajar for him. But he belongs to an organization which has special interest in the subject matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered. I, therefore, take the view that the present petition would clearly have been permissible under Art. 226."

609. In the instant case the impugned Circular as well as the short-term extensions, according to the petitioners, are directly subversive of judicial independence, which is a basic feature of our Constitution, in the upholding of which not merely the sitting Additional Judges but also the lawyers practising in various High Courts are keenly interested. In fact, in the task of administration of justice the role of Judges and the role of lawyers are complementary to each other and the practising lawyers as a class are an integral part of justifying machinery rendering assistance to the Judges in the discharge of their function of reaching justice to the litigants appearing before the Courts; in other words, the practising lawyers, who are nothing short of partners in the task of administration of justice undertaken by the Judges, are vitally interested in the maintenance of a fearless and an independent Judiciary to ensure fair and fearless justice to the litigants. That being the position, can it be said that the petitioners either in their individual capacity or as representing some of the Lawyers' Associations (as is the case in the Bombay petition) are way-farers, interlopers, officious interveners or busy-bodies without any interest or concern of their own in the subject-matter? In my view, the petitioners either in their individual capacity or representing Lawyers' Association have not merely sufficient interest but special interest of their own in the subject-matter of the writ petitions and they cannot be told off at the gates and the petitions at their instance are clearly maintainable.

610. The next contention urged on behalf of the contesting respondents has been that though Shri S. N. Kumar could be regarded as

a person aggrieved by the two impugned actions of the Government, he being a sitting Additional Judge from whom consent under the Circular letter was sought and was also granted a short-term extension, the issues raised in the case are not justiciable at his instance, much less at the instance of the petitioners. The contention is that Shri Kumar's term having come to an end by efflux of period for which he was appointed he is no longer concerned with the impugned Circular letter nor with the short-term extension that had been granted to him and after he has ceased to be a Judge of the Delhi High Court he does not have any vested or enforceable right against the President or the Union Government in the matter of either continuation as an Additional Judge or appointment as a Permanent Judge and, therefore, his challenge to the governmental action is not maintainable. In this behalf Counsel contended that in either extending an Additional Judge for a further term or in making him a Permanent Judge in the vacancy of a permanent post, a fresh appointment is involved by issuance of a fresh warrant under Art. 217 (1) and the position of an Additional Judge on the expiry of his initial or extended term is exactly the same as that of a proposed candidate for initial appointment in that neither has any enforceable right to be considered for the post, much less to be appointed to it. Counsel pointed out that Art. 217 (1) confers power upon the President to appoint High Court Judges subject to the consultations mentioned therein but the President has a discretion in the matter which cannot be controlled by judicial review by issuance of a mandamus; in any event, non-appointment of a proposed candidate for initial recruitment or non-continuance of an Additional Judge on the expiry of his term does not give rise to any enforceable obligation against the President/Union Government and in favour of the person who is not appointed or not continued and, therefore, even a breach of the constitutional mandate, such as total lack of consultation or lack of full and effective consultation or consultation getting vitiated by mala fides, merely amounts to a case of complete non sequitur. In other words, Counsel contended that even on the assumption that the Government's actions are not warranted by the constitutional provisions, the invalidity or unconstitutionality thereof does not give any corresponding right to Shri S. N. Kumar to sustain the petition.

611. The aforesaid contention of Counsel for the contesting respondents directly raises two questions: (i) whether the proposed ap-

pointees (either from the Bar or services), who are being recommended for their initial appointments, and the sitting Additional Judges, whose cases for their continued appointments either as Additional Judges or as Permanent Judges on the expiry of their initial term are to be decided, stand in the same class or category or is there any difference — a valid difference between the two and (ii) whether the non-appointment either at the stage of initial recruitment or at the stage of continuance furnishes any actionable wrong for issuance of a mandamus? In the context of these questions Arts. 217 (1) and 224 (1) will have to be considered. Article 217 (1) runs thus:

"217 (1). Every Judge of a High Court shall be appointed by the President by warrant under this hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in Art. 224, and in any other case, until he attains the age of sixty two years."

Article 224 runs thus:

"224.(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify."

612. It cannot be disputed that Judges of the High Court occupy a high constitutional position and a special machinery is provided for their appointment. For obvious reasons, the post of a High Court Judge is not filled in by inviting applications through advertisements nor by holding test interviews; further, the minimum qualifications for appointment as a Judge (prescribed in sub-art. (2) of Art. 217) would be possessed by numerous advocates and by a fair number of service Judges but even so, the special machinery for making appointments is indicated in Art. 217 (1), obviously designed to recruit persons of great ability, high character and unquestioned integrity to the Bench. All these factors go to show that at the stage of initial recruitment under Art. 217 (1), no one has a right to be appointed a Judge of the High Court nor the right to be considered for such appointment and, therefore, it does appear that a writ of mandamus at the instance of an aggrieved person would

not lie. But at the same time I am quite sure whether simply because a mandamus directing the President to reconsider the case of a non-appointee may not lie, it would be correct to say that in the case of non-appointment at the stage of initial recruitment the mandate of consultation becomes otiose, superficial or inconsequential, or that a positive breach thereof may not provide any relief whatever to the aggrieved person but since that question does not arise in the instant case I would rather leave it open for decision in an appropriate case and proceed on the basis that a mandamus for reconsideration of his case would not lie as the aggrieved person does not have the right to be considered. But the question is whether the sitting Additional Judges, whose continuance either for an extended term or as Permanent Judges is to be determined on the expiry of their initial term, stand in the same position as that of proposed appointees for initial appointment?

613. It is true that, unlike a Permanent Judge whose tenure is fixed by reference to his age, the tenure of an Additional Judge when appointed under Art. 224 (1) is fixed by the warrant of his appointment and on the expiry of the period mentioned in the warrant he ceases to be a Judge of the High Court. It is also true that his continuance as an Additional Judge for any further term or as a Permanent Judge in the vacancy of a permanent post cannot be thought of unless for continuance as Additional Judge either one or the other or both the pre-conditions mentioned in Art. 224 (1) obtain in that High Court, and for continuance as a Permanent Judge the normal business of the High Court justifies the filling up of the vacancy in the permanent post. In other words pendency of work must justify such continuance temporary increase in the business of the High Court or arrears of work therein or both for extension of his term and normal business (current institutions) for making him permanent. The question whether obtaining of the pre-conditions mentioned in Art. 224 (1) or the pendency of normal business is alone enough for such continuance or any other requirement suitability as adjudged during the consultation under sub-art. (1) of Art. 217 is also necessary is a different aspect, which I propose to deal with later and need not be mixed up with the question under consideration at the moment. In other words, granted the pre-conditions in Art. 224 (1) and also the pendency of the normal business, the question is whether an Additional Judge whose term is about to expire has any enforceable right to be considered (even assuming that suitability

is also required to be taken into account at this stage) for his continuance either as an Additional Judge for a further term or as a Permanent Judge if a vacancy in the permanent post is available?

614. In order to deal with the aforesaid question, Art. 224 (1), inserted in our Constitution by the 7th Amendment Act, 1955 will have to be considered in proper perspective having regard to the reasons and purposes for which and the circumstances in which it came to be enacted. Prior to that in the Government of India Act, 1915 the provision to appoint Additional Judges to any High Court 'as may be required' by the Governor-General in Council was contained in the proviso (i) to S. 101 (2) while in the Government of India Act, 1935 the provision was to be found in S. 222 (3) which was almost in similar terms as the present Article except that the power was conferred on the Governor-General acting in his discretion. When the Constitution was framed the provision (Draft Article 199) was deleted because of the strong plea made against it by several Members of the Constituent Assembly including eminent authorities in this field like Sir Te. Bahadur Sapru, Shri K. M. Munshi and others, mainly on the ground that Members of the Bar recruited as Additional Judges will revert to the Bar on the expiry of their term and such reversion to the Bar was manifestly dangerous to the fair administration of justice and opposed to public interest. In 1956 it was felt that the provision for recalling retired High Court Judges to function on the Bench for short periods (loosely called Ad hoc Judges) was found to be neither adequate nor satisfactory and the same (original Art. 224) was deleted and replaced by "a provision for appointment of Additional Judges to clear off arrears" (vide Statement of Objects and Reasons) and the present Art. 224 (1) came to be enacted. In other words the existence of a large volume of mounting arrears in several High Courts and the necessity to clear off the same provided the basis for inserting the provision in the Constitution. That this is the rationale of the provision for appointment of Additional Judges has been clearly indicated by the Madras High Court in *Kandasami Pillai v. Muthuvenkatachala* (1917) 33 Mad LJ. 787; (AIR 1918 Mad 263) where in the context of the provision contained in the Government of India Act, 1915 that Court held that "the object of the proviso to S. 101 (2) of the Government of India Act, 1915, clearly was to provide for occasions when the permanent strength of the High Court is unable to cope with the work of dis-

posul, but the work is not sufficient to justify the appointment of another permanent Judge, by enabling additional Judges to be appointed from time to time for such fixed periods not exceeding two years as may be found necessary; the proviso must therefore be read as meaning that appointments may be made from time to time for such period, not exceeding two years, as may be required from time to time on each occasion when the power is exercised." (vide Head Note in the Report). Thus, the very purpose and *raison d'être* of Art. 224 (1) being the existence of arrears of work and clearance thereof, it stands to reason that sitting Additional Judges who have already been selected and appointed for the very purpose must be considered for continued appointments if the arrears obtain and go on mounting in their High Courts.

615. Secondly, on a comparison of Articles 216 and 224 (1), it will appear clear that the former deals with the appointment of Permanent Judges to dispose of the normal business whereas the latter deals with appointment of Additional Judges whenever there is neither a temporary increase in the normal business of a High Court or arrears of work therein. It seems the work in a High Court has been classified into three categories, namely, (a) Normal business indicated by the current annual institutions (suits, writs and other proceedings), (b) Sudden temporary increase in business over and above the normal institutions, such as filing of hundreds of petitions challenging an enactment, like for instance Money Lenders Act, which will disappear when the validity or otherwise of the enactment is pronounced upon and (c) Arrears of work meaning the normal or ordinary work which the permanent strength has not been able to cope with and dispose of within a reasonable or stated period, say one or two years and has accumulated; and it is clear that Art. 216 has to be resorted to for the first category of work and Art. 224 (1) for the other two categories. But it was not disputed before us that Article 224 (1) appears to have been construed and worked by all concerned under some misapprehension in the sense that it has been resorted to even in situations where Art. 216 ought to have been resorted to; for, since the insertion of Art. 224 (1) in the Constitution it has been the invariable practice to appoint every Judge (whether from the Bar or Services) initially as an Additional Judge for two years and then to make him permanent in due course, i.e. as and when a permanent vacancy arises in that High Court. Such a practice, though contrary to the clear intend-

ment of the said two Articles, followed by the President or the Union Government has given rise to a legitimate expectancy on the part of the sitting Additional Judges (whether from the Bar or Services) to be considered for their continuance either for an extended term or for making them permanent on vacancies arising in permanent posts. In fact after following such practice over the years and thus putting all the Additional Judges into the belief that they will be confirmed in normal course it does not behove the appointing authority to say that the sitting Additional Judges have no right to be considered for their continuance either for an extended term or for making them permanent. Clearly, by reason of the said practice though followed under some misapprehension, they have such a right.

616. Thirdly, so far as the sitting Additional Judges recruited under Art. 224 (1) from the Members of the Bar are concerned, they would be having such legitimate expectancy and the right to be considered for continuance for two additional reasons, namely, (a) a well established constitutional convention or practice has grown over the years since after the insertion of the provision in the matter of appointment of such Additional Judges and confirming them as permanent Judges — the convention or practice being, that notwithstanding the words "for such period not exceeding two years as the President may specify" occurring in Art. 224 (1), the appointing authority has invariably exercised the power under that Article by appointing Additional Judges initially for a period of two years, which has come to be regarded as the 'normal term', that when the said period is about to expire if there is no vacancy of a permanent Judge in that Court to continue such Judges for a further term of two years and if a permanent vacancy arises to confirm the seniormost among them as a Judge of that High Court, and (b) the undertaking taken from them at the time of their initial appointment that "if and when a permanent Judgeship of that Court is offered to them they will accept it and not decline the same." It may be stated that so far as the Bombay High Court is concerned further undertaking is obtained by the Chief Justice of that High Court from such Judges to the further effect that "if they decline to accept such permanent judgeship though offered or in case they resign from the office of Additional Judge even before the question of their confirmation is taken up they will not practice in that High Court or in any Court or Tribunal subordinate to that High Court." It may be point-

ed out that since 1956 barring very few or exceptional instances the aforesaid convention or practice has almost invariably been followed and the same has grown out of two weighty considerations: (i) that it is not in public interest to permit them to revert to the Bar, and (ii) not to loose or fritter away the experience and expertise gained by them in administering justice during their initial term, and as regards the undertaking mentioned above the same became necessary because at the time of the insertion of Art. 224 (1) into the Constitution no provision was inserted imposing any ban or prohibition on practice by such Additional Judges after expiry of their term, as was thought of in 1949 when Draft Articles 199 (dealing with Additional Judges) and 196 (b) (dealing with ban on their practice) were considered together and deleted together. It will be pertinent to mention here that during the Parliamentary debates over the relevant Bill which sought to introduce Art. 224 (1) into the Constitution great anxiety was shown by several Members to see to it that such Additional Judges, when recruited from the Bar were not permitted to revert to the profession on the expiry of their term and a categorical suggestion was put forward that when a Member of the Bar was appointed as an Additional Judge it must be done with a view to make him permanent in due course and if that was not possible an Additional Judgeship should not be offered to a Member of the Bar. In fact in Lok Sabha, Shri Tek Chand, M. P. from Ambala-Simla had opposed the recruitment of any Member of the Bar as an Additional Judge and suggested that such recruitment should be confined to District Judges, while in the Rajya Sabha Shri P. N. Saprú from Uttar Pradesh strongly pleaded that in appointing Additional Judges care should be taken to appoint Members of the Bar who were not likely to revert to the profession on the expiry of their term, that is to say "appoint a man whom you are going to appoint as a Permanent man". These views expressed during the debate on the Bill have been referred to merely to bring out the genesis out of which the aforesaid convention or practice grew and the undertaking commenced to be taken from Members of the Bar. Even as late as on June 29, 1967 in a Note prepared by him Justice K. N. Wanchoo had also stated thus:

"When a Member of the Bar is appointed an Additional Judge, it must be with a view to make him permanent in due course. If that is not possible, Additional Judgeship should not be offered to a Member of the

Bar. I agree that an undertaking should be taken from Members of the Bar that they will accept a permanent Judgeship when offered to them in due course"

(Note quoted in the Shah Commissioner's Interim Report-I Para 7.23 at page 52)

If the genesis of the aforesaid convention or practice as well as the undertaking is nothing but public interest in the sense that public interest is served: (a) by not permitting them to revert to the Bar on the expiry of their term, and (b) by not losing or frittering away the experience or expertise gained by them in administering justice during their initial term, then it is these very aspects of public interest which form the compelling reasons to consider their cases for their continuance either by extending their term or making them permanent in preference to outsiders or freshers. It is not as if that these two aspects of public interest giving rise to the convention or practice and the undertaking are merely factors to be taken into account while deciding upon their continuance but along with the disability emanating from the undertaking these aspects confer upon them a legitimate expectancy and the enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority but to be considered for such continuance in that High Court.

617. There has been no answer from the side of the contesting respondents and in fact it was not disputed by Counsel on their behalf that the practice to appoint every Judge (whether from Bar or Services) initially as an Additional Judge for two years and then to make him permanent in due course without considering the question as to which one of the two Articles was attracted has been followed by the appointing authority and therefore, it is clear that on this ground alone it can be held that the sitting Additional Judges have an enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority but to be considered for their continuance either by extending their term or making them permanent until this practice is changed and a proper practice is introduced which can be done only after having made a complete and correct assessment about the requisite strengths of Permanent as well as Additional Judges for every High Court depending upon statistical data to be collected throwing light on 'normal business,' 'temporary increase' and 'arrears of work' after fixing rate of disposal per Judge per year and defining what should be termed as main cases, miscellaneous cases or interlocutory cases etc.

618. As regards the constitutional convention or practice and the undertaking which have been pressed into service in relation to Bar recruits as Additional Judges for basing their right to be considered for their continuance on the expiry of their initial term, the learned Attorney-General appearing for the Union of India raised a twofold contention. Regarding the former he urged that a constitutional convention or practice, howsoever wholesome, cannot affect, alter or control the plain meaning of Art. 224 (1) which according to him gives absolute power and complete discretion to the President in the matter of continuance of sitting Additional Judges on the expiry of their initial term, the pendency of arrears being relevant only for deciding whether or not Additional Judges should be appointed and not relevant with regard to a particular person to be appointed. As regards the undertaking he pointed out that the usual undertaking obtained from a Member of the Bar in all High Courts — and for that matter even the additional undertaking that is being obtained in the Bombay High Court if properly read will show that it merely creates a binding obligation on the concerned Member of the Bar but does not create any obligation or commitment on the part of the appointing authority to make the offer of permanent judgeship to him. It is difficult to accept either of these contentions of the learned Attorney-General. It was not disputed before us that constitutional conventions and practices have importance under unwritten as well as written Constitutions and the position that conventions have a role to play in interpreting Articles of a Constitution is clear from several decided cases. In *U. N. R. Rao v. Smt. Indira Gandhi*, (1971) Suppl. SCR 46 : (AIR 1971 SC 1002) Chief Justice Sikri observed thus : "It was said that we must interpret Art. 75 (3) according to its own terms regardless of the conventions that prevail in the United Kingdom. If the words of an Article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with a Cabinet. In trying to understand one may well keep in mind the convention prevalent at the time the Constitution was framed." In *State of Rajasthan v. Union of India* (1978) 1 SCR 1 : (AIR 1977 SC 1361) also the importance of a constitutional convention or practice by way of crystallising the otherwise vague and loose content of a power to be found in certain article has been emphasized. In the State of

West Bengal v. Nripendra Nath Bagchi, (1966) 1 SCR 771 : (AIR 1966 SC 447) the entire interpretation of the concept of "vesting of control" over District Courts and Courts subordinate thereto in the High Court was animated by conventions and practices having regard to the history, object and purpose that lay behind the group of relevant articles, the principal purpose being, the securing of the independence of the subordinate judiciary. It is true that no constitutional convention or practice can affect, alter or control the operation of any Article if its meaning is quite plain and clear but here Art. 224 (1) merely provides for situations when Additional Judges from duly qualified persons could be appointed to a High Court and at the highest reading the Article with S. 14 of the General Clauses Act it can be said that the power conferred by that Article may be exercised from time to time as occasion requires, but on the question as to whether when the occasion arises to make appointment on expiry of the term of a sitting Additional Judge whether he should be continued or a fresher or outsider could be appointed by ignoring the erstwhile incumbent even when arrears continue to obtain in that High Court the Article is silent and not at all clear and hence the principle invoked by the learned Attorney General will not apply. On the other hand, it will be proper to invoke in such a situation the other well settled principle that in construing a constitutional provision the implications which arise from the structure of the Constitution itself or from its scheme may legitimately be made and looking at Art. 224 (1) from this angle a wholesome constitutional convention or practice that has grown because of such implications will have to be borne in mind especially when it serves to safeguard one of the basic features which is the cardinal faith underlying our Constitution, namely, independence of the judiciary. In other words a limitation on the otherwise absolute power and discretion contained in Art. 224 (1) is required to be read into it because of the clear implication arising from the said cardinal faith which forms a fundamental pillar supporting the basic structure of the Constitution, as otherwise the exercise of the power in the absolute manner as suggested will be destructive of the same. That it is not sound approach to embark upon 'a strict literal reach' of any constitutional provision in order to determine its true ambit and effect is strikingly illustrated in the case of Art. 368 which came up for consideration before this Court in *Kesavananda Bharti's case*, (1973) Suppl SCR 1 : (AIR 1973 SC 1461)

where this Court held that the basic or essential features of the Constitution do act as fetters or limitations on the otherwise wide amending power contained in that Article. In Australia limitations on the law-making powers of the Parliament of the Federal Commonwealth over the States were read into the concerned provisions of the Constitution because of implications arising from the very Federal nature of the Constitution: (vide *The Lord Mayor Councillors and Citizens of the City of Melbourne v. The Commonwealth*, (1947) 74 CLR 31 and *the State of Victoria v. Commonwealth of Australia* (122 CLR 353). As regards the undertakings of the types mentioned above, it is true that strictly and legally speaking these undertakings only create a binding obligation on the concerned Member of the Bar and not on the appointing authority but it cannot be forgotten that when such undertakings were thought of, the postulate underlying the same was that there was no question of the appointing authority not making the offer of permanent judgeship to the concerned Member of the Bar but that such an offer would be made and upon the same being made the sitting Additional Judge recruited from the Bar should not decline to accept it and revert to the Bar. I am therefore clearly of the view that the aforesaid convention or practice and the undertaking serve the cause of public interest in two respects as indicated above and those two aspects of public interest confer upon these sitting Additional Judges recruited from the Bar a legitimate expectancy and the enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority but to be considered for continuance in that High Court either by way of extending their term or making them permanent in preference to freshers or outsiders and it is impossible to construe Art. 224 (1) as conferring upon the appointing authority absolute power and complete discretion in the matter of appointment of Additional Judges to a High Court as suggested and the suggested construction has to be rejected. In view of the above discussion it is clear that there is a valid classification between proposed appointees for initial recruitment and the sitting Additional Judges whose cases for their continuance after the expiry of their initial term are to be decided and the two are not in the same position.

619. The next question hotly debated at the Bar has been whether while exercising the power under Art. 224 (1) of the Constitution at the time of determining whether the sitting Additional Judges should be continued either by way of extending their term or by way of making them permanent it is open to the President (Appointing Authority) to resort to the consultative process under Art. 217 (1) on the aspect of suitability again or the exercise of the power should be strictly governed by the consideration as to whether the pre-conditions mentioned in Art. 224 (1) obtain in the concerned High Court and pendency of work justifies the filling up of the permanent vacancies or not? Counsel for the petitioners have contended that while deciding upon the continuance of the sitting Additional Judges of a High Court, who have already been selected and appointed as such, the consultative process mentioned in Art. 217 (1) is not attracted for the purpose of considering suitability again, the same having been gone through once and for all at the stage of their initial recruitment and the appointing authority has merely to see whether one or the other or both the pre-conditions obtain or not and on being satisfied about their existence it must continue the sitting Additional Judges for a further term and if vacancies in the permanent posts are available to make them permanent in that High Court on being satisfied that pendency of normal business justifies the same. In support of this contention reliance has been placed on the fact that for all purposes the sitting Additional Judges of a High Court are in no way different from its permanent Judges as regards (a) qualification for the appointment; (b) salary and other service conditions; (c) criteria for their selection; (d) their position, jurisdiction, powers and privileges; (e) oath of office to be taken by them and (f) the grounds and procedure for their removal and it has been pointed out that Additional Judges are not on probation and cannot be regarded or dealt with as probationers. Principally, the bringing in of the consultative process under Art. 217 (1) on the point of suitability again at the stage of deciding upon their continuance is objected to on three grounds: (a) it amounts to making their continuance dependent upon the evaluation of their capacity, character, integrity and fitness as emerging from their work, performance and behaviour during their initial term and runs counter to the well-settled position that they are not on probation, (b) if in that process they are dropped because of suspected misbehaviour or reported lack of integrity, it would, in substance and reality, mean their removal merely on the basis of reports, rumours and gossip jeopardising their security and independence without resorting to the regular process of removal laid down in Art. 124 (4) and (5) read with Art. 218 and the Judges (Inquiry) Act No. 51 of 1968, and

(c) it is bound to affect the quality or character of justice administered by them during their initial term or at any rate towards the end of their term because human nature, being what it is their work performance and behaviour will be guided by the anxiety to keep themselves on the right side of the Chief Justice of the High Court, the Chief Justice of India and the appointing authority and every litigant will be entitled to complain that as against the State he has been denied equal protection of the laws and equality before law; in other words, violation of Arts. 14 and 21 is involved and in this behalf reliance has been placed on *Krishna Gopal v. P. C. Sethi*, (1974) 2 SCR 206 : (AIR 1974 SC 209) and *In Re The Special Courts Bill*, 1978, (1979) 2 SCR 476 : (AIR 1979 SC 478).

620. On the other hand Counsel for the contesting respondents have urged that since in either granting an extension to these Additional Judges on the expiry of their initial term or in making them permanent a fresh appointment is involved the consultative process covering suitability under Art. 217 (1) is clearly attracted; even otherwise, going through the consultative process at this stage is both necessary and desirable inasmuch as an erroneous appointment of an unsuitable person produces irreparable damage to the faith of the community in the administration of justice causing serious injury to public interest though failure to appoint a deserving person is not likely to inflict such irreparable injury and therefore it is but proper that at the time of their reappointment these sitting Additional Judges should pass the test of suitability (i. e. capacity, character, integrity and fitness) under Art. 217 (1) and it is unthinkable that if all the constitutional consulting functionaries are of the agreed view and the appointing authority shares the same view that by reason of what has happened in the meantime as erstwhile Additional Judge is no longer fit to be appointed, he should nonetheless be appointed. Counsel for the contesting respondents refuted each one of the grounds urged by the petitioners in support of their objection to bringing in the consultative process inclusive of suitability again at the stage of reappointment of the sitting Additional Judges. Regarding the aspect of probation, Counsel accepted the position that Additional Judges are not and cannot be said to be on probation but according to him what is meant by that is that, unlike a probationer who is liable to be removed during his probationary period if he is found unfit or unsuitable and who is confirmed only upon

satisfactory completion of the probationary period, the sitting Additional Judges, not being on probation, have an indefeasible tenure though for short periods fixed in their warrants of appointment and during the fixed tenure they can be removed only by following their regular process laid down in the Constitution and Judges (Inquiry) Act, 1968; any further appointment is always the result of a fresh consideration and fresh consultation with the consulting functionaries mentioned in Art. 217 (1). To suggest that they should be re-appointed as a matter of course if the pre-conditions of Art. 224 (1) subsist or pendency of work justifies their confirmation and then take steps for their removal under Art. 124 (4) and (5) read with Art. 218 and Judges (Inquiry) Act, 1968 would be manifestly unsound, if not absurd. Counsel disputed that if as a result of the consultative process undertaken they are dropped it amounts to their removal because, according to him, it becomes a case of non-appointment after their initial term has expired. Counsel strenuously disputed that bringing in the process of consultation under Art. 217 (1) inclusive of suitability again at the stage of re-appointment would affect the quality or character of justice administered by them during their initial term or towards the end of their term as suggested by the petitioners and no question of any violation of Art. 14 or 21 is involved and the two decisions relied upon by Counsel for the petitioners do not support that contention.

621. I have already come to the conclusion that there is a valid classification between the proposed appointees for initial recruitment and the sitting Additional Judges whose cases for their continuance on the expiry of their initial term are to be decided and have further held that unlike the former the latter have a legitimate expectancy and an enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority and to be considered for their continuance either as Additional Judges or as Permanent Judges in their High Court. From this conclusion certain consequences logically ensue. First, if the sitting Additional Judges have this enforceable right to be considered for their continuance, it must follow that the eventual non-continuance, if any, can become a justiciable issue open to judicial review, if such non-continuance is based on extraneous or non-germane considerations or is mala fide in law or in fact, and in that sense it will not be a case of non-appointment as is the case qua the proposed appointees at the stage of their initial recruitment. Secondly, it

also follows that in substance and reality in extending their term or making them permanent in their High Court no 'fresh appointment' in the sense of initial or fresh recruitment is involved, except for the formality of issuing a fresh warrant of appointment and taking a fresh oath. If that be the correct position then all the submissions made on behalf of the contesting respondents on the basis that granting them extension or making them permanent involves a 'fresh appointment' must be rejected and logically speaking the consultative process in so far as suitability under Art. 217 (1) is concerned is not attracted at all.

622. Even so, in view of the aspects of public interest that have been pressed into service, the question may be considered as to whether, when their continuance on the expiry of their initial term is being determined, the test of suitability under the consultative process of Art. 217 (1) should be invoked or gone through afresh? The question thus posed assumes great significance but is ticklish and defies easy solution in view of the cogent and almost convincing rival submissions made on either side as summarized above but the answer to the same will have to be found only on objective considerations. At the outset it may be stated that it was not disputed before us that sitting Additional Judges are not on probation and cannot be regarded or dealt with as probationers. Question is what is the implication of admitting the position that "an Additional Judge is not a Judge on probation" as has been done by Shri Kankan in his counter-affidavit dated July 22, 1981 (filed in the Transfer Case No. 20 of 1981)? It is true as has been pointed out by the learned Attorney General that they are not probationers in the sense that they have an indefeasible tenure though for the periods fixed in their warrants of appointment and that during such fixed tenure, like the Permanent Judges, they can be removed only by following the regular process for it as indicated in the Constitution and the Judges (Inquiry) Act, 1968 but in the context of their having an enforceable right not to be dropped illegally and to be considered for their continuance, will it be possible to confine the concept of probation to these two aspects mentioned by him? Does it mean that for deciding upon their continuance they should be treated as on probation? The learned Attorney-General did not mince words when he contended that they should pass the test of suitability again at the time of deciding upon their continuance because he asserted that what has happened in the

meantime during their short tenure (meaning their work, performance and behaviour as throwing light on their capacity, character, integrity and fitness) should be taken into consideration. It cannot be disputed that aspects like slow disposal, unsatisfactory performance, inefficiency, incompetency, suspected misbehaviour and/or reported lack of integrity all converge on suitability and therefore all these will have to be taken into consideration as suggested by him. However, the full implication of the admission made on behalf of the contesting respondents is that Additional Judges are not appointed to try out their fitness pending their further continuance either as Additional Judges or as permanent Judges; they are appointed, having passed the suitability test at the initial stage, to dispose cases instituted in the High Court in accordance with their Oath "without fear or favour, affection or ill-will" from the very first day of their assuming office, though the occasion to appoint them arises because of a sudden increase in the work of High Court or arrears of work therein; in fact appointment of Additional Judges on probation would be destructive of judicial independence. If, therefore, the Additional Judges are not on probation in any sense of the term, how can their continuance either as Additional Judges or Permanent Judges be made to depend upon the evaluation or assessment of their suitability as emerging from their work, performance and behaviour during their initial term? Clearly the answer would be in the negative. On this reasoning aspects like slow disposal, unsatisfactory performance, inefficiency and incompetency get easily ruled out but the real problem that requires to be faced is what should happen when aspects like suspected misbehaviour and/or reported lack of integrity on their part during their short tenure come to the fore? This is the knottiest problem that has engaged my long and anxious consideration. Baldly put, the question is: Should an Additional Judge whose misbehaviour or lack of integrity has come to the fore be continued as an Additional Judge or confirmed as a Permanent Judge? The answer at the first impulse and rightly would be in the negative but the question requires deeper consideration. If the misbehaviour or lack of integrity is glaringly self-evident the question of his continuance obviously cannot arise and in all probabilities will not engage the attention of the appointing authority, for, the concerned Judge in such a situation would himself resign, but when we talk of misbehaviour or lack of integrity on the part of an Additional Judge having come to the fore, by and large the

instances are of suspected misbehaviour and/or reported lack of integrity albeit based on opinions expressed in responsible and respectable quarters and the serious question that arises is whether in such cases the concerned Additional Judge should be dropped merely on opinion material or concrete facts and material in regard to allegations of misbehaviour and/or lack of integrity should be insisted upon? In my view since the question relates to the continuance of a high constitutional functionary like the Additional Judge of High Court it would be jeopardising his security and judicial independence if action is taken on the basis of merely opinion material. Moreover, no machinery having legal sanction behind it for holding an inquiry — disciplinary or otherwise against the concerned Judge on allegations of misbehaviour and/or lack of integrity obtains in the Constitution or any law made by the Parliament, save and except the regular process of removal indicated in Art. 124 (4) and (5) read with Art. 218 and the Judges (Inquiry) Act, 1968. Therefore, the important question that arises in such cases of suspected misbehaviour and/or reported lack of integrity is who will decide and how whether the concerned Judge has in fact indulged in any misbehaviour or act of corruption? In the absence of satisfactory machinery possessing legal sanction to reach a positive conclusion on the alleged misbehaviour or an act of corruption the decision to drop him shall have been arrived at merely on the basis of opinions, reports, rumours or gossip and apart from being unfair and unjust to him such a course will amount to striking at the root of judicial independence. The other alternative, namely, to continue him as an Additional Judge for another term or to make him permanent if a vacancy is available and then take action for his removal under the regular process indicated in Art. 124 (4) and (5) read with Art. 218 and Judges (Inquiry) Act, 1968 may sound absurd but must hold to be inevitable if judicial independence, a cardinal faith of our Constitution, is to be preserved and safeguarded. Not to have a corrupt Judge or a Judge who has misbehaved is unquestionably in public interest but at the same time preserving judicial independence is of the highest public interest. It is a question of choosing lesser evil and the inevitable course has to be adopted not for the protection of the corrupt or dishonest Judge but for protecting several other honest, conscientious and hard-working Judges by preserving their independence; it is a price which the Society has to pay to avoid the

greater evil that will ensue if judicial independence is sacrificed. Considering the question from the angle of public interest, therefore, I am clearly of the view that while considering the question of continuance of the sitting Additional Judges on the expiry of their initial term either as Additional Judges or as Permanent Judges the test of suitability contemplated within the consultative process under Art. 217 (1) should not be invoked — at least until such time as proper machinery possessing legal sanction is provided for enabling a proper inquiry against an alleged errant Judge less cumbersome than the near impeachment process contemplated by Article 124 (4) and (5) of the Constitution.

623. However, the third ground of objection to bringing in the consultative process covering suitability under Art. 217 (1) at the stage of deciding upon their continuance does not impress me much. It is difficult to accept the contention that bringing in the suitability test under Art. 217 (1) at that stage is bound to affect the quality or character of justice administered by the sitting Additional Judges during their initial term or towards the end of their term. In fact, so far on every occasion the consultative process inclusive of the suitability test under Art. 217 (1) has been resorted to while considering the question of granting extension to the Additional Judges or making them permanent on the expiry of their initial term and no one has suggested that because of this their work, performance or behaviour was or has been guided by the anxiety to keep themselves on the right side of the Chief Justice of the High Court, the Chief Justice of India or the Appointing Authority. Instances are not wanting when within the first few days of their assuming office they have delivered judgments dissenting from their Chief Justice as also of having rendered decisions unpalatable to the Executive when their term was about to expire. If the basic assumption made while putting forward the argument is not well founded then there will be no question of any violation of Arts. 14 and 21 being involved. The two decisions on which reliance has been placed also do not support the contention urged on behalf of the petitioners. In the former decision (P. C. Sethi's case ((1974) 2 SCR 206 : AIR 1974 SC 209) (supra) though the Chief Justice's order transferring the election petition from a Permanent Judge and allocating it to an Ad hoc Judge appointed under Art. 224-A was set aside on the facts of the case, this Court at p. 215 (of SCR) : (at p. 215 of AIR) of the report observed thus :—

"It seems indeed desirable that election petitions should ordinarily, if possible, be entrusted for trial to a permanent Judge of the High Court, even though we find that additional or acting judges or those requested under Art. 224-A of the Constitution to sit and act as judges of the High Court, if assigned for the purpose by the Chief Justice, are legally competent to hear those matters." If anything the observation suggests is that there is nothing illegal or improper if Additional or Acting or Ad hoc Judges hear and dispose of elections petitions though in that particular case because of 'special facts and circumstances' obtaining therein the Chief Justice's order was interfered with. In the other case (*In re The Special Courts Bill, 1978*) (AIR 1979 SC 478) (supra), Cl. 7 of the Special Courts Bill provided that Special Courts were to be presided over either by a sitting Judge of a High Court or by a person who had held the office of a Judge of a High Court to be nominated by the Central Government in consultation with the Chief Justice of India and this Court pointed out a couple of infirmities in that Clause, namely, a retired Judge of the High Court unlike a sitting Judge did not enjoy security of tenure and would be holding his office as a Judge of the Special Court during the pleasure of the Government and it was conceivable that such a Judge presiding over the Special Court, if he displayed strength and independence might be frowned upon by the Government and there was nothing to prevent the Government from terminating his appointment as and when it liked. It was further pointed out that though his appointment was required to be made in consultation with the Chief Justice of India there was nothing in the Bill to show that his termination will also require similar consultation and even if it were assumed that such consultation would be made even for his termination the process of consultation, with its own limitations, would be a poor consolation to an accused whose life and honour was at stake. It is true that these infirmities in Cl. 7 of the Bill were pointed out by this Court to emphasize the aspect that appointing a retired High Court Judge as a Judge of the Special Court who is to be nominated by the Central Government to try a special class of cases may not inspire confidence not only in the accused but in the entire community. It is also true that on these infirmities being pointed out the then Central Government accepted the suggestion of the Court that only a sitting Judge of a High Court would be appointed to preside over a Special Court and that such

appointment will be made with the concurrence of the Chief Justice of India. However, all these observations and views that emerge from the opinion or advice which this Court gave to the President in a reference under Art. 143 (1) of the Constitution, on which Counsel for the petitioners placed great reliance, must be understood in the context of the Special Courts Bill which had been drafted by the then Central Government for the purpose of trial of special type of offences allegedly committed by persons holding high public or political offices in the country in the peculiar circumstances that obtained during the last Emergency and for some period prior thereto, under which a special expeditious procedure for trial other than the normal procedure contained in the Criminal Procedure Code had been prescribed and those observations and views, therefore, would be inapplicable to the issue raised before us, for parity of reasoning, in the absence of parity of situation, is of no avail. However, for the reasons indicated earlier, in my view, at the time of deciding upon the continuance of the sitting Additional Judges on the expiry of their initial term the consultative process should be confined only to see whether the pre-conditions mentioned in Art. 224 (1) exist or not or whether pendency of work justifies their confirmation or not and the test of suitability contemplated within the consultative process under Art. 217 (1) cannot and should not be resorted to at all.

624. The next question that requires consideration is whether in the consultative process contemplated by Art. 217 (1) is any primacy intended to be given to the views or advice to be tendered by the Chief Justice of India in the matter of appointment of a High Court Judge or whether from amongst the three consulting functionaries the President (appointing authority) is entitled to choose or prefer the views or advice of anyone to those of the other or others? It may be stated that this question really arises only in regard to the views or advice tendered on the suitability aspect and not on the aspect touching the existence of the pre-conditions of Art. 224 (1) or pendency of work justifying confirmation, because the former aspect is a matter of subjective assessment while the latter depends on objective facts over which no difference is likely to arise. I would also like to observe that the aforesaid question cannot at all arise in view of my conclusion that the test of suitability falling within the consultative process under Art. 217 (1) cannot and should not be resorted to, while deciding upon the continuance of sitting Addi-

tional Judges. Obviously the question cannot arise in cases of non-appointments qua proposed appointees at the time of their initial recruitment, for such non-appointments are cases of non sequitur. My conclusion thus completely obviates the dilemma posed in the question. However, I shall be considering this question on the assumption that I am wrong in my view that the test of suitability is not attracted and should not be invoked at the time of deciding upon the continuance of the sitting Additional Judges. The question of primacy obviously has to be considered by keeping in mind the object or purpose of providing for such consultation which was explained by Dr. Ambedkar in the Constituent Assembly thus:—

“There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two different ways in which this matter is governed in other countries ... (Here follows a reference to the practices obtaining in Great Britain and the United States)..... The Draft Article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex-hypothesi, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.

With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that, that is also a dangerous proposition.”

(Vide Constituent Assembly Debates, 1949, Vol. 8, page 258) (Emphasis supplied.)

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In other words the object of providing for such consultation clearly is that the same should act as a controlling or limiting factor on the discretion vested in the President while performing his executive function of making appointment of High Court Judges and neither the President nor the Chief Justice should have a power to veto a proposal. Further, this question will have also to be considered in the light of what this Court has said about the almost binding character of the resultant advice flowing from the consultative process. In *Sankalchand Sheth's* case (1978-1 SCR 423 : AIR 1977 SC 2328) (supra) dealing with the efficacy of consultation with the Chief Justice of India under Art. 222 (1) Krishna Iyer, J. at p. 502 (of SCR) : (at p. 2384 of AIR) of the report, observed :

“It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India ... Of course, the Chief Justice has no power of veto, as Dr. Ambedkar explained in the Constituent Assembly.”

In *Samsher Singh's* case (1975) 1 SCR 814 : (AIR, 1974 SC 2192) the Court was dealing with consultation with the High Court under Art. 234 read with Art. 235 and in that behalf Krishna Iyer, J. at p. 873 (of SCR) : (at p. 2228 of AIR) of the report has observed :

“In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order.”

625. Keeping both the above aspects in mind one has to consider the question of primacy and in order to consider the same it will be necessary to set out Art. 217 (1) which runs thus :

“217 (1). Every Judge of the High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the

Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office in the case of an Additional or Acting Judge as provided in Article 224 and in any other case until he attains the age of 62 years."

On the question as to whether any primacy is intended to be accorded to the views or advice that would be tendered by the Chief Justice of India during the consultative process over the views or advice of the other two consulting functionaries (Governor of the State and the Chief Justice of the High Court) or whether all the three consulting functionaries are of co-ordinate authority so as to accord equal efficacy to each one's views or advice, the Article is clearly silent and simply because the expression 'consultation' has been used, it does not mean that the President has absolute authority or discretion in the matter because as explained by Dr. Ambedkar consultation has been provided with the object of limiting the authority or discretion of the President. Question is whether when the three functionaries differ in their views or advice has not the President a choice to prefer the views or advice of one of the three? Counsel for contesting respondents contended that the President must have the right to make a choice as no one functionary has been given any primacy and in support Counsel strongly relied upon the fact that during the constituent assembly debates a specific amendment was moved by Mr. B. Pocker Sahib from Madras to the original Draft Art. 193 (1) (which was in identical terms as the present Article in so far as is material) to the effect that every Judge should be appointed by the President "on the recommendation of the High Court concerned, after consultation with the Governor of the State concerned and with the concurrence of the Chief Justice of India clearly seeking to give higher importance or status to the Chief Justice of India in the matter (vide Constituent Assembly Debates 1949, Vol. VIII page 658) but the said amendment was rejected and the Draft Article became the present Art. 217 (1). It was urged that the rejection of the amendment is a clear pointer indicating that the Constituent Assembly wanted to give co-ordinate authority to each one of the three consulting functionaries and no primacy was intended to be given to the views or advice of any particular functionary.

626. In the first place in the very nature of things it is difficult to accept the submission that all the three consulting functionaries

under Art. 217 (1) must be regarded as of co-ordinate authority for the simple reasons that on aspects like capacity, character, merit, efficiency and fitness which converge on the suitability of the person proposed for appointment the Governor of the State will be least informed and will have nothing to say whereas the Chief Justice of the High Court and Chief Justice of India, being best informed, are well equipped to express their views and tender advice; further it is an accepted position which has been alluded to by the Law Commission in its 14th Report, that it is because of the financial aspect (salary and emoluments of a High Court Judge being charged on the Consolidated Fund of the State) and information about the antecedents, local affiliations and like other matters, capable of objective proof, concerning the proposed appointee which the State Executive would be possessing, that consultation with the Governor has been provided for. It is, therefore, difficult to regard the Governor of the State as being of co-ordinate authority with the other two consulting functionaries especially on the aspect of suitability which is the primary thing in the matter of making appointment of High Court Judges. Secondly, in my view, Mr. Pocker Sahib's rejected amendment has nothing to do with the primacy question at all because it was concerned with the effort at complete exclusion of the executive interference in the matter of appointment of the High Court Judges. If the amendment had been accepted the result would have been that the appointment shall have been made with the initiation of the proposal by the Chief Justice of the High Court, the consultation with the State Executive being retained because of the financial aspect and information regarding antecedents, etc. and only upon the concurrence of the Chief Justice of India, which, in other words, means the Chief Justice of India would have had the power to veto any proposal. In my view, conferring a power of veto on the Chief Justice of India is entirely different from the primacy being given to his views or advice over and above the views or advice of the other consulting functionaries, as a limiting factor on the President's discretion. Dr. Ambedkar also understood the proposed amendment of Mr. Pocker Sahib in this manner and pleaded for its rejection on the ground that it sought to confer a power of veto on the Chief Justice of India which he thought was undesirable. The rejection of the amendment, therefore, has no bearing whatsoever on the question of primacy with which the Court is concerned at the moment. Thirdly, once it is rea-

lised that the scope and ambit of full and effective consultation requires that all the material facts and records concerning the proposed candidate must be made available to both these consulting functionaries by placing the same before each during the consultative process and that each consulting functionary must consider the same or identical material and exchange each one's views thereon with the other there is no merit left in the argument that the Chief Justice of the High Court has a closer opportunity to assess the suitability of the proposed appointee; surely it is not a case of watching the demeanour of a witness so as to put the assessment of the Chief Justice of the High Court on any higher footing. Having regard to these aspects, particularly the last one, one will have to consider whether any primacy could be and should be given to the views and advice tendered by the Chief Justice of India to the President in the matter of appointing High Court Judges. I must confess that the Article does not expressly suggest that any primacy is to be accorded to his advice during the consultative process undertaken in Art. 217 (1) but, in my view, the scheme of consultative process contemplated by that Article envisages consideration of identical facts and materials bearing on the suitability of the candidate by both the consulting functionaries, namely, the Chief Justice of the High Court and the Chief Justice of India, as also an exchange of their views on such material, and thereafter placing of the entire material together with each one's views thereon and the tendering of the advice or final recommendation by the Chief Justice of India to the President whose decision should be guided by such advice or final recommendation so tendered. If such be the scheme envisaged by Art. 217 (1) — and I am of the opinion it does envisage such a scheme, then clearly by implication primacy is intended to be given to the advice that would be tendered by the Chief Justice of India to the President. In any event, I would suggest that evolving such a scheme regarding the consultative process under Art. 217 (1) would be in fitness of things as primacy shall have been given to the advice or final recommendation to be tendered by the Chief Justice of India who happens to occupy the highest constitutional position as the head of the Indian Judiciary. It may be noted that giving primacy to the advice of the Chief Justice of India in the matter of appointment of High Court Judges is not to give power to veto any proposal as was contemplated by Mr. Pocker Sahab's amendment nor would giving such primacy to his

advice mean that the Chief Justice of India would be enjoying unfettered arbitrary powers, for, if his advice has proceeded on extraneous or non-germane considerations the same shall be subject to the judicial review just as the President's final decision is so subject if he were to disregard the advice of the Chief Justice of India unless the same is justified for cogent and convincing reasons. But the point I would like to emphasise is that construing Art. 217 (1) as envisaging the scheme of the nature indicated above would go a long way in preserving judicial independence rather than not according primacy to Chief Justice of India's advice and permitting the President to act as an arbiter between the divergent views of the two high constitutional functionaries and leaving him to prefer the views of one to the other.

627. Having considered the question of primacy as aforesaid, I would like to make a couple of observations on the basis that the suitability test is required to be passed by the sitting Additional Judges over again at the time of deciding upon their continuance either as Additional Judges or as Permanent Judges. The consultative process even on this occasion must be full, complete and effective as is the case with the consultative process that is required to be gone through under Art. 222 (1) when the question of transfer of a Judge from one High Court to another High Court is considered. Further, the procedure to be followed at the time of undertaking such consultative process must also ensure fair play qua the concerned sitting Additional Judge. In other words, though the principle of natural justice in its full vigour is not contemplated, the sitting Additional Judge should not receive a raw deal at the hands of the consulting functionaries and either one or the other or if necessary both should hear him, especially if any adverse material is weighing in their minds against him, just as in the case under Art. 222 (1) the personal difficulties and other grounds of objections of the proposed transferee are considered by the consulting functionary. In other words, in my view the scope and ambit of the consultative process under Arts. 217 (1) and 222 (1) are and must be the same.

628. I shall next deal with the question of short-term extensions which have been challenged by the petitioners as being directly subversive of the independence of Judiciary and, therefore, not contemplated by the Constitution. The contesting respon-

dents in that respect have placed strong reliance upon the provision contained in Art. 224 (1) to suggest that such short-term extensions are contemplated and fall within the power conferred upon the appointing authority under that Article. It is true that Art. 224 (1) confers power on the President to appoint duly qualified persons to be Additional Judges of a High Court if the pre-conditions mentioned therein exist "for such period not exceeding two years as he may specify". Relying on the phrase "for such period not exceeding two years as he may specify" occurring in the Article, the contesting respondents have claimed that that phrase only fixes the maximum period of two years at a time, that the Article does not limit the discretion of the appointing authority in the matter of the period for which an Additional Judge can be appointed except in regard to the ceiling of two years and that the appointment can be for a shorter period which period is not justiciable and what has been urged is that the period must of necessity get correlated to the continued existence of the pre-conditions relating to the volume of work for which the appointments are to be made. Such a literal construction is difficult to accept because no provision of the Constitution can be interpreted in a manner which will be in conflict with any of the basic features of the Constitution and the cardinal principle of independence of Judiciary is one such basic feature; therefore, the construction to be put on the phrase in the Article must be consistent with the said principle. It cannot be disputed that security of tenure ensures judicial independence and tenures for short-terms like three months, six months or nine months bring in insecurity directly impinging on judicial independence and also tend to shake the faith of the community in the administration of justice and, therefore, would be unconstitutional. Moreover, granting short-term extensions for periods like three months, six months, or nine months 'pending inquiry into the complaints' said to have been received against some of the sitting Additional Judges, as has been admitted by Shri Kankan in his counter-affidavit on behalf of the contesting respondents, would be clearly outside the contemplation of the Constitution for no machinery having legal sanction behind it has been provided for either in the Constitution or any other law authorising such inquiry or investigation into the complaints against sitting Additional Judges and the practice of giving short-term extensions on such ground must be deprecated and regarded as unconstitutional. I have already held that the suitability

test is not attracted while deciding upon the continuance of the sitting Additional Judges but assuming that it is required to be gone through the process must be completed well in advance of the date of expiry of their initial term or if for any reason it cannot be so completed the concerned Additional Judge must be given extension for at least one year. In this behalf I would again like to refer to the constitutional convention or practice that has grown over the years, notwithstanding the phrase "for such period not exceeding two years as he may specify" occurring in Art. 224 (1), which is to appoint Additional Judges initially for a period of two years, which has come to be regarded as the 'normal term' and on the expiry of this term to continue them for a further period of two years and so on till they are confirmed as Permanent Judges, subject, of course, to the pre-conditions continuing to obtain in that High Court and it has been pointed out that Art. 224 (1) has been worked in that manner over the years. In any case no extension for less than a year should ever be granted irrespective of whether volume of work justifies it or not simply with a view to give the Judge concerned fixity of tenure for that period. Further, it is extremely desirable and necessary that orders granting extensions to sitting Additional Judges or making them permanent are issued and intimated to the concerned Judges and not merely to the Constitutional authorities as was suggested during the vacation hearing, well in advance of the date of expiry of their term and not at the eleventh hour keeping them on tenter-hooks till the last moment. After all the sitting Additional Judges are high Constitutional functionaries possessing the same position, powers and privileges as the Permanent Judges, and deserve due consideration and respectful treatment at the hands of the appointing authority.

629. Apropos their challenge to short-term extensions the petitioners have contended that Art. 216 of the Constitution casts a primary obligation upon the President mandatorily to provide adequate permanent strength to every High Court to cope with its normal business so as to ensure its disposal within reasonable time and to review such strength from time to time so that arrears do not accumulate and justice to litigants is not unduly delayed, while the power to appoint Additional Judges under Art. 224 (1) is only to meet, (a) temporary increase in the business of the High Court or (b) arrears of work therein, and the complaint is

that the appointing authority or the Union Government has failed to discharge its mandatory obligation under Art. 216 and has gone on appointing Additional Judges even when a substantial increase in the normal business is there in almost every High Court justifying the reviewing of the permanent strength of those High Courts. The contention has been that the objective facts obtaining in many High Courts unmistakably demonstrate that the increase of business is not of a temporary character but is a permanent increase every year and that the arrears have increased and accumulated to an appreciably disturbing level with no reasonable prospects of substantially reducing the same over a period of years and, therefore, the President cannot resort to Art. 224 (1) but has to increase the permanent strength by making permanent appointments under Art. 217 read with Art. 216. In any case it is urged that Additional Judges cannot be appointed while keeping permanent post vacant as is happening at present frequently. The submission of the petitioners therefore has been that in view of such reality, obtaining in various High Courts the action on the part of the appointing authority in keeping a large number of sitting Additional Judges as Additional Judges would be arbitrary and unconstitutional and clear case exists for declaring them to be deemed to have become permanent or for directing the President to make them permanent by appropriately increasing the permanent strength in the concerned High Courts and it will be within the powers of this Court to pass appropriate orders or give necessary directions in this behalf. In support of these submissions statements containing statistical materials pertaining to Bombay High Court and Delhi High Court were relied upon and on the question of Courts' power to grant appropriate reliefs reliance was placed upon two decisions of this Court, namely, *Shewpujanrai Indrasanrai Ltd. v. The Collector of Customs*, 1959 SCR 821 at pp. 840 and 841 : (AIR 1958 SC 845 at pp. 854, 855) and *Y. Mahaboob Sheriff v. Mysore State Transport Authority*, (1960) 2 SCR 146 : (AIR 1960 SC 321).

630. On the other hand, Counsel for the contesting respondents denied that the appointing authority has failed to discharge its obligation to provide adequate permanent strength in the High Courts. It was not disputed that the volume of work in almost every High Court has increased tremendously and heavy arrears have accumulated and are ever mounting but it is pointed out that whenever any Chief Justice of any High

Court had asked for an increase either in the permanent strength or in the strength of Additional Judges such request was always considered and responded to satisfactorily. On the question of liquidating arrears it has been pointed out that the problem is not merely related to the strength of either permanent or Additional Judges obtaining in High Court but depends on numerous other factors and several suggestions in the direction of finding a solution to that problem have been under active consideration of the Union Government. Counsel, however, strenuously disputed that in this area appertaining to executive function of the appointing authority and/or the Union Government this Court can grant relief by way of declaring the sitting Additional Judges to be deemed to have become permanent or by directing the President to make them permanent by appropriately increasing the permanent strength in the concerned High Courts as has been prayed for by the petitioners.

631. On a consideration of two relevant Articles, namely, 216 and 224 (1) it seems to me quite clear that Art. 216 unquestionably casts a mandatory obligation on the President (appointing authority) to provide adequate strength of permanent Judges in every High Court to cope with and dispose of its normal business and further to review periodically such permanent strength. The word "shall" and the further words "such other Judges as the President may from time to time deem it necessary to appoint" occurring in the Article are a clear pointer in that direction. Article 224 (1) as has been stated earlier, confers power on the President to appoint Additional Judges only to meet the situation arising from (a) temporary increase in the business of the High Court, or (b) arrears of work therein. In other words if the increase in the work or business of the High Court is not of a temporary character but a permanent increase every year resort will have to be made to Art. 216 and not to Art. 224 (1). Further, I would also like to observe that ordinarily it will not be proper to appoint an Additional Judge in a High Court while keeping a permanent post vacant or unfilled. But beyond making these observations which should guide the exercise of the power both under Art. 216 and Art. 224 (1) by the appointing authority I am satisfied that it will not be proper for this Court to give the directions or reliefs sought by the petitioners for the reasons which I shall presently indicate. In the first place it cannot be disputed that appointing Judges to a High Court either as permanent

Judges or Additional Judges is purely an executive function entrusted by the Constitution to the appointing authority and it will not be proper for this Court to usurp that function to itself or issue any directions in that behalf unless forced by glaringly compelling circumstances. Secondly, no direction or relief as sought is possible unless a full, complete and correct assessment about the requisite strengths of Permanent as well as Additional Judges of every High Court as on a particular date is made available to the Court. Thirdly such assessment about the requisite strengths for every High Court must depend on statistical data to be collected throwing light on 'normal business', 'temporary increase', and 'arrear of work' in each High Court after fixing the rate of disposal per Judge per year and defining what should be regarded as 'main cases', 'miscellaneous cases' or 'interlocutory cases' etc.; the norm in regard to such matters being a variable criterion requiring refixation depending on facts, circumstances and situation as and when they develop. It would, therefore, be extremely difficult for this Court to issue directions or grant reliefs of the nature sought by the petitioners. Moreover, relief by way of declaring the sitting Additional Judges to be deemed to have become permanent is sought on the footing that the President should be deemed or taken to have done what he ought to have done in the circumstances of the case but it will be difficult to accept the position that when the President has appointed a duly qualified person as an Additional Judge for two years he should be deemed to have appointed him as the Permanent Judge under Art. 216. Though no particular Article is not referred to in the warrant of appointment reference in the warrant to the fact that the person has been appointed "an Additional Judge" and the mentioning of the short-period therein will clearly negative any intention on the part of the President to appoint him a permanent Judge, notwithstanding the duty having arisen in the circumstances of the case to make a permanent appointment. For these reasons I do not think that this Court should issue the directions or reliefs sought by the petitioners in this behalf and it is hoped that the observations made above will guide the future course of action of the appointing authority.

632. The next question on which a great deal of argument was advanced at the Bar by Counsel for the petitioners is whether before effecting a transfer of a Judge from one High Court to another his 'consent' to

such transfer should be obtained or not, that is to say, whether the words "with his consent" should be read into Art. 222 (1) of the Constitution or because a transfer involves a 'fresh appointment'. Article 222 (1) runs thus:

"The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to another."

It must be observed that this question was considered and decided by this Court in Sankalchand Sheth's case ((1978) 1 SCR 423 : AIR 1977 SC 2328) (supra) in the negative by a majority of 3 : 2 but according to Counsel for the petitioners the majority view requires reconsideration and since these cases were heard by a larger Bench of seven Judges he addressed the Court elaborately on the point. Before dealing with the various aspects of the contention urged by the Counsel for the petitioners in this behalf it will be desirable to set-out in brief the background in which that question arose for consideration and in what manner the same was dealt with in that case both by the Gujarat High Court at the initial stage and by this Court in appeal. During the last Emergency a mass transfer of Permanent Judges from one High Court to another was attempted in the name of national integration and in May, 1976 it had been proposed to transfer 56 Judges of the various High Courts and as the first instalment 16 Judges, including Chief Justices, were in fact transferred. Justice Sankalchand Sheth, one of the transferees, was shifted from Gujarat High Court to the High Court of Andhra Pradesh. He filed a writ petition in the Gujarat High Court against the Union of India and Chief Justice A. N. Ray challenging the order of transfer as void and inoperative, inter alia on grounds of promissory estoppel, no effective consultation, and want of consent on his part which should be read into Art. 222 (1). The Union of India in its affidavit in reply supported the impugned order, inter alia, on the ground that the power of the President to transfer a Judge was absolute save and except that he had to consult the Chief Justice of India and as this had been done the transfer was valid; that there was no question of promissory estoppel and that no consent was required. No reasons were given for the transfer but the policy of transfer was justified on the ground of national integration. No affidavit in reply was filed by the Chief Justice of India who was the 2nd respondent to the petition. The matter was heard by a Full Bench of Gujarat High Court which unanimously re-

jected the petitioner's plea of promissory estoppel. By a majority, consisting of Mehta and D. A. Desai, JJ. the Full Bench rejected the petitioner's contention that 'consent' must be read into Art. 222 (1) and also the contention that as a transfer of a Judge involves fresh appointment such appointment could not be made without the Judge's consent. A. D. Desai, J. however, in a minority view, upheld the petitioner's contention as regards 'consent' on both the grounds, that is to say, he held that 'consent' must be read into Art. 222 (1) and that since a transfer of a Judge involves a fresh appointment it could only be done with the Judge's consent. However, all the three Judges unanimously held that the order of transfer was void as it had been made without the requisite consultation with the Chief Justice of India as contemplated by Art. 222 (1) on its true interpretation. Feeling aggrieved by this judgment of the Gujarat High Court the Union of India preferred an appeal to this Court under Certificate granted by the High Court, which was heard by a Constitution Bench of five Judges of this Court. On a statement being made by the learned Attorney-General for the Union of India to the effect that on the facts and circumstances of the case on record the then Government did not consider that there was any justification for transferring Justice Sheth from Gujarat High Court and proposed to transfer him back to that High Court, Counsel for Justice Sheth stated that his client was prepared to withdraw his writ petition with the leave of the Court. Though the appeal got settled as above to the satisfaction of Justice Sheth, the Constitution Bench desired to consider important issues arising in the case which related to the aspect of judicial independence involved in transfer of High Court Judges and after hearing arguments from Counsel on either side delivered its judgment expressing its views on the issues involved. It may be stated that the plea of promissory estoppel was not pressed and was not considered by this Court. On the aspect of 'consent' of the Judge concerned qua Article 222 (1) the Bench was divided in its opinion, the majority of the Court (Chandrachud, Krishna Iyer and Fazal Ali, JJ.) upon a consideration of the wording of the Article itself in the context of the scheme, other provisions and all relevant aspects held that as a matter of construction 'consent' could not be read into Art. 222 (1) and further that consent of the Judge who was transferred was not necessary as transfer involved no fresh appointment; the majority further held that the power to transfer could not be exercised by way of punishment but could be exercised only in

public interest and after consultation with the Chief Justice of India and that public interest and consultation with the Chief Justice of India were sufficient safeguards against the abuse of power under Art. 222 (1) and with these built-in-safeguards it was unnecessary to read 'consent' in that Article. Bhagwati, J. upheld both the contentions of the original petitioner, namely that as a matter of construction 'consent' should be read into Art. 222 (1) and secondly consent of the concerned Judge who was transferred was necessary as a transfer involved a fresh appointment. Untwalia, J. held that although consent could not be read into Art. 222 (1) as a matter of construction, such consent was necessary because the transfer of a Judge involved a fresh appointment.

633. It may be stated that before arriving at the aforesaid conclusions the Judges have expressed their considered views on several aspects concerning the power of transfer vested in the President under Article 222 (1) in the context of the concept of independence of judiciary to which a brief reference will be appropriate. In the first place all the Judges have emphasised the fact that the framers of our Constitution had taken the utmost pains to secure the independence of the Judges of the Supreme Court and the High Courts and in that behalf several provisions in the Constitution were referred to — a position which was not disputed by the Attorney-General for the Union of India. Further, all the Judges rejected the claim made on behalf of the Union Government that the power conferred on the President under Art. 222 (1) was absolute or that if he were to "consult" the Chief Justice of India there was an end of the matter and the order of transfer could not be questioned. The Court held that the power of transfer conferred on the President under Art. 222 (1) was subject to two built-in-safeguards: (i) that it must be exercised in public interest alone and not in order to punish a Judge or to make him toe the Government line and (ii) that it must be exercised after full, complete and effective consultation with the Chief Justice of India; in other words an order of transfer would become a justiciable issue and be liable to be quashed or set aside if (a) it was not in public interest or (b) it was passed without full, complete and effective consultation or (c) if the opinion or advice of the Chief Justice of India was ignored or brushed aside without cogent reasons. On the scope and efficacy of consultation contemplated under Art. 222 (1) two learned Judges Chandra-

chud, J. and Krishna Iyer, J. dealt with those aspects at some length and the other learned Judges have substantially expressed their agreement with their views on the point. The effect of the observations on the scope of consultation can be briefly stated thus: Consultation with the Chief Justice is obligatory and a condition precedent to the exercise of that power by the President; such consultation must be a real, substantial and effective consultation and in order that it should be so, all relevant facts in support of the proposed action of transfer must be placed before the Chief Justice and all his doubts and queries must be adequately answered; the consultation casts an obligation and a duty on the Chief Justice to elicit information not merely from the President and the Judge concerned but from such quarters as he thinks fit on all relevant aspects bearing on the desirability, advisability and necessity of the proposed transfer including factors personal to the Judge concerned such as his health, extreme family factors involving dislocation etc. so as to leave him no grounds to complain of arbitrariness or unfairplay. On the efficacy of the resultant advice tendered by the Chief Justice, Krishna Iyer, J. observed at p. 502 (of SCR): (at p. 2384 of AIR 1977 SC) of the Report thus:

"Secondly, although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power under Article 222 cannot be exercised whimsically or arbitrarily."

Again after quoting passage from the judgment in Chandramouleshwar's case (1970) 2 SCR 666: (AIR 1970 SC 370) and after referring to his own judgment in Samsher Singh's case (AIR 1974 SC 2192) (supra) in which he struck the same chord, he observed thus (at p. 2384):

"It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India." The learned Judge has further gone on to observe thus (at p. 2385):

"The dangers of arbitrary action or unsavoury exercise has been minimised by strait-jacketing of the power of transfer. Likewise, the high legal risk of invalidation of the Presidential order made in the teeth

of the Chief Justice's objection, runs in an added institutional protection. For, it is reasonable for the Court, before which a Judge's transfer is challenged, to take a skeptic view and treat it as suspect if the Chief Justice's advice has been ignored."

634. It may also be stated that according to Chandrachud, J. just as the safeguard of public interest kept transfers by way of punishment outside the purview of Art. 222 (1) the safeguard of effective consultation also indicated that policy transfers on a wholesale basis were also outside the scope of that Article. As regards the plea of national integration on the basis of which the transfers of 16 permanent Judges were sought to be justified, Chandrachud, J. expressed the view that it was a moot point whether it would be necessary to transfer Judges from one High Court to another in the interest of national integration but since it was a policy matter the Court was not concerned with it directly but suggested that considering the great inconvenience, hardship and possibly a slur which a transfer from one High Court to another High Court involves, the better view would be to leave the Judges untouched and take other measures to achieve that purpose, and further added that if at all on mature and objective appraisal of the situation it was still felt that there should be a fair sprinkling in the High Court judiciary of persons belonging to other States, that object could be more easily and effectively attained by making appointments of outsiders initially; but he categorically observed that the record of the case before the Court did not bear out the claim that any of the 16 High Court Judges had been transferred in order to further the cause of national integration and the true position was far from it. On the question of non-consensual transfers being within the Article Krishna Iyer, J. summed up the position thus (at p. 2385 of AIR 1977 SC):

"Logamachy may confuse, philosophy may illumine, teleology may shed interpretative sheen. We have considered the design, the source, the impact and the engineering aspects of Article 222. At the end of the journey we feel clearly that the power of non-consentaneous transfer does exist. Salutory safeguards to ensure judicial independence with concern for the All India character of the superior Courts in the context of the paramount need of national unity and integrity and mindful of the advantages of inter-State cross-fertilization and avoidance of provincial parochiousness were all in the calculations of the framers of the Constitution. A power is best felt by its aware presence and rare exercises."

635. Counsel for the petitioners principally urged two grounds before us which according to him necessitate a reconsideration of the majority view in Sankalchand Sheth's case (AIR 1977 SC 2328) about non-consensual transfers being within the purview of Art. 222 (1) which I propose to discuss one after the other. In the first place according to Counsel one of the principal reasons why the majority felt that there was no need to read the words "with his consent" into Art. 222 (1) was that the power to transfer thereunder could not be exercised by way of punishing a High Court Judge, which aspect was exclusively governed by Art. 218 read with Art. 124 (4) and (5), but had to be exercised only in public interest and after effective consultation with the Chief Justice of India and that public interest and such consultation were sufficient safeguards against the abuse of power under that Article but the safeguard of public interest so as to prevent the exercise of the power by way of punishment will be found to be illusory if the examples of transfers in public interest as have been given by Chandrachud, J. in his judgment are carefully scrutinised; for, according to Counsel the illustrative cases of transfers in public interest as given by the learned Judge on analysis will be found to involve misbehaviour mentioned in Art. 124 (4) and therefore in those illustrative cases though the transfers may appear to be in public interest in one sense they would be really by way of punishment and as such there is a contradiction at the heart of the judgment. Reliance in this behalf was placed on the following passage occurring in the judgment of Chandrachud, J. at p. 446 (of SCR): (at p. 2341 of AIR):

"Experience shows that there are cases, though fortunately they are few and far between, in which the exigencies of administration necessitate the transfer of a Judge from one High Court to another. The factious local atmosphere sometimes demands the drafting of a Judge or Chief Justice from another High Court and on the rarest occasions which can be counted on the fingers of a hand, it becomes necessary to withdraw a Judge from a circle of favourites and non-favourites. The voice of compassion is heard depending upon who articulates it. Though transfers in such cases are pre-eminently in public interest, it will be impossible to achieve that purpose if a Judge cannot be transferred without his consent. His

personal interest may lie in continuing in a Court where his private interest will be served best, whereas, public interest may require that his moorings ought to be severed to act as a reminder that "the place of justice is hallowed place."

It is pointed out that in the cases mentioned above, if the veil of the language of judicial courtesy was lifted, it will appear clear that the power of transfer that would be used would be to punish a Judge for misbehaviour, for which, as the judgment points out, action has to be taken only under Art. 218 read with Art. 124 (4) and (5). For instance, a transfer brought about by "the factious local atmosphere" put in plain language means that a Judge or Chief Justice is failing to administer justice impartially by favouring or disfavours a faction; similarly, where a transfer is effected in order "to withdraw a Judge from a circle of favourites and non-favourites" it would be a clear case of the Judge being guilty of gross misbehaviour in clear violation of his judicial oath. It is, therefore, urged that though in such cases, the transfers may apparently be in public interest they are really by way of punishment and as such the safeguard of public interest is of no avail. In fact, according to Counsel transfers of such Judges would run counter to public interest as these Judges should not be inflicted on other High Courts to vitiate the atmosphere there. Counsel further urged that if regard be had to the ordinary dictionary meaning of the word 'punishment' it is clear that punishment means: "pain, damage or loss inflicted" (without any retributive or judicial character) and in this sense every transfer of a High Court Judge from one High Court to another without his consent would amount to punishment since it inflicts on him personal injury, loss or damage in the sense of uprooting him from his moorings, his being required to have two establishments, suffering a dislocation in family affairs, etc., apart from the slur involved in being so transferred. It is further pointed out that the main safeguard is of public interest and the safeguard of effective consultation is secondary arising out of and in furtherance of the main safeguard and as such if the principal safeguard fails the secondary safeguard, which is in furtherance of it, would also fail. If, therefore, both the safeguards, the principal as well as the secondary, become illusory and if punishment is involved in every transfer without consent then one of the principal reasons suggested by the majority for not reading consent into the Article must disappear and there would be the need to read 'consent'

into the Article so as to obviate the element of punishment.

636. It is difficult to accept the aforesaid line of argument as necessitating the reconsideration of the majority view in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra) for the reasons which I shall presently indicate.

637. But before dealing with the contention I would like to observe that I am in agreement with Counsel for the petitioners that the illustrative cases given in the passage quoted above are in substance where Judges could be said to be guilty of misbehaviour falling under Art. 124 (4) and that their transfer to other High Courts, apart from being by way of punishment, would amount to doing great dis-service to public interest. In this context I would like to emphasize that the safeguard of public interest read into Art. 222 (1) is not intended for protecting any black-sheep in the judiciary but for protecting the numerous honest, conscientious hard-working Judges and I have always been of the confirmed view that no corrupt or dishonest Judge, and nor a Judge, who contrary to his oath of office, indulges in any kind of favouritism while discharging his duties — who could be likened to a rotten egg, should be tolerated in the judicial basket and he deserves to be dealt with under Art. 218 read with Art. 124 (4) and (5) but not by transferring him to another High Court, for, such a transfer would be contrary to public interest. That is why I would reiterate that a transfer by way of punishment for misbehaviour is clearly outside the purview of Article 222 (1) and similarly, any transfer with an oblique motive or for an oblique purpose, such as for not toeing the line of the Executive or for rendering decisions unpalatable to the Executive or for having for some reason or the other fallen from the grace of the Executive, would also be outside its purview and liable to be struck down, if oblique motive or purpose is established.

638. Turning to the contention, it must, in the first place be pointed out that the mere fact that the illustrative cases of transfers given by Chandrachud, J. in his judgment as being in public interest are in substance and reality cases of transfers by way of punishment does not mean that there can be no cases of transfers purely in public interest without any element of punishment being involved. Cases of transfers in public interest pure and simple without involving any element of punishment are conceivable

with the result that the safeguard of public interest dwelt at length in the judgment cannot be said to be illusory or otiose. When Art. 222, as inserted anew by Drafting Committee in the Revised Draft Constitution prepared on Nov. 3, 1949, was discussed in the Constituent Assembly on Nov. 16, 1949. Dr. B. R. Ambedkar indicated the purpose of inserting the provision in the Revised Draft and gave at least two instances of transfers which would purely be in public interest. This is what he said :

"The Drafting Committee felt that since all the High Courts so far as the appointment of Judges is concerned form now a Central subject it was desirable to treat all the Judges of the High Courts throughout India as forming one single cadre like the I. C. S. and that they should be liable to be transferred from one High Court to another. If such power was not reserved to the Centre the administration of justice might become a very difficult matter. It might be necessary that one Judge may be transferred from one High Court to another in order to strengthen the High Court elsewhere by importing better talent which may not be locally available. Secondly, it might be desirable to import a new Chief Justice to a High Court because it might be desirable to have a man unaffected by local politics or local jealousies. We thought, therefore, that the power to transfer should be placed in the hands of the Central Government.

We also took into account the fact that this power of transfer of Judges from one High Court to another may be abused. A Provincial Government might like to transfer a particular Judge from its High Court because that Judge had become very inconvenient to the Provincial Government by the particular attitude that he had taken with regard to certain judicial matters or that he had made a nuisance of himself by giving decisions which the Provincial Government did not like. We have taken care that in effecting these transfers no such considerations ought to prevail. Transfers ought to take place only on the ground of convenience of general administration. Consequently, we have introduced a provision that such transfers shall take place in consultation with the Chief Justice of India who can be trusted to advise the Government in a manner which is not affected by local or personal prejudices." (vide: Constituent Assembly Debates Vol. 11 p. 580).

It is thus clear that transfers under Art. 222 (1) have to be made only in public interest the ground being convenience of the general administration and the two instances given by Dr. Ambedkar (vide: the underlined portion in first para) would clearly fall within the ambit of this ground and such transfers would be purely in public interest without any element of punishment being involved therein. Yet another instance of a transfer which could be said to be purely in public interest would be where the same is effected for remedying unsatisfactory working conditions obtaining in a High Court for reasons beyond the control of the Judge concerned and for which he is not responsible in any manner; similarly, if a particular Judge by reason of his nature and temperament is unable to get along with the Chief Justice or any of his colleagues in a High Court his transfer would be in public interest and not by way of punishment in the sense in which that expression is to be understood in the context of the power to transfer under the Article. In such cases the power to transfer a Judge from one High Court to another without his consent would be appropriate and justified. Coming to the aspect of punishment put forward by Counsel for the petitioners it must be observed that when it is said that the power of transfer under Art. 222 (1) cannot be and should not be exercised by way of punishment what is intended to be conveyed is that the Judge concerned should not be transferred for misbehaviour falling under Art. 124 (4) or with oblique motive or for oblique purpose indicated above, which alone would be by way of punishment in the correct sense of that expression in the context of the power as contained in the Article and not that he should not be subjected to the kind of punishment which is inherent in the transfer. In my view, there is a clear distinction between the punishment involved in making the transfer for misbehaviour or out of oblique motive and the punishment which is inherent in the order of transfer in the sense of infliction of personal injury, loss or damage arising out of his moorings being severed, he being required to have two establishments or his suffering a dislocation in his family affairs, etc. Further, it is not as if this latter aspect of punishment which is inherent in an order of transfer is being totally ignored before passing the order of transfer, for, precisely these very aspects concerning the Judge proposed to be transferred are required to be taken into consideration and given due weight by the Chief Justice of India during the consultative process

which he is required to undertake for observing the second safeguard of full and effective consultation. It is, therefore, not possible to accept the contention that the two safeguards of public interest and effective consultation subject to which the power of transfer is to be exercised are either illusory or unreal and if they afford real protection to the Judge concerned against the abuse of power as suggested in the majority view there would be no need to read consent into Art. 222 (1).

639. The other ground which necessitates the reconsideration of the majority view, according to the Counsel for the petitioners, is that while rejecting the contention of the original petitioner that a transfer of a Judge from one High Court to another involves "a fresh appointment" and, therefore, his consent to the transfer would be necessary, both Chandrachud, J. and Krishna Iyer, J. have proceeded on the basis that the Government of India Act 1935 did not contain any provision for the transfer of a Judge and contrasted S. 220 (2), Proviso (c) of that Act with Art. 217 (1) (c) of the Constitution and took the view while enacting the latter provision the framers of the Constitution had made a distinction between 'appointment' and 'transfer' by using these two expressions in contradistinction with one another while providing that "the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or his being transferred by the President to another High Court within the territory of India" (see: Art. 217 (1) (c)). In other words, by contrasting the provision contained in S. 220 (2), Proviso (c) of the Government of India Act 1935 with Article 217 (1) (c) of the Constitution both the learned Judges took the view that the expression 'appointment' in the first part of the latter provision meant 'fresh appointment' while the expression 'transfer' used in the latter part did not mean fresh appointment and for taking such a view and that the two expressions had not been interchangeably used reliance was placed on the supposed absence of any provision for a transfer of a Judge in the Government of India Act, 1935. But Counsel has submitted that Government of India Act, 1935 did contain a provision for the transfer of a Judge and in that behalf reliance was placed upon the fact that Proviso (c) to S. 220 (2) was introduced with retrospective effect from April 1, 1937 by Sec. 2 of the India (Miscellaneous Provisions) Act, 1944 enacted by the British Parliament and it was pointed

out that though the actual Proviso (c) used the word 'appointment', the Marginal Note of S. 2 ran thus: "Judges to vacate office on transfer" and even during the discussion that took place on the Bill, Earl of Munster addressing the House of Lords and the Secretary of State for India Mr. Amery addressing the House of Commons while explaining the provision that was being inserted with retrospective effect stated that the said provision was being made providing for vacating the office of a Judge on his transfer to another High Court or to the Federal Court. In other words, what has been urged by counsel for the petitioners is that the Marginal Note to S. 2 of the India (Miscellaneous Provisions) Act, 1944 as well as the debates in the House of Lords and House of Commons clearly indicate that Proviso (c) which was added with retrospective effect to S. 220 (2) of the Government of India Act, 1935 really dealt with transfer of a High Court Judge when he was either appointed to another High Court or to the Federal Court that is to say, the expression 'appointment' has been used really to connote a transfer, suggesting an interchangeable use of the two expressions by the British Parliament and, therefore, the basis adopted by the learned Judges for drawing a distinction between 'appointment' and 'transfer' would disappear and, therefore, the conclusion arrived at would not be correct. Counsel fairly stated that Reports of British Parliamentary Proceedings compiled by Hansard were not available to him when Sankalchand Sheth's case (AIR 1977 SC 2328) (supra) was argued by him before this Court but have since been made available now and he was making his submission before us. There may be some force in the submission but in my view the submission is not adequate to necessitate a reconsideration of the majority view for two reasons. In the first place the assumed basis (which is now found to be wrong) for making the distinction between 'appointment' and 'transfer' in Art. 217 (1) (c) was merely used for refuting an argument of the original petitioner that since in S. 220 (2), Proviso (c) of the Government of India Act, 1935 appointments to Federal Court were clubbed with the appointments "to another High Court" and since the Judge's consent was necessary in both the cases the Court should read the corresponding provision of the Constitution in Art. 217 (1) (c) to mean that a process of the transfer of a Judge from one High Court to another involves a fresh appointment and in that connection it was said that the Government of India Act, 1935 did not contain any provision for a transfer of

a Judge. Secondly, apart from that reason, several other reasons have been indicated in the judgment why a transfer of a Judge does not involve a fresh appointment, such as non-issuance of a fresh warrant of appointment, no consultation as contemplated under Art. 217 taking place but only of the kind contemplated by Art. 222 (1), etc. The first reason does smack of formality but the second cannot be regarded as unsubstantial, for the nature of the two consultations is different and the fact that only that kind of consultation contemplated under Art. 222 (1) takes place emphasises the position that it is not a fresh appointment. In view of this position the second ground on which the reconsideration of the majority view is sought is of no avail.

640. Having regard to the aforesaid discussion, in my view, no case could be said to have been made out for reconsidering the decision of the majority in Sankalchand Sheth's case (supra), according to which non-consensual transfers are within the purview of Art. 222 (1). The other submissions in support of the contention that 'consent' should be read into that Article as a matter of construction or that consent of the concerned Judge is necessary as a transfer involves fresh appointment, which were reiterated in brief before us, have all been dealt with and answered by the learned Judges who pronounced the majority view in Sankalchand Sheth's case (supra). I am, therefore, in agreement with the majority view that non-consensual transfers are within the purview of Art. 222 (1).

641. Before parting with the decision in Sankalchand Sheth's case (1978-1 SCR 423 : AIR 1977 SC 2328) (supra) I would like to refer to certain observations made by Chandrachud, J. in connection with policy transfers, as I feel that they need some clarification and apropos those observations I would like to deal with and make my observations with regard to the two policies which appear to have been accepted in principle, though not fully formulated and formally declared by the Union Government in connection with the transfer of High Court Judges. In Sankalchand Sheth's case (supra) a view has been expressed by Chandrachud, J. that the safeguard of effective consultation suggests that policy transfers on wholesale basis are outside the purview of Art. 222 (1) and in this behalf the pertinent observations made by him are as follows:

"Thus, deliberation is the quintessence of consultation. That implies that each in-

individual case must be considered separately on the basis of its own facts. Policy transfers on a wholesale basis which leave no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution." (vide p. 454 (of SCR) : (at p. 2347 of AIR)). The last sentence in these observations is likely to create a wrong impression that if large number of transfers are made pursuant to a general policy these would be outside the purview of Art. 222 (1) of the Constitution but that is not what is really intended to be conveyed. The emphasis clearly is on wholesale transfers without considering each individual case on its own merits being outside the purview of Art. 222 (1) and more so when such wholesale or mass transfers are influenced by one-sided governmental considerations which would be outside the purview of the Article. In other words, it is clear that even if a transfer is effected pursuant to a general policy adopted by the Government the same must satisfy requirements of Art. 222 (1), that is to say, it must be in public interest and made after full and effective consultation. Ordinarily no general policy will be adopted unless it clearly serves some public interest and hence when a transfer is stated to be pursuant to such general policy it will be a difficult task for the Judge concerned to establish that it has been made for extraneous considerations but all the same a transfer based on a general policy will have to satisfy the requirements of Art. 222 (1) and if extraneous considerations are established the same will have to be struck down.

642. In this context I would like to refer to one aspect which was debated at the Bar, whether before any such general policy is adopted by the Government any consultation with the Chief Justice of India is necessary or questions of policy are exclusively to be decided by the Government? It is true that Art. 222 (1) merely refers to consultation of the Chief Justice of India on specific individual proposals for transfer as and when these are made and nothing is mentioned therein as regards consultation with him on points such as whether and if so what policy or policies should be adopted for effecting transfer of Judges from one High Court to another. It is also true that ordinarily policy matters would be decided upon by the Government. But propriety requires and perhaps smooth working thereof may necessitate consultation with the Chief Justice who is the highest administrative head of the country's Judiciary

especially as the policy or policies to be adopted are in relation to transfer of High Court Judges. But, as stated earlier, even after a general policy in the matter of transfers of High Court Judges is framed and adopted whenever a transfer is to be made in pursuance of such policy the proposal, before it culminates into an order, will have to satisfy the requirements of Art. 222 (1).

643. Coming to the two policies which the Union of India seems to have accepted in principle though not fully formulated by fixing the mechanism or modality of procedure, it may be stated that one such policy is to have one-third of the Puisne Judges in a High Court from outside the State — a policy which has been referred to in the Circular dated March 18, 1981 and the other is the policy to have Chief Justices of all the High Courts from outside — a policy that became the subject-matter of debate in *Shri K. B. N. Singh's* case. Without going into the merits or demerits of either of them and without going into the question whether there are proper or justifiable grounds for adopting either of them, that is to say, whether either of them serves any public interest or not, I would like to deal with a couple of aspects touching these policies which I feel it is necessary to clarify at this stage. It was suggested at one stage during the arguments that individual selective transfers are prone to be punitive in character but once a general policy is adopted there will be no scope for raising a contention that the transfer made in pursuance thereof is a punitive transfer. In fact, the argument went to the length of equating individual selective transfers with punitive transfers and policy transfers as being always above board. Such an extreme contention is difficult to accept. It will not be correct to say that a policy transfer, that is to say, a transfer based on or made in pursuance of a general policy would necessarily be non-punitive in character nor would it be correct to say that every selective transfer is necessarily punitive. Taking the policy of having one-third Puisne Judges in a High Court from outside, it will be clear that in the absence of any mechanism or modality of procedure giving guidelines as to how that one-third complement will be chosen for implementing it, such a policy would obviously be fraught with the danger or vice of discrimination; further, if a vacancy arises in that complement of that High Court then filling it up in the absence of proper guidelines would again be arbitrary. Similarly, even the policy of having the Chief Justices of all the High Courts from outside stands

the risk of being abused by the Executive in the absence of proper guidelines being provided in the matter of regulating which Chief Justice shall be posted in what particular High Court; this assumes significance in federal polity like ours. It is thus clear that a policy transfer without fixing the requisite mechanism or modality of procedure which ensures complete insulation against the Executive interference could be a punitive transfer in the sense of having been effected with some oblique motive. Even with proper mechanism or modality of procedure a transfer can be made for extraneous considerations and will be liable to be struck down if it is so established. But admittedly no mechanism or modality of procedure of any kind has been fixed or decided upon so far and, therefore, how can it be asserted that every policy transfer made in pursuance of either of these two policies would necessarily be above board? In other words, merely adopting a general policy, which is or may be broadly supportable for reasons of public interest, would not be sufficient to insulate transfers of High Court Judges against Executive interference unless adequate mechanism or modality of procedure in that behalf is also fixed and followed in practice. Conversely, a selective transfer in an appropriate case for strictly objective reasons and in public interest of general administration could be non-punitive. In other words, each case of transfer, whether based on a policy or a selective transfer, will have to be judged on the facts and circumstances of its own for deciding whether it is punitive in character in the sense of having been effected with some oblique motive or not.

644. Coming to the impugned Circular letter dated March 13, 1981 it is clear that the petitioners on the one hand and the contesting respondents on the other are at great variance with each other on the true nature, content and effect thereof; whereas according to the petitioners the Circular letter seeks to effect, in substance and reality, a mass transfer of sitting Additional Judges as also of the proposed appointees based on a policy decision unilaterally taken by the Law Minister and/or the Union Government and in that behalf seeks to obtain their consent under threat, coercion and duress, according to the contesting respondents no such transfers are intended at all but the Circular letter merely seeks to obtain consent from sitting Additional Judges for their appointment as Permanent Judges of other High Courts on the expiry of their initial term or extended term and consent from the proposed appointees for their initial or first appointment to High

Courts other than their home-State High Courts and the action proposed to be taken thereunder is for the purposes of Art. 217 of the Constitution and no threat, coercion or duress is involved in obtaining such consent. The impugned Circular letter has already been set out verbatim at the commencement of this judgment and a careful analysis of the contents thereof brings out the following seven aspects very clearly: In the first place the action proposed in para 2 thereof (of obtaining consent) is being taken with a view to implement a policy suggested by several bodies and forums "to have one-third of the Judges of a High Court, as far as possible, from outside the State in which that High Court is situated" for "furthering national integration and combating narrow parochial tendencies bred by caste, kinship and other local links and affiliation"; secondly, the letter records that as no start could somehow be made in the past in that direction the feeling was strong, growing and justified that some effective steps should be taken very early in that behalf; thirdly, para 2, which specifies the action to be taken, is in two parts; (i) in relation to sitting Additional Judges in all the States of India (except North-eastern States), it seeks to obtain their consent "to be appointed" as Permanent Judges to High Courts in States other than their own and (ii) in relation to the proposed appointees (either from the Bar or services) for initial appointment (either as Additional or Permanent Judges) it seeks to obtain their consent for being "appointed to" in any other High Court in the country (meaning other than their home-State High Court); fourthly, in this behalf it also seeks from them their choice by naming three High Courts in order of preference to which they would prefer to go; fifthly, the sitting Additional Judges and the proposed appointees from whom such consent and preferences are sought are to be told clearly that furnishing of the consent or the indication of a preference does not imply any commitment on the part of the Government either in regard to their appointment or to accommodation in accordance with the preferences given; sixthly, the letter strikes a note of urgency and requests the addressees thereof to initiate action very early and after obtaining the written consent and preferences from the persons concerned to forward the same to the Law Minister within a fortnight of the receipt of the letter; lastly, the Circular letter has been addressed by the Law Minister to the Governor of Punjab and all Chief Ministers of the States (except

North-eastern States) requesting them to obtain such consent and preferences from all Additional Judges as well as the proposed appointees, with merely a copy of the letter being sent to each of the Chief Justices of the concerned High Courts.

645. Counsel for the contesting respondents pointed out that when an Additional Judge is appointed under Art. 224 (1) his tenure is fixed by the warrant of his appointment and on the expiry of the period mentioned in the warrant he ceases to be a Judge of the High Court and he has no vested right either to be continued or to be made permanent and in either extending him for a further term as an Additional Judge or in making him permanent in the vacancy of a permanent post, a fresh appointment is involved by issuance of a fresh warrant under Art. 217 (1) and as such there is no question of any transfer being involved in such a case, while in the case of a proposed appointee (either from the Bar or services) when he is being initially appointed obviously there is no question of any transfer in his case either and it is from such persons that consent is being sought under para 2 of the Circular letter and the same is for 'a fresh appointment' in the case of the former and 'an initial appointment' in the case of the latter under Art. 217 (1) of the Constitution. Counsel further pointed out that para 2 of the Circular letter uses the expression "to be appointed" in the case of sitting Additional Judges as also in the case of proposed appointees and the word "transfer" has not been used at all and as such counsel contended that the Circular letter does not deal with the topic of transfer of Judges at all. Reliance in this behalf is also placed on the Law Minister's statement in Parliament made on 16th April, 1981 in response to the Calling Attention Motion by Shri Rashid Masood and other M. Ps. and the answers given by him to the questions put to him by several Members during the discussion that followed, wherein he clarified the position that consent from sitting Additional Judges was sought under the Circular letter for their fresh appointments under Art. 217 and not for their transfers and Art. 222 was not attracted at all. It was further contended that para 3 of the Circular letter merely clarified the legal and constitutional position that obtained even before the sending of the letter that there will be no commitment on the part of the Government either in regard to the appointment or in regard to the accommodation in accordance with preference given and that such clarification of the legal position was necessary lest a wrong impression was

created that furnishing of consent or indication of preference would imply such a commitment as also to avoid any legal arguments based on the theory of promissory estoppel and no threat, coercion or duress could be inferred from the contents of para 3 of the Circular letter. The question is whether this is the true nature and effect of the Circular letter.

646. It is true that according to its dictionary meaning the word 'transfer' means 'removal from one place or position to another', but it is not such physical shifting of a person from one place to another with which the Court is concerned in the case; the Court is concerned with the concept of transfer contemplated in Art. 222 (1) of the Constitution which says: "The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to another High Court". This clearly refers to the transfer of a person, who is already a Judge of a High Court. As stated earlier, para 2 of the Circular letter refers to two categories of persons, namely, sitting Additional Judges and the proposed appointees (either from the Bar or services) and it would be clear that in the case of the latter who are being initially appointed Judges, either as Additional or Permanent, to some High Court there would be no question of any transfer in their case as contemplated in Art. 222 (1). It is difficult to accept the petitioners contention that in regard to these proposed appointees recommended for their initial appointment the Circular letter seeks to obtain their consent for their transfer, though in being appointed to other High Courts they would within the dictionary meaning of that expression be shifted and perhaps uprooted from their usual place of work, namely, their home-State High Courts. The question really is whether in the case of the former category, namely, sitting Additional Judges whose consent is sought for 'being appointed' to High Courts other than their own High Courts a transfer is involved and whether the Circular letter in substance and reality effects their transfers as contended by the petitioners. In the earlier part of this judgment it has been pointed out that a valid classification subsists between proposed appointees who are being recommended for their initial appointments and sitting Additional Judges whose initial or extended term is about to expire. In the case of the former they have no right to be considered for the post of a High Court Judge nor have they, even after being recommended on completion of the consultative process by the three constitutional functionaries men-

tioned in Art. 217 (1), any right to be appointed and, therefore, have no remedy against their non-appointment but in the case of the latter the position is entirely different. It is true that under Art. 224 (1) read with Art. 217 (1) the tenure of an Additional Judge fixed by his warrant of appointment comes to an end at the expiry of the period mentioned in the warrant and he ceases to be a Judge of the High Court, but for reasons already discussed in the earlier part of this judgment he has a legitimate expectancy and an enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority but to be considered for being continued as Additional Judge or made permanent in that High Court. The convention or practice and the undertaking taken from the member of the Bar at the time of his initial appointment make it clear that he has such enforceable right to be considered for being continued or made permanent in that very High Court. That is how Art. 224 (1) has all along been understood and worked. He is not in the same position as a proposed candidate for initial appointment. In substance and reality in extending his term or making him permanent in that High Court no "fresh appointment" is involved, except for the formality of issuing a fresh warrant of appointment and taking a fresh oath. If in the case of such sitting Additional Judge his consent is sought for being 'appointed' to another High Court it is virtually and in substance seeking his consent for his transfer from his own High Court to another High Court falling within the concept of transfer contemplated in Art. 222 (1). It is true that para 2 of the Circular letter uses the expression "to be appointed" but it is not the nomenclature or label used that would be decisive of the matter but one has to look to the substance and looked at the Circular from this angle it is clear that in so far as sitting Additional Judges are concerned their consent is sought for transferring them from their own High Court to other High Courts and the attempt in substance is to transfer them under the guise of making fresh appointment on the expiry of their initial or extended term. Further, considered in the light of the historical background, there appears to be some force in the petitioners' contention that the Circular letter is another attempt on the part of the Union Government this time to effect mass transfers of sitting Additional Judges, the previous attempt to effect mass transfers of Permanent Judges during the last Emergency having failed. (One such transfer was successfully challenged and all the transferred Judges, except those who

were unwilling, were repatriated to their own High Courts.) This Court in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra) has laid down the safeguard of public interest and the stringent condition of full and effective consultation with the Chief Justice of India which are required to be observed before the power of transfer under Art. 222 (1) can be exercised and the Circular letter appears to be an attempt to circumvent the safeguard and the stringent condition by resorting to transfers of sitting Additional Judges under the garb of making fresh appointments on the expiry of their initial or extended term.

647. Reliance on the Law Minister's statement made in Parliament on 16th April, 1981 clarifying the position that consent from sitting Additional Judges is being sought under the Circular letter for their fresh 'appointment' and not for their transfers and the Art. 222 was not attracted at all will be of no avail in view of the conclusion reached above that it is not a case of fresh appointment but in substance their consent is being sought for their transfer. This apart, the fact that the Circular letter was intended to effect transfers of sitting Additional Judges becomes amply clear from what transpired during the debate that followed the Calling Attention Motion of Shri Rashid Masood and other M. Ps. and particularly from admissions made by the Law Minister himself under stress of questions in the nature of cross-examination put to him by Members of Parliament. It will be pertinent to mention that the subject matter of the Calling Attention Motion moved by Shri Rashid Masood and other Members as a matter of urgent public importance is captioned in the relevant proceedings of Lok Sabha Debates as "Circular letter to Chief Ministers of States about the consent from Additional Judges for transfer to other High Courts". This clearly suggests that even Members of Parliament regarded the Circular letter as dealing with the topic of obtaining consent from sitting Additional Judges for their transfer from their own High Courts to other High Courts but apart from what several Members of Parliament felt about it, even the Law Minister, while asserting that the Circular letter dealt with the subject of fresh appointments of sitting Additional Judges on the expiry of their initial term or extended term and not their transfer and the consent thereunder was merely sought for making their fresh appointments under Art. 217 (1), explained the genesis and reasons which prompted him to issue the Circular and in that behalf stated that the various complaints were pouring in

about prejudiced attitudes bred by kinship and other local links and affiliations etc., that political links had also been mentioned in certain cases and various State authorities had expressed their reservations about the continuance of some Additional Judges and it was felt that in some cases of this kind if Additional Judges could be made permanent in other High Courts there could be no valid objections to such appointments as their service would then be outside the local setting in which they had the roots. Such a statement on the part of the Law Minister by way of explaining the genesis and reasons for the issuance of the Circular letter undoubtedly lends considerable force and support to the petitioners' contention that 'furthering national integration and combating parochial trends' is merely a garb used and the real intention is to transfer such sitting Additional Judges who have become unpalatable to the State authorities because of alleged political links obviously not to their liking; or whom the concerned State authorities have come to regard as black-sheep from their point of view. At one stage during the debate when the facts, that the Law Commission in its 80th Report had made a distinction between initial appointees and the sitting Additional Judges in the context of their recommendation of having one third of the Judges of the High Court from outside and that it had suggested that their recommendation should be implemented in the case of the former, were brought to the notice of Law Minister this is how the Law Minister reacted :

"May be that according to him (Hon'ble Member who brought the aforesaid facts to his notice) the Additional Judges would not come within the purview of the initial appointment. Then I would put it in a different form. I have given the reason as to why we have to ask for the Additional Judges (consent) also. Things being what they are, I would like to ask the Hon'ble Member, when complaints come where it is not possible to convincingly prove, then, what should be done with such Additional Judges? Are they to be dropped? I take a safer approach, namely, if they are appointed elsewhere, then this allegation which persists could be avoided."

This statement clearly suggests that in regard to sitting Additional Judges against whom complaints are received but it is not possible to convincingly prove them the Law Minister clearly contemplated the shifting of such Judges elsewhere so as to avoid allegations

being persisted against them and presumably for doing so an opportunity presents itself when their term is about to expire. Then follow two important sets of question and answer which put the matter beyond doubt that even the Law Minister admitted in terms that what is being done under the Circular is a transfer of Additional Judges. The following are the questions and answers :

SHRI SATISH AGGARWAL : "Excuse me, Mr. Law Minister. You have stated a particular situation, where there is evidence but not sufficient, what should be done : a transfer can be made. It is only applicable in cases which are ad hoc. But what about cases when complaints are there with regard to those who are permanent Judges? That does not solve the problem. You are applying your stick only to those who have finished a two or three years period."

SHRI P. SHIV SHANKAR : " I have never said 'ad hoc'. Where the additional Judges are there, each complaint will have to be considered on its own merit and a decision could be either to drop a person based on evidence or to see if he could be transferred."

x x x x x

SHRI BAPUSAHEB PARULEKAR : "You have stated : 'I may add that it is not the intention of the Government to appoint all Additional Judges from outside the State'. What is the criteria? You can victimise any person if this is the policy of the Government. Is it not?"

SHRI P. SHIV SHANKAR : "I can assure my friend, it is not a question of victimisation. As I said each case will be considered on its own merit. It is not the intention that everyone should be transferred. That is all. (Interruptions). Perhaps he is going back to the same ground on the question of sporadic transfer of Chief Justice and Judges and so on. The position is very simple. Supposing there is any material bearing on a particular case, that would be considered on its own merit. It is not the intention that everyone should be transferred. I think I have covered all the points raised."

It is significant that though in the first set of question and answer both the Hon'ble Member and the Law Minister have used the expression 'transfer' in the context of what is being done to the Additional Judges on receipt of complaints against them and evidence in respect thereof is not sufficient, in the second set the Hon'ble Member specifically used the expression 'to appoint' in the context of Additional Judges intended to be

brought from outside but even then the Law Minister in his reply stated that "it is not the intention that everyone should be transferred". This shows that under the stress of questions truth has come out that the Circular is intended to effect transfers of sitting Additional Judges from their own High Court to another High Court in respect of whom complaints have been received but evidence in support is insufficient and that will be done at the time of expiry of their initial or extended term. The reference to other portions of the Law Minister's statement and answers given by him on the Floor of the House has been made with a view to ascertain the real intention behind the issuance of this Circular letter because it is the Law Minister alone, and not a Deputy Secretary in his department, who can depose about it and the Law Minister in spite of being impleaded *eo nomine* a party to the proceedings has chosen not to file his own affidavit in the case.

648. On the question whether the consent sought thereunder from the sitting Additional Judges is induced by threat, coercion or duress or not, regard will have to be had to four or five aspects about the Circular letter that emerge clearly on the record. In the first place instead of seeking their consent through the Chief Justices of the concerned High Courts, which would have been in keeping with decorum and dignity of the high office held by them, the Circular letter in utter impropriety requests the Executive Head (the Governor of Punjab and all Chief Ministers of the States) "to obtain from all the Additional Judges ... their consent to be appointed as Permanent Judges in any other High Court" together with their order of preferences, which smacks of demonstrating the power of the Executive over the Judiciary. Secondly, the tenor of the letters in executive arrogance presumes that the consent sought will be forthcoming from all the sitting Additional Judges inasmuch as the possibility of consent not forthcoming from some or any of them has not been considered or dealt with in the letter. Thirdly, para 3 of the letter, by necessary implication, contains a threat to the Additional Judges that they would not be continued as Additional Judges or confirmed as Permanent Judges and may be dropped unless they furnish their consent inasmuch as without more it merely states that furnishing of consent as well as indication of the preferences does not imply any commitment on the part of the Government either in regard to their appointment or accommodation in accordance with the preferences given; such misgiving which naturally arises from this kind of a statement

ought to have been removed by clearly indicating the consequences of non-furnishing of the consent. It ought to have been stated clearly and categorically that non-furnishing of the consent will not be held against any Additional Judge and will not come in his way of being continued or being made permanent and further that furnishing of consent by an Additional Judge will not enable him to steal a march over those who have either not furnished or refused to furnish their consent in the matter of making them permanent. Both these things were vital and ought to have been stated in order to remove all misgivings and omission to do so clearly leads to the inference that the statement in para 3 of the letter, by implication, contains a threat to the Additional Judge of the type indicated above. The explanation given on behalf of the contesting respondents that para 3 was by way of merely clarifying the legal and constitutional position obtaining in the matter even before the sending of the Circular letter, namely, that there was no commitment on the part of the Government to appoint every Additional Judge as a Permanent Judge and that it was necessary to make the legal and constitutional position clear lest a different impression was created as also to avoid any legal argument based on the theory of promissory estoppel is hardly convincing; for, if para 3 was inserted only with a view to clarify the legal and constitutional position it was all the more necessary to state the consequences of non-furnishing of the consent in the manner indicated above to remove all misgivings. Fourthly, the Circular letter is obviously intended to have adverse impact on the sitting Additional Judges' right on the expiry of their initial term or extended term, — it being merely a right to be considered for being continued or made permanent. Fifthly, the timing of the Circular is significant in considering its effect and impact on the sitting Additional Judges; the Circular letter has been issued by the Law Minister on March 18, 1981 at about the time when politicians and persons occupying high positions had been indulging in a campaign of denigrating the higher Judiciary, treating every Court decision adverse to Government as a deliberate and motivated attack on the Executive. A Chief Minister of a prominent State had described it as the "Dictatorship of the Court" while a Cabinet Minister in the Central Government had bracketed the Judiciary with the opposition parties and had been complaining that they were not co-operating with the Government; the highest Executive Head at the Centre had prior to March 18, 1981 publicly stated: "The former

Janta Regime had made a lot of appointments in the Judiciary on political basis..... that a dilemma faced by the ruling party was whether these persons appointed on political basis in Judicial Services should be allowed to continue and if they are continued how can we expect justice from them? What is their credibility?" It is true that in this behalf the petitioners have relied upon extracts from Newspaper reports of such statements and utterances but when these have been made part of their pleadings by the petitioners (vide para 2 of Shri Tarkunde's petition and para 43 (O) of Shri Gupta's petition) a duty is cast on the contesting respondents to deal with the same in reply and from the counter-affidavits filed in reply by Shri Kankan on their behalf it will appear clear that there is no denial that such statements and utterances were made by the persons concerned. In reply to para 2 of Shri Tarkunde's petition, Shri Kankan has merely averred that "the views stated to have been expressed by the Chief Minister of a State and a Cabinet Minister would have been their personal views and do not and could not have conveyed the policy of the Government", while there is no specific reply to para 43 (O) of Shri Gupta's petition at all but an omnibus general submission in regard to para 43 (H) to para 43 (Q) has been made by Shri Kankan by stating thus: "with regard to paras 43 (H) to 43 (Q) I submit that these paras are full of surmises and conjectures". From this state of pleadings it will appear clear that there is no denial that the concerned Chief Minister and the Cabinet Minister and the highest Executive Head at the Centre had made the several statements and utterances attributed to them as quoted from the extracts of the Newspaper reports and at the highest Shri Kankan desired to suggest that these statements and utterances were their personal views and not of the Government. It cannot be disputed that such statements and utterances from persons occupying high positions in the Government help create an atmosphere of fear-psychosis for the not-so-sterner stuff in the judiciary; secondly, even taking the assertion of Shri Kankan that these statements and utterances represented their personal views at its face value (which it is difficult to do) one cannot be sure when these personal views imperceptibly or unobtrusively become the views of the Government and form the basis of a Government policy, as has happened here, for, the Circular letter does reflect partly some of the views contained in these statements and utterances. The question is what impact the Circular letter will create on the minds of the sitting

Additional Judges whose terms would be coming to an end on the expiry of the periods specified in their warrants in the light of the atmosphere of fear-psychosis created by such statements and utterances made by persons occupying high positions in the Government? The answer is too obvious to be stated. Reading it as a whole and in the light of the aspects discussed above, the Circular letter clearly exudes an odor of executive dominance and arrogance intended to have coercive effect on the minds of the sitting Additional Judges by implying a threat to them that if they do not furnish their consent to be shifted elsewhere they will not be continued nor made permanent but would be dropped. The Circular letter, therefore, which seeks to obtain the consent of the sitting Additional Judges to their transfers from their own High Court to another High Court induced by threat, coercion or duress clearly amounts to Executive interference with the Judiciary and impinges on its independence and as such is illegal, unconstitutional and void and the consent if any either already obtained thereunder or that may be obtained, would be equally void.

649. Once the conclusion is reached that the Circular letter seeks to effect in substance and reality transfers of sitting Additional Judges from their own High Courts to other High Courts on the expiry of their initial term or extended term and the consent sought from them thereunder is for such transfer and not for their 'fresh appointment' as Permanent Judges) does not involve a challenge to the same as being violative of Art. 222 (1) of the Constitution becomes quite apparent. It was sought to be urged at one stage that if on true construction of Art. 224 (1) the sitting Additional Judges during their tenure are outside the pale of transfer under Art. 222 (1) then the question of the impugned Circular being violative of Art. 222 (1) does not arise. It is difficult to accept this contention because even assuming that Art. 224 (1) is construed in the manner suggested the Circular aims at transferring the sitting Additional Judges not during their tenure but just on the expiry of their term and if their continuance as permanent Judges (and not as Additional Judges because the Circular talks of appointing them as permanent Judges of other High Courts, fresh appointment as held above, the question of challenge to the Circular as being violative of Art. 222 (1) very much survives. In *Sankalchand Sheth's case* (1978-1 SCR 423 : AIR 1977 SC 2328) (supra) this Court took the view that full and effective consulta-

tion by the President with the Chief Justice of India under Art. 222 (1) of the Constitution implies that each individual case must be considered separately on the basis of its own facts and "policy transfers on a wholesale basis which leave no scope for considering each particular case and which are influenced by one sided Governmental considerations are outside the contemplation of our Constitution" (vide observations of Chandrachud, J. as he then was, at p. 454 (of SCR) : (at pp. 2347, 2348 of AIR) of the Report). The transfers of sitting Additional Judges contemplated by the Circular (for which their consent is sought thereunder) are based on the policy to have one third of the Judges of a High Court from outside without each individual case being considered on its own facts and merits and therefore such transfers based on policy accepted or adopted by the Law Minister and/or the Union Government would be outside the purview of Art. 222 (1). In any case, — and this is important — it cannot be disputed that by procuring the consent of the sitting Additional Judges for their transfers from their own High Court to another before undertaking any consultation with the Chief Justice of India clearly reduces the full and effective consultation contemplated under that Article to a mere formality, if not to a mockery, for, it is obvious that such consultation and the advice which Chief Justice will be tendering following upon such consultation will not be of any use or avail as the consent to such transfer shall have already been procured from the concerned Additional Judges. The consultation and the resultant advice of the Chief Justice will be robbed of its real efficacy in face of such pre-obtained consent. The Circular which has such effect is clearly violative of Art. 222 (1); in fact it will have to be regarded as having been issued mala fide for a collateral purpose namely to by-pass Art. 222 (1) and confront the Chief Justice of India with fait accompli when the proposal to transfer such Additional Judge would be forwarded to him and as such the same is illegal and unconstitutional and deserves to be struck down.

650. The next challenge to the impugned Circular letter based on Art. 14 also seems to be well founded and the same is irrespective of whether the Circular letter deals with transfers of Additional Judges or their fresh appointments and the initial appointments of the proposed appointees. Briefly stated the contention is that in regard to the sitting Additional Judges it makes an invidious distinction between those who would be furnishing their consent and those who would not be doing so or would be refusing to furnish

their consent inasmuch as the former would be at an advantage while the latter will suffer a disadvantage and even within the class of those who would be furnishing their consent it gives to the Government unfettered and unguided power or discretion to pick and choose, that is, to select some for being shifted to High Courts other than their own while retain and appoint others in their own High Courts which power can be exercised either by way of punishment or by way of favouritism. It is further pointed out that the Circular letter will encourage an ignominious race amongst self-seeking Judges to look to the Government for appointment as Permanent Judges out of turn or select places which are centres of power. Counsel further contended that even in regard to the proposed appointees (either from the Bar or Services) recommended for their initial appointments, though no question whatsoever may arise in case of non-appointment, discrimination is bound to result in the case of those who are appointed and who have furnished their consent inasmuch as from amongst such consenting appointees the Government has unfettered and unguided power to select some for being appointed to other High Courts and to appoint others to their home-State High Courts. Thus discrimination is writ large on the face of the Circular letter and the seeds of destruction of judicial independence are inherent therein.

651. Dealing with the case of sitting Additional Judges first, it cannot be disputed that the Circular letter intends to confer advantage to those who would be furnishing their consent and make those who would not be giving their consent or would be refusing to give their consent suffer a disadvantage. This position emerges very clearly from what has been stated by Shri Kankan in para 6 of his counter-affidavit filed in reply to Shri Iqbal Chagla's petition. This is what he has categorically asserted: "It is not, however, the intention of the letter that a permanent or further appointment will be denied to a Judge only on the ground that he has not given his consent; in fact, a further appointment to an Additional Judge has recently been given even though he had not given his consent By no stretch of construction or from the facts and circumstances existing can it be sought to be inferred that failure to give consent would necessarily involve an Additional Judge ceasing to be a Judge." The first sentence clearly means that the ground that an Additional Judge has not given his consent could along with other grounds be the basis of denying to him

a permanent or a further appointment and this is put beyond doubt by the last sentence where it is stated that failure to give consent would not necessarily involve the dropping of an Additional Judge which means failure to give consent may involve the dropping of such Additional Judge. In other words, there is no doubt that failure to furnish consent under the Circular letter is bound to put the concerned Additional Judge to disadvantage of not being extended or not being made permanent or of being dropped altogether and correspondingly it confers some advantage on those who would be furnishing their consent. That the Circular letter was not a preliminary step in the direction of collecting data and information from sitting Additional Judges which could be placed before the Chief Justice of India when the consultation process under Art. 217 (1) would be gone into, as has been now stated by Shri Kankan for the contesting respondents, but was and is intended to be acted upon forthwith by conferring an advantage on those who would be furnishing their consent is clearly borne out by the stand taken by Shri Kankan on behalf of the contesting respondents at the stage of the appeal preferred by them against the interim relief granted by the learned single Judge in Shri Iqbal Chagla's writ petition; by the interim relief granted by the learned single Judge the contesting respondents were restrained by an injunction from implementing the Circular letter or from acting in any manner upon the consent if obtained from any person following on or arising from the said Circular letter and while challenging this order of interim relief as being erroneous and ought not to have been made at least on the ground of balance of convenience, Shri Kankan in para 3 of his affidavit dt. 23rd Apr., 1981 (filed in the Bombay High Court) asserted that the balance of convenience lay in refusing to grant an injunction rather than to grant one because it was claimed that persons who would be willing to give their consent to be appointed as Judges in High Courts other than their own should not be deprived of the chance of such appointment merely by reason of the petitioners' having moved the Hon'ble Court questioning the validity of the Circular and that it would be against the public interest to delay or hold up appointment of persons as Judges to other High Courts by reason of pendency of the writ petition. It is thus clear that the contesting respondents were and are interested in forthwith acting upon the consent that would be obtained from the sitting Additional Judges under the Circular letter by giving them a chance in the matter of their appointments as Permanent

Judges in preference to those who would not be furnishing their consent. The Circular letter thus makes invidious discrimination against those sitting Additional Judges who would not be furnishing their consent as they will suffer a disadvantage, while those who would be furnishing their consent will be at an advantage.

652. Secondly, the Circular letter seems to confer unfettered and unguided power on the Government to indulge in picking and choosing even within the class of those Additional Judges who shall have furnished their consent in the sense it will be up to the Government to select some from that class for being shifted to High Courts other than their own and to retain and appoint others in their own High Courts. In this behalf reliance has been placed upon the statement made by the Law Minister on the floor of the Parliament on April 16, 1981 to the effect that it is not the intention of the Government to appoint all Additional Judges to outside High Courts. This statement clearly suggests that the Government will be indulging in picking and choosing while appointing some Additional Judges to outside High Courts and retaining and appointing others in their own High Courts and in the absence of any guidelines the power can be exercised arbitrarily, either by way of punishment or by way of favouritism as pointed out by the petitioners.

653. As regards the proposed appointees (either from the Bar or service) recommended for their initial appointments, there will be no question of discrimination in the case of those who have not been appointed at all but in the case of consenting appointees discrimination is bound to arise because of unfettered and unguided power or discretion vesting in the Government to pick and choose from amongst the consenting appointees, for, in their case also it will be up to the Government to decide and select some for being appointed to High Court other than their home-State High Courts and appoint the others in their home-State High Courts. Having regard to the aforesaid position it is abundantly clear that invidious discrimination is writ large on the face of the Circular letter and the same is clearly violative of Art. 14 and as such unconstitutional and liable to be struck down.

654. In the result the impugned Circular letter, in my view, deserves to be struck down for the aforesaid three reasons.

655. Coming to the specific individual case of Shri S. N. Kumar (respondent No. 3 in Transfer Case No. 20 of 1981) it may be

stated that the gravamen of the challenge is directed against the President's action in dropping him outright on the expiry of his extended short term on June 6, 1981, i.e. during the pendency of the case before this Court and the action is challenged by the petitioners as well as by Shri S. N. Kumar as being violative of Art. 224 (1) as also Art. 217 (1) and hence illegal, unconstitutional and void. Principally, it is contended that the decision of the appointing authority not to continue but to drop him is vitiated by legal mala fides inasmuch as assuming that the case is governed by Art. 217 (1) there has been no full or effective consultation between the President and the other constitutional functionaries particularly the Chief Justice of India as contemplated by that Article and therefore the said decision must be regarded as void and non est. The contesting respondents have joined issue by asserting that there was full and effective consultation as required by Art. 217 (1).

656. At the outset it may be stated that the petitioners had pleaded (vide para 11 (w) of Shri Tarkunde's petition) that the Chief Justice of Delhi High Court and the Chief Justice of India had recommended extension to three Judges (including Shri S. N. Kumar) for the full period of two years but there was a half-hearted and vague denial thereof by Shri Kankan in his Counter-Affidavit dated July 22, 1981 who merely stated that the aforesaid statement that both the Chief Justices had recommended extension to the concerned three Judges for two years was untrue and incorrect, without specifying whether, if not both, any one had done so and if so who had recommended it, and further if the recommendation was not for all the three Judges it was for whom and if not for two years for what period? A vague denial like this meant no denial at all. Shri S. N. Kumar in his Counter-Affidavit dated July 17, 1981 had also asserted that the Chief Justice of Delhi High Court had told him and a number of his colleagues that he (Chief Justice) had recommended the extension to the concerned three Judges (including himself), to which there was a reply from Shri T. N. Chaturvedi, Secretary (Justice) Government of India, in his Affidavit dated Aug. 25, 1981 to the effect that in the nature of things the Chief Justice of Delhi High Court could not have told Shri S. N. Kumar that he had made a recommendation in his (Shri S. N. Kumar's) favour and Shri Chaturvedi further averred categorically: "I state that as a matter of fact there was real and effective consultation with the two Chief Jus-

tices and the President preferred the views of the Chief Justice of Delhi High Court which were not favourable for a further appointment of S. N. Kumar". By implication it became obvious that there was complete divergence between the two Chief Justices in their views on the point of Shri S. N. Kumar's continuance and that the Chief Justice of India had made a recommendation favourable to Shri S. N. Kumar. In such state of pleadings a question naturally arose whether this divergence has arisen on a consideration of the same or identical material by both the Chief Justices or otherwise? Meanwhile, a Newspaper Report appearing in the issue of Hindustan Times of July 10, 1981 under the caption "Govt. overruled Chandrachud's views", not merely stated that, though the Chief Justice of India had dismissed the allegations against Shri S. N. Kumar as "unsubstantiated" and had recommended his confirmation, the Government had placed greater reliance on the views of the Chief Justice of Delhi High Court but went further and asserted, the reporter claiming to have had a look into the files, that certain correspondence between the Chief Justice of Delhi High Court and Union Law Minister had been marked for "Law Minister's eyes" suggesting thereby that the same was meant for being kept away from the Chief Justice of India. On the aforesaid Newspaper Report being made a part of his pleading by Shri Tarkunde by annexing a copy thereof to his Rejoinder Affidavit dated August 3, 1981, Counsel for the petitioners repeatedly sought information from the learned Attorney General appearing for the Union of India on the point whether any part of the correspondence between the Chief Justice of Delhi High Court and the Union Law Minister had been kept away from the Chief Justice of India as, if that were true, it would directly vitiate the consultation contemplated by Art. 217 (1) but instead of making any statement furnishing the correct information on the point the learned Attorney General claimed privilege even in regard to such information. It was in these circumstances that this Court on Oct. 16, 1981 directed disclosure of relevant documents contained in the file relating to Shri S. N. Kumar concerning his short-term extension and eventual non-continuance for the purpose of ascertaining whether there has or has not been full, complete and effective consultation between the appointing authority on the one hand and the constitutional functionaries on the other, particularly the Chief Justice of India. On the question of privilege claimed by the contesting re-

spondents in respect of the relevant files and documents my learned brother Bhagwati has dealt with and discussed the issue elaborately and exhaustively after referring to all the relevant authorities cited at the Bar and since I am agreeing with his view on the point I am not dilating on it at all. I adopt all that he has stated on the issue in his judgment. The position needs to be made perfectly clear that the disclosure has been ordered by the Court only for the limited purpose mentioned above and not for deciding upon the merits or demerits of the grounds on which each of the Chief Justices made his own recommendation nor is the Court concerned with the truth or otherwise of the facts or materials on the basis of which each one acted. After the disclosure was made Counsel for Shri S. N. Kumar was understandably anxious to address the Court on the merits and demerits of the grounds which prompted the two Chief Justices to make their divergent recommendations and desired to vindicate his client's honour and fair name before the Bar of this Court but we prevented him from doing so by categorically telling him that it was not the function of this Court to go into the merits or demerits of the grounds on truth or falsity of the material and that the disclosure had a limited purpose and if upon the scrutiny of the disclosed material the Court came to the conclusion that there was no full or effective consultation with the Chief Justice of India the appointing authority's decision dropping his client may have to be quashed and the matter may have to be sent back to the appointing authority for fresh consideration and passing appropriate orders after undertaking the requisite consultation under Art. 217 (1) again and in that process fair-play will require that his client gets full opportunity to have his say in vindication of his honour and fair name. The main question, therefore, that arises for our consideration is whether it could be said on a perusal of disclosed documents that full and effective consultation as contemplated by Art. 217 (1) between the President on the one hand and the Constitutional functionaries on the other, particularly the Chief Justice of India, had preceded the impugned action of dropping Shri S. N. Kumar outright. It is clear that if the answer is in the affirmative the impugned action will have to be upheld, but if it is in the negative the same will have to be regarded as vitiated by legal mala fides and will have to be struck down.

657. Having regard to the decisions of this Court in Chandramouleshwar Prasad's

case (AIR 1970 SC 370) (supra) and Sankalchand Sheth's case (1978-1 SCR 423 : AIR 1977 SC 2328) (supra) it can now be regarded as well settled that consultation implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or at least a satisfactory solution and that in order that the two minds may be able to confer and produce a mutual impact it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision. It is equally well settled that consultation or deliberation is not complete or effective before the parties thereto make their respective points of views known to the other or others and discuss and examine the relative merits of their views. In the latter decision Chandrachud, J. (as he then was) has (at p. 453 of SCR) : (at p. 2347 of AIR) of the Report observed :

"It must therefore follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which, he can offer to the President the benefit of his considered opinion The fulfilment by the President of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other."

Again, Krishna Iyer, J. (for himself, Bhagwati and Fazal Ali, JJ.) has (at p. 495 of SCR) : (at p. 2379 of AIR) of the Report observed thus :

"We consult a physician or a lawyer, an engineer or an architect and thereby we mean not casual but serious, deliberate seeking of informed advice, competent guidance and considered opinion. Necessarily all the materials in the possession of one who consults must be unreservedly placed before the consultee. Further, a reasonable opportunity for getting information, taking other steps and getting prepared for tendering effective and meaningful advice must be given to him. The consultant, in turn, must take the matter seriously since the subject is of grave importance. The parties affected are high-level functionaries and the impact of erroneous judgment can be calamitous."

(Emphasis supplied.)

It is in the light of these well settled principles concerning consultation that the disclos-

ed material will have to be scrutinised for deciding whether in the instant case there has been full and effective consultation between the President and the Chief Justice of India in the matter of the impugned decision that was taken in regard to Shri S. N. Kumar.

658. In all 13 documents comprising correspondence between the Chief Justice of Delhi High Court and the Union Law Minister, between the Chief Justice of India and the Union Law Minister and between the Chief Justice of Delhi High Court and the Chief Justice of India and some notings made by the Union Law Minister have been disclosed. A perusal of this material clearly shows that, though initially the non-recommendation of extension to Shri S. N. Kumar was thought of on four grounds: (a) his behaviour in Court, (b) his slow disposal, (c) his doubtful integrity based on unverified and uninvestigated complaints and (d) adverse IB reports, ultimately the decision to drop him, according to the Union Law Minister's noting dated May 27, 1981, was based on and confined to the aspect concerning his 'reputation and integrity' and the correspondence clearly shows that the two Chief Justices held exactly divergent and opposite views regarding the said ground on which the final decision was based. The correspondence and notings bring out the following facts very clearly: (a) the Delhi Chief Justice's view regarding Shri S. N. Kumar's integrity was based on (i) serious complaints (both oral and in writing) received by him against Shri S. N. Kumar, including some received from the Union Law Minister himself and (ii) doubts expressed by some responsible Members of the Bar and some of his colleagues about his integrity; and while admitting that he had no investigating agency to find out whether the complaints were genuine or not, he informed the Union Law Minister that he could not recommend Shri S. N. Kumar's continuance as in his view "reputation for integrity was just as important as the person actually being above board"; (b) the Chief Justice of India felt that the material mentioned by the Delhi Chief Justice for doubting Shri S. N. Kumar's integrity was too vague and his independent inquiries from the Members of the Bar and the Bench of the Delhi High Court showed that Shri S. N. Kumar was a man of unquestioned integrity and justified a favourable recommendation for his continuance; (c) the Chief Justice of India by his letter of the March 14, 1981 had requested the Delhi Chief Justice to furnish him with "further details" and "concrete

facts" in regard to the allegations against Shri S. N. Kumar and the Union Law Minister also, in view of the insistence of the Chief Justice of India, had by his letter of Apr. 15, 1981 called for such "concrete material" with his comments thereon from the Delhi Chief Justice so that the basis on which he had formed his view about Shri S. N. Kumar's reputation for integrity would be available to Government; (d) no "further details or concrete facts or material" as desired by the Chief Justice of India were furnished to him by the Delhi Chief Justice but the Delhi Chief Justice sent a lengthy letter of five pages dated May 7, 1981 to the Union Law Minister marked "Secret — for personal attention only" which contained "further details and concrete materials" including references to specific cases (with suits numbers and titles) wherein according to him Shri S. N. Kumar's integrity had been doubted; and (e) the Delhi Chief Justice had, both before and after the issuance of the aforesaid letter, during his discussions with the Law Minister requested the latter that his letters marked as above may be kept secret for his personal attention only, that is to say, these may be avoided from being brought to the notice of the Chief Justice of India and he also explained to him the reasons for the same and the Law Minister's notings show that he responded to that request; in fact, by his letter of May 29, 1981 addressed to the Delhi Chief Justice, which happens to be last letter in the file, the Union Law Minister has placed on record the fact that, as per the request of the Delhi Chief Justice, letters marked "Secret-for personal attention only", including the letter of May 7, 1981, had been kept confidential from the Chief Justice of India and had not been shown to him. In other words, it is abundantly clear from the correspondence and notings that "further details" or "concrete facts or material" regarding Shri S. N. Kumar's integrity, though specifically asked for by the Chief Justice of India, were not furnished to him and the letter dated May 7, 1981 which contained such further details and concrete facts or materials was deliberately kept out of his way.

659. Counsel for the contesting respondents, however, pointed out that after the Chief Justice of India had sent his letter of March 14, 1981 to the Delhi Chief Justice calling for "further details" and "concrete facts", the two Chief Justices had a meeting on March 26, 1981 and an oral discussion had taken place between the two, and counsel contended that during this oral discussion

the Delhi Chief Justice must have given these "further details" and "concrete facts or materials" to the Chief Justice of India and such inference becomes probable from the fact that long before the letter dated May 7, 1981 was disclosed under this Court's order dated October 16, 1981, Shri S. N. Kumar has in his counter-affidavit dated July 17, 1981 made a reference among others to three suits being Summary Suits Nos. 1408/79, 1409/79 and 1417/79 which happen to be the very three suits wherein, according to Delhi Chief Justice, his integrity had become questionable and presumably he got particulars of these suits from the Chief Justice of India when the Chief Justice of India had a lengthy discussion with him about his work and other general matters. True, there was a meeting and oral discussion between the two on March 26, 1981 but it is impossible to accept the aforesaid contention of the Counsel that in the oral discussion "further details" and "concrete facts or material" must have been disclosed to the Chief Justice of India for three reasons. First, what transpired between them during the said discussion has been referred to and recorded by the Chief Justice of India in his letter of May 22, 1981 addressed to the Union Law Minister and this is what he has said in that letter: "The Chief Justice (meaning Delhi Chief Justice) met me on March 26, 1981, when he told me that Justice S. N. Kumar was very slow in his disposal and that he doubted his integrity because even after Justice S. N. Kumar's allocation of work changed from the Original Side to the Appellate Side he still continued to hear the part-heard cases on the Original Side". As regards the latter aspect the Chief Justice of India had all along maintained that that conduct on Shri Kumar's part by itself could not be regarded as blame-worthy in view of long standing practice obtaining in that behalf in Delhi High Court, and without more from that alone no inference of corruption or lack of integrity could be drawn. In other words, details of the complaints received against Shri S. N. Kumar or particulars of specific cases wherein Shri Kumar's integrity had become suspect were not mentioned to the Chief Justice of India otherwise the Chief Justice of India would have referred to this aspect while recording what transpired between them. The Delhi Chief Justice's letter to the Chief Justice of India on March 28, 1981, immediately following upon the meeting and oral discussion is of no use because beyond stating that he had an opportunity "to discuss this delicate matter with you" and further stating that as regards the com-

plaints about Justice S. N. Kumar's integrity and general conduct "the matter has already been discussed between us" no further details are recorded as to what transpired between them during their meeting. Even in his letter of even date (March 28, 1981) addressed to the Union Law Minister the Delhi Chief Justice merely records baldly thus — "I have since had an opportunity to discuss the entire matter in detail with the Chief Justice of India" without mentioning what was discussed. Therefore, the only record of what was discussed between them is to be found in the letter of May 22, 1981 written by the Chief Justice of India to the Union Law Minister and as stated earlier this record of what transpired between them in the meeting does not show that "further details" and "concrete facts and materials" in relation to complaints about lack of integrity of Shri S. N. Kumar were disclosed or discussed by the Delhi Chief Justice with the Chief Justice of India. Secondly, if during the oral discussion "further details" and "concrete facts or materials" which find a place in the letter of May 7, 1981 had been disclosed, discussed or placed before the Chief Justice of India it was simply pointless for the Delhi Chief Justice to mark his letter dated May 7, 1981 'Secret — for personal attention only' and further to request the Union Law Minister to keep it away from the Chief Justice of India and for the Union Law Minister to comply with such request. Admittedly the letter was kept confidential from him and was not shown to him. The very fact that this letter dated May 7, 1981 was kept away from him at the insistence of the Delhi Chief Justice clearly shows that "further details" and "concrete facts or materials" asked for by the Chief Justice of India were not placed before him. Thirdly, just as the Chief Justice of India during his discussion with Shri S. N. Kumar put to him and got his explanation regarding aspects like his behaviour in Court, his slow disposal, his dealing with Original Side part-heard matters notwithstanding change in his assignment from the Original Side to Appellate Side etc., he would have also put to him and got his explanation about the "further details" and "concrete facts or materials" in regard to the allegations against his integrity, had he (the Chief Justice of India) known such "further details" and "concrete facts or materials" and this has not happened. The reliance on Shri S. N. Kumar's counter-affidavit dated July 17, 1981 wherein a reference has been made by him to the three Summary Suits Nos. 1408, 1409 and 1417 of 1979 is of no avail, for, if his

counter-affidavit in that behalf is carefully scrutinised it will appear clear that he has made a reference to these three suits along with six or seven other suits and all in connection with explaining the charge of impropriety on his part in taking up these part-heard matters even after his assignment had been changed from the Original Side to the Appellate Side and he explained it on the basis of a long standing practice obtaining in that behalf in Delhi High Court. He has not referred to these suits by way of explaining the allegations of corruption or behaviour raising doubt about his integrity. Any one who goes through the disclosed material carefully cannot fail to come to the conclusion that vital material in the shape of "further details" and "concrete facts" was deliberately kept away from the Chief Justice of India. The contention has, therefore, to be rejected.

660. If the reasons, which prompted the Delhi Chief Justice to keep away his communication of May 7, 1981 containing vital material in the shape of "further details" and "concrete facts" from the Chief Justice of India, are scrutinised and these have been mentioned in the Law Minister's noting of May 19, 1981 and his letter of May 29, 1981 — it will appear clear that apart from being vague they show a lack of proper perception on his part of the true nature of the obligations cast on him under the Constitution. In substance the sum total of his reasons comes to this:— (i) that he did not want to be embarrassed by the likely disclosure of the contents of his communication dated May 7, 1981 to Shri S. N. Kumar as had happened in the case of his earlier communication dated 19th Feb., 1981 to the Chief Justice of India and (ii) that as he could not desist from expressing without fear or favour what he felt about certain matters (in relation to Shri S. N. Kumar) he communicated all that he wanted to say about him to the Union Law Minister through his letter of May 7, 1981 but at the same time because he was particular that his relations with Chief Justice of India should not be spoiled he desired that the contents of that communication should not be shown or made known to the Chief Justice of India. As regards (i), all that can be said is that it is surprising how he expected the Chief Justice of India not to put to Shri S. N. Kumar and seek his explanation on whatever he had come to know against him from any source including the Delhi Chief Justice: in fact, before supplying any material to the Union Law Minister he himself ought to have ap-

prised Shri S. N. Kumar of all the material and all that he had heard about him and held discussion with him to ascertain his version thereon and then conveyed both sides of the picture to the other functionaries. As regards (ii), it must be first observed that full and effective consultation as contemplated by Art. 217 (1) required of him to place all relevant and material facts about Shri S. N. Kumar before the Chief Justice of India even at the cost of spoiling of his relations with the Chief Justice of India if it came to that and secondly, it was an unreal as well as erroneous apprehension on his part that a full disclosure of facts and material about Shri S. N. Kumar accompanied by his frank and honest opinion thereon would have spoiled his relations with the Chief Justice of India; in any event maintaining good and cordial relations with the Chief Justice of India was thoroughly irrelevant in the context of discharging a constitutional obligation. Having regard to the well settled principles concerning consultation referred to above it is clear that both the Union Law Minister as well as Delhi Chief Justice have failed to discharge their constitutional obligation in the matter of consultation contemplated under Art. 217 (1). In the first place, contrary to the principles laid down by this Court in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra) that the President must make the relevant data available to the Chief Justice of India for obtaining his considered opinion, the Union Law Minister did not forward the complaints which he had received against Shri S. N. Kumar to the Chief Justice of India (which he forwarded to the Delhi Chief Justice); secondly, the Delhi Chief Justice did not forward "further details" and "concrete facts or materials" touching Shri S. N. Kumar's integrity to the Chief Justice of India in spite of the latter having specifically called for the same, and thirdly between them the Union Law Minister and the Delhi Chief Justice saw to it that the communication of May 7, 1981 (from the Delhi Chief Justice to the Union Law Minister) which contained "further details" and "concrete facts or material" in regard to the allegations of lack of integrity against Shri S. N. Kumar was kept confidential from the Chief Justice of India and was not shown to him. It is thus amply clear from the record that the facts which were taken into consideration by the Union Law Minister and the Delhi Chief Justice and which provided the basis to the appointing authority to arrive at the impugned decision were not placed before the Chief Justice of India, and, therefore, there was

neither full nor effective consultation between the President and the Chief Justice of India as required by Art. 217 (1) of the Constitution.

661. There is another aspect relating the procedure that has to be followed while undertaking such full and effective consultation namely, that the procedure must ensure fair play qua the concerned Judge. That the scope and ambit of consultation includes fair play qua the concerned Judge is clearly laid down in Sankalchand Sheth's case (supra) in the context of question of the Judge's transfer and the same position must obtain in regard to consultation under Article 217 (1) in the context of the question of the continuance of an Additional Judge on the expiry of his initial or extended term, especially when it has been held that such an Additional Judge has a legitimate expectancy and a right to be considered for continuance either for another term or as a Permanent Judge and the consideration of his case would suffer grave infirmity and illegality unless the consultation is again full and effective, that is to say, all facts concerning him are before all the functionaries undertaking the consultation including his version on facts allegedly adverse to him. In other words, the procedure to be followed in such consultation under Art. 217 (1) qua an Additional Judge must ensure fair play in relation to him. If a person has a right to be considered how can such right be effective unless he has an opportunity to meet or explain the alleged adverse material against him. Sans such opportunity his right to be considered will be illusory and unreal. The question is whether the procedure followed in Shri S. N. Kumar's case ensured fair play qua him. It is clear from the record that "further details" and "concrete facts and material" in regard to the allegations of lack of integrity against Shri S. N. Kumar were not put to him nor was his explanation thereon sought; and there is no reason why Shri S. N. Kumar's averment that the said material was never disclosed to him nor put to him by anybody should not be accepted. The question of Chief Justice of India disclosing or putting to him the said material obviously does not arise, for he himself was not apprised of such "further details" and "concrete facts or materials" but the same constituted the basis on which the Delhi Chief Justice and the Union Law Minister acted leading to the impugned decision and therefore it was up to the Delhi Chief Justice to have apprised Shri S. N. Kumar of such material by telling him that the same is likely to be held against him

and by seeking his explanation or version thereon and it was up to the Union Law Minister to see to it that such procedure was followed through the Delhi Chief Justice before advising the appointing authority to act on the same. The record does not show that anything of the kind was done and in that sense also there was no full and effective consultation which vitiates the impugned decision. In short in Shri S. N. Kumar's case it is quite clear that both these high constitutional functionaries, namely the Union Law Minister and the Delhi Chief Justice abdicated their constitutional responsibility or to use Justice Krishna Iyer's language they utterly failed to discharge their "accountability to the justice constituency."

662. The result is that the impugned decision against Shri S. N. Kumar is vitiated by legal mala fides and as such must be held to be void and non-est and his case must go back to the President for re-consideration and passing appropriate orders after the requisite consultation is undertaken afresh, with due observance of adequate fair-play.

WRIT PETITION NO. 274 OF 1981.

AND

TRANSFERRED CASES NOS. 2, 6 AND
24 OF 1981.

663. In the above matters, with the resignation of Shri M. M. Ismail Chief Justice of Madras High Court which has become effective, this Court is only concerned with the challenge made to the transfer of Shri K. B. N. Singh, Chief Justice of Patna High Court to Madras High Court. Initially by a Writ Petition No. 2224 of 1981 filed in the Patna High Court the challenge was made by two lawyers, Shri D. N. Pandey and Shri Thakur Rampeti Sinha, the Secretary and President respectively of Bihar State Socialist Lawyers' Association to which Shri K. B. N. Singh was impleaded as respondent No. 3 but after it was transferred to this Court and became the subject matter of Transfer Case No. 24 of 1981 at his request by this Court's order dated Sep. 15, 1981 Shri K. B. N. Singh was transposed as co-petitioner and he has filed a self-contained comprehensive affidavit dated Sep. 16, 1981 making all the necessary averments and submissions in support of the challenge.

664. The brief facts concerning Shri K. B. N. Singh's transfer are, these: while he was practising as an advocate of the Patna High Court, Shri K. B. N. Singh was appointed as Judge of that High Court on Sep. 15, 1966; he was made permanent Judge

of that High Court on March 21, 1968; he was first appointed Acting Chief Justice and later on Permanent Chief Justice of that Court by the Presidential Notification dated July 7, 1976 and he assumed charge of that office on July 19, 1976. For about 9 months, i.e. from January to Sep. 21, 1979 he functioned as an Acting Governor of State of Bihar whereafter he resumed work as the Chief Justice. By the impugned Notification dated Jan. 19, 1981 the President, after consultation with the Chief Justice of India, was pleased to transfer him as the Chief Justice of the High Court of Madras with effect from the day he would assume charge of his office. It is this transfer that is being challenged by Shri K. B. N. Singh and other petitioners on four or five grounds, namely, (a) Art. 222 (1) does not refer to a Chief Justice and hence the impugned transfer is outside its purview; (b) since the said Article properly construed covers only consensual transfers the impugned transfer, which is admittedly non-consensual, is bad in law; (c) it has not been effected in public interest; (d) it has been effected without full and effective consultation contemplated by Article 222 (1) and (e) the procedure followed in effecting the same did not ensure fair-play in relation to him and the transfer is punitive in character. On behalf of the contesting respondents, amongst whom is included the Chief Justice of India who has been impleaded as party-respondent No. 2, the challenge is refuted under each of the heads. It is contended that the transfer of a Chief Justice falls within the purview of Art. 222 (1), that non-consensual transfers also fall within its scope and purview, that the impugned transfer has been effected in public interest, that there was full and effective consultation between the President and the Chief Justice of India as contemplated by Art. 222 (1) and that the procedure followed in effecting the same was quite fair and that the impugned order had been made after giving Shri K. B. N. Singh full opportunity to place his point of view and difficulties before the Chief Justice and after these were objectively considered. It is categorically denied that it is a punitive transfer.

665. At the outset it may be stated that Counsel for Shri K. B. N. Singh and the other petitioners did not seriously press the contention that the transfer of a Chief Justice from one High Court to another was not within the purview of Art. 222 (1) for the reason that it was difficult to maintain that a Chief Justice was not included or could not fall within the expression "a Judge

of a High Court"; similarly, having regard to the conclusion reached in the earlier part of the judgment that consent cannot be read in Art. 222 (1) and that the said Article covers non-consensual transfers it is unnecessary to deal with the second contention again at this stage. The real questions that arise for determination in regard to the transfer of Shri K. B. N. Singh, therefore, are whether the transfer has been ordered in public interest, whether there has been full and effective consultation between the President and the Chief Justice of India as required by Art. 222 (1) and whether the procedure that was followed ensured fair-play in the sense that Shri K. B. N. Singh was heard fully and his say was taken into consideration before effecting his transfer.

666. On the aspects of the scope and limits of the power to transfer a Judge under Art. 222 (1) and the built-in-safeguards to prevent its abuse this Court in *Sankalchand Sheth's case* (1978-1 SCR 423 : AIR 1977 SC 2328) (supra) has clearly laid down that the said power is circumscribed by two important safeguards, namely, (1) the exercise of the power is conditioned by the requirements of public interest and cannot be exercised by way of punishment and (2) there must be a full, complete and effective consultation between the President and the Chief Justice of India before an order under that Article can be made. *Chandrachud, J.* (as he then was) has observed (at p. 456 of SCR) : (at p. 2349 of AIR) of the Report) thus :

"Article 222 (1) postulates fair play and contains built-in-safeguards in the interests of reasonableness. In the first place, the power to transfer a High Court Judge can be exercised in public interest only. Secondly, the President is under the obligation to consult the Chief Justice of India which means and requires that all the relevant facts must be placed before the Chief Justice. Thirdly, the Chief Justices owes a corresponding duty, both to the President and to the Judge who is proposed to be transferred, that he shall consider every relevant fact before he tenders his opinion to the President. In the discharge of this constitutional obligation, the Chief Justice would be within his rights, and indeed it is his duty whenever necessary, to elicit and ascertain further facts either directly from the Judge concerned or from other reliable sources. The executive cannot and ought not to establish rapport with the Judges which is the function and privilege of the Chief Justice. In substance and effect, therefore, the Judge concerned

cannot have reason to complain of arbitrariness or unfair play, if the due procedure is followed."

It is by reference to these principles that the question will have to be considered whether the impugned transfer is vitiated on any of the three grounds mentioned above.

667. Learned Counsel for the petitioners (including Shri K. B. N. Singh) urged that the three grounds or aspects really get inter-mixed and will have to be considered together in the light of the relevant material on record and according to counsel the material on record clearly shows that the impugned transfer stands vitiated by the infirmities indicated in each of the said grounds, Counsel contended that a mere recital in the Presidential Notification that the transfer has been ordered by the President "after consultation with the Chief Justice of India" is not enough and will not avail the contesting respondents and when the factum of full and effective consultation has been put in issue the respondents have to show demonstrably that there has been such full and effective consultation as contemplated by Art. 222 (1) and the material produced is lacking in this behalf particularly when the normal procedure was reversed in that the proposal for transfer in the instant case emanated from the Chief Justice of India and further there was nothing to show whether the communication received from the Chief Minister of Madras containing grounds of his objection to the proposed transfer had been placed before the Chief Justice of India. It was further contended that it has not been shown that the transfer is in public interest or what category of public interest is being served thereby. It was pointed out that there is a divergence between the transferring authority (the President) and the Chief Justice of India as to the reasons for which the impugned transfer has been made; whereas according to the transferring authority it was in pursuance of a policy of having all Chief Justices in every High Court from outside, according to the Chief Justice of India it was a selective transfer made in an appropriate case for strictly objective reasons, but the transfer could not be for the reasons of the policy because that policy had not been then and has not been even now finally formulated or adopted and if it is a selective transfer it has been by way of punishment and therefore bad in law. It was also contended that no reasons or grounds necessitating or justifying the transfer nor materials in support thereof were ever disclosed or discussed with Shri K. B. N. Singh by any one

on behalf of the transferring authority or by the Chief Justice of India, that the advanced age and serious illness of his mother and his other difficulties were not properly considered and as such the procedure followed lacked fair-play and for all these reasons the impugned transfer deserves to be quashed or set aside.

668. In view of the aforesaid contentions raised by the Counsel for the petitioners it will be necessary to indicate briefly the relevant material on the record and ascertain what facts or aspects emerge clearly therefrom so as to adjudicate upon the validity or otherwise of the grounds of attack levelled against the impugned transfer. The entire relevant material requiring analysis and consideration consists of: (a) Self-contained comprehensive affidavit dated Sep. 16, 1981 of Shri K. B. N. Singh filed after he was transposed as a co-petitioner containing all the relevant averments and submissions in support of the challenge; (b) Counter-affidavit dated Sep. 24, 1981 of Shri Kankan filed on behalf of the Union of India; (c) Rejoinder-Affidavit dated Sep. 28, 1981 of Shri K. B. N. Singh in reply to Shri Kankan's counter-affidavit; (d) Counter-affidavit dated Sep. 29, 1981 of the Chief Justice of India, respondent No. 2; (e) Rejoinder-affidavit dated Oct. 16, 1981 by Shri K. B. N. Singh in reply to the counter-affidavit of Chief Justice of India; (f) Relevant correspondence between the Chief Justice of India on the one hand and the Union Law Minister and the Prime Minister on the other and between the Chief Minister of Madras and the Union Law Minister contained in a file pertaining to the impugned transfer disclosed by the Union Government pursuant to this Court's order dated Nov. 2, 1981; (g) Relevant notings in File No. 50/6/80-Jus pertaining to the appointment of Chief Justices of Delhi High Court and Andhra Pradesh High Court in the context of the proposed general policy of having all Chief Justices in various High Courts from outside also disclosed pursuant to this Court's order dated Nov. 18, 1981.

669. Reading items (f) and (g) together the following facts or aspects emerge very clearly on the record:

(1) a general policy to have Chief Justices of all the High Courts from outside was being evolved by the Union Government, who had almost decided to accept the basic principles underlying it but had not finally formulated or adopted the same because the mechanism or modality of procedure had yet to be decided upon and fixed and the

notings in File No. 50/6/80-Jus clearly show that the appointments of the two Acting Chief Justices as Permanent Chief Justices of Delhi High Court and Andhra Pradesh High Court were made on the understanding that they will be liable to be transferred "if eventually a decision is taken that every Chief Justice must come from outside";

(2) that the Government's view in regard to such policy was put across to the Chief Justice of India but the Chief Justice of India was "firmly opposed to a wholesale transfer of the Chief Justices of the High Courts" and had stated, "I take the view, which I have expressed from time to time, that such transfers may be made in appropriate cases for strictly objective reasons." (vide letter dated Dec. 7, 1980 from the Chief Justice of India to the Union Law Minister).

670. Reading the correspondence at item (f) above, the following additional facts or aspects emerge clearly :

(3) that transfers of some of the Chief Justices had been engaging the attention of the Chief Justice of India for the past few months, and he had made personal inquiries in this behalf and had met several lawyers, and Judges of the concerned High Courts and on the basis of the data which he had collected and which he had considered with the greatest objectivity he had suggested transfers of certain Chief Justices including that of Shri K. B. N. Singh (vide letter dated December 7, 1980);

(4) that initially on December 7, 1980, the recommendation was to transfer Shri K. B. N. Singh to Rajasthan High Court to take the place of Shri K. D. Sharma, Acting Chief Justice there, who was proposed to be transferred as the Chief Justice of the Kerala High Court, but after the Union Law Minister had pointed out certain difficulties in the chain of the connected transfers, the Chief Justice of India gave a fresh thought to the problem and by about December 20, 1980 in supersession of his previous proposals the Chief Justice of India recommended that Shri M. M. Ismail Chief Justice of the Madras High Court should be transferred as the Chief Justice of the Kerala High Court and Shri K. B. N. Singh should be transferred as the Chief Justice of the Madras High Court;

(5) that these suggested transfers including that of Shri K. B. N. Singh, apart from being discussed in the correspondence were also discussed orally in meetings and over telephone by and between the Chief Justice of India on the one hand and the Union Law

Minister and the Prime Minister on the other an inference arising from the correspondence at item (f) itself.

671. Reading items (a) to (e) above, and particularly the self-contained comprehensive affidavit of Shri K. B. N. Singh, counter-affidavit of the Chief Justice of India and rejoinder-affidavit of Shri K. B. N. Singh in reply thereto together and proceeding on the basis of points of convergence only and excluding or ignoring the points of divergence between them arising from their respective affidavits, the following additional facts or aspects emerge very clearly :

(6) that much prior to his suggesting the transfer of Shri K. B. N. Singh from Patna to Rajasthan High Court on Dec. 7, 1980, the Chief Justice of India had paid a visit to Patna High Court in Feb., 1980 after disclosing to Shri K. B. N. Singh the purpose of his visit and had during that visit met on Feb. 24, 25 and 26, 1980 the Hon'ble Judges of that High Court and the Members of that Bar individually, the Members of the Advocates' Association collectively and the Judges of the District Court at Patna and held discussions with them, and on his objective assessment of the situation and the data collected he concluded that dissatisfactory working conditions obtained in the High Court;

(7) that in regard to the proposal to transfer Shri K. B. N. Singh from Patna to Madras High Court, Shri K. B. N. Singh and the Chief Justice of India had discussions with each other on two occasions — one on the 5th Jan., 1980 over phone and the other on Jan. 8, 1981 at the residence of the Chief Justice of India. What transpired between the two on these two occasions is very material and again leaving points of serious divergence and proceeding on the points of broad convergence between the two it can safely be stated that this is what transpired between them: On Jan. 5, 1981 the Chief Justice of India informed Shri K. B. N. Singh over phone that it was proposed to transfer Shri M. M. Ismail to Kerala and that he (Shri K. B. N. Singh) may have to go to Madras; on further query as to the reason for it, the Chief Justice of India referred to Government policy but further specifically conveyed to him that it was proposed to transfer Shri M. M. Ismail from Madras and it was necessary to appoint an experienced and senior Chief Justice in his place; during the telephonic talk Shri K. B. N. Singh told the Chief Justice of India that his mother was seriously ill and bed-ridden and was not in a position to

move out of Patna and accompany him to Madras and further told him that if his transfer was insisted upon he would prefer to resign whereupon the Chief Justice of India requested him not to act in haste and to give the matter a close thought; the Chief Justice of India also added that he (Chief Justice) was making a note of the personal difficulty mentioned by him and that it will have to be taken into consideration before a final decision was taken; the Chief Justice of India also requested him to go over to Delhi to discuss the question of his transfer. During the meeting that took place at the residence of the Chief Justice of India on 8th Jan., 1981 at about 7.30 p. m. the proposed transfer was further discussed and when during the discussion the question of his mother's advanced age and illness cropped up, the Chief Justice of India told him that he was unable to agree with his view on the matter as there were other dependable persons in his family who could look after his mother, that in any case his brother Shri S. B. N. Singh, who was practising in the High Court, was quite capable of looking after his mother, to which Shri K. B. N. Singh replied that his mother had a special attachment to him and that he could not leave her to the care of his brother and other members of the family; during the discussion Shri K. B. N. Singh told the Chief Justice of India that it was possible that baseless complaints, which were the bane of Bihar, might have been made to him, and if so, he would like to remove any wrong impression that might have been created, whereupon the Chief Justice of India told him that he never went by baseless complaints and he did not believe that his (Shri K. B. N. Singh's) conduct was blame-worthy but that if he wanted to explain any matter, which according to him, had created dissatisfaction about the working of the High Court, he was free to do so; further, during the discussion the Chief Justice of India assured him that he did not hold that he (Shri K. B. N. Singh) himself was to blame but certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. It may be stated that Shri K. B. N. Singh in his rejoinder-affidavit has admitted that during the discussion the Chief Justice of India did mention to him that certain persons were exploiting their proximity to him and that there was misunderstanding and dissatisfaction in the High Court;

(8) the Chief Justice of India has in terms stated on oath that there was full and ef-

fective consultation between him and the President of India (meaning the President acting on advice of Council of Ministers) on the question of Shri K. B. N. Singh's transfer from Patna to Madras and that every relevant aspect of that question was discussed by him fully with the President (acting as such) both before and after he had proposed the transfer and that every relevant circumstance, including the personal difficulty mentioned by Shri K. B. N. Singh was considered by him carefully and objectively before coming to the conclusion that he should be transferred to Madras; he has further stated that the paramount consideration in the impugned transfer was public interest and that it was not by way of any punishment at all and that he came to the conclusion on a dispassionate assessment of the relevant facts and circumstances, including the language difficulty involved, that Shri K. B. N. Singh was suited for being transferred to Madras High Court and that it was necessary so to transfer him. The Union of India through the counter-affidavit of Shri Kankan has denied that the impugned order was passed without effective consultation between the President of India (meaning acting on the advice of Council of Ministers) and the Chief Justice of India and asserted that relevant considerations were taken into account by the President (acting as above) and that the impugned transfer has been made only in public interest and is not punitive in character.

672. To the aforesaid facts or aspects that emerge clearly from the relevant materials on the record two more facts will have to be added as having come on record through the statements made by the learned Solicitor-General in answer to pointed queries made by the Court to elicit requisite information and such a course was adopted by the Court with a view to avoid burdening the record with additional files containing the notings which were, however, produced for Court's inspection and these facts are:

(9) that pursuant to the executive instructions contained in the 1972 Memorandum dealing with the procedure to be adopted in connection with the appointment and transfer of Judges of High Courts the Union Law Minister had ascertained the views of the concerned Chief Ministers, namely, the Chief Minister of Madras, the Chief Minister of Kerala and the Chief Minister of Bihar on 3rd, 4th and 6th January, 1981 respectively, in the matter of the proposed transfers;

(10) that the effective decision on the impugned transfer was taken by the Prime Minister on 9th January, 1981 whereafter the necessary and relevant papers were forwarded to the President of India and the impugned Notification was issued on 19th January, 1981.

673. At the outset, I would like to observe that a needless controversy was raised as to whether the impugned transfer has been a policy transfer (i.e. a transfer pursuant to the policy of having Chief Justices of all the High Courts from outside) or a selective transfer and a great deal of confusion was added to it by the statement which the learned Solicitor-General appearing on behalf of the Union of India was instructed to make during the hearing. As discussed and explained in the earlier part of this judgment it cannot be accepted as an invariably correct proposition that a policy transfer would always be non-punitive in character or that a selective transfer would necessarily be a punitive transfer. It has been pointed out earlier that a policy to have one-third of the Puisne Judges of a High Court from outside, in the absence of any mechanism or modality of procedure giving guidelines as to how that one-third number will be chosen for implementing it, would obviously be fraught with the vice of discrimination; similarly even the policy of having the Chief Justices of all the High Courts from outside stands the risk of being abused by the Executive in the absence of proper guidelines being provided in the matter of regulating which Chief Justice will be posted in what particular High Court. A policy transfer, therefore, without fixing the requisite mechanism or modality of procedure that ensures complete insulation against executive interference, could be a punitive transfer in the sense of having been effected with some oblique motive whereas a selective transfer in an appropriate case for strictly objective reasons and in public interest could be non-punitive, with the result that each case of transfer, whether based on a policy or a selective transfer, will have to be judged on the facts and circumstances of its own for deciding whether it is punitive in character in the sense of having been effected with some oblique motive or not. In the instant case, having regard to the facts mentioned at Nos. 1 and 2 above, the impugned transfer must be regarded as a selective transfer and not based on the policy in the contemplation of the Union Government, notwithstanding the reference to 'Government Policy' made by the Chief Justice of India during his telephonic

talk with Shri K. B. N. Singh on Jan. 5, 1981. Since the impugned transfer order in the ultimate analysis is of the transferring authority (the President) this Court wanted to know from the learned Solicitor General as to what were the reasons which prompted the transferring authority to pass the impugned order and therefore, a clarification was invited, but the statement that was made by him on Nov. 12, 1981, of course, under instructions from proper quarters, instead of clarifying the position made it more puzzling. The statement in substance was that the Chief Justice of India had suggested certain transfers, including the impugned transfer, in pursuance of his own view that transfers should be made in appropriate cases strictly for objective reasons but the Government had acceded to the transfers proposed by him as "(1) it was felt that not agreeing to these transfers may be construed as though the Government is departing from the view of having Chief Justices from outside; (2) the policy aspect could still be pressed into service later". The statement gives the impression that the transferring authority agreed to the transfers because it did not want to depart from its view of having Chief Justices from outside but at the same time it categorically states that it was felt that the policy could be pressed into service later; the second part of the statement clearly suggests that the policy, which had not been till then clearly formulated, could be and was to be pressed into service later meaning thereby that the instant transfers were not in pursuance of the policy. Perhaps what is sought to be conveyed is that each one of the instant transfers was a selective transfer appropriately made strictly for objective reasons and justified by reasons for which the Chief Justice of India had recommended them but at the same time they indirectly helped the Government in achieving the same result which would have been achieved had the transfers been made in pursuance of the policy which the Government intended to have. That this was intended to be conveyed by the statement of Nov. 12, 1981 has been made clear by the learned Solicitor General later on, for, in his written note filed before this Court on Nov. 18, 1981, he has made the following categorical statement: "The impugned transfer, though not in pursuance of a policy decision, yet is a step forward which is consistent with the view of appointing Chief Justices from outside. The impugned transfer order, is, however, valid in that it satisfies the requirements of Art. 222". In

other words, even as a selective transfer the Union Government found it justified for reasons given by the Chief Justice of India and valid under Art. 222 (1) but at the same time accepting his advice and recommendation amounted to taking a step forward in the direction of their intended policy. But, even if it were assumed at the highest that the two parties to the consultation (the Transferring Authority and the Chief Justice of India) had different reasons for agreeing to the ultimate result this cannot vitiate the consultation contemplated by Art. 222 (1), for, consultation, as has been pointed out by this Court in *Sankalchand Sheth's case* (AIR 1977 SC 2328) (supra), requires the parties thereto to make their respective points of view known to each other and discuss and examine the relative merits of their views and as has been put aptly by Krishna Iyer, J. at page 496 of the report "Consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur". But, apart from this aspect of the matter it seems sufficiently clear that the impugned transfer has been a selective transfer in the instant case and it will have to be decided whether it properly falls within Art. 222 (1), the same having been made after observing the safeguards of public interest and effective consultation and after following the procedure that ensured fair play.

674. The main question that arises in the case is whether the impugned transfer, being a selective transfer, has been really made in public interest or by way of punishment. In this behalf Counsel for Shri K. B. N. Singh has raised a two-fold contention which has to be squarely dealt with. In the first place it has been urged that merely asserting that the said transfer has been made in public interest without categorising the public interest served thereby would be of no avail; and secondly, it is clear on record that during his visit to Patna in Feb., 1980 the Chief Justice of India had collected some data and information which showed that certain persons were exploiting their proximity to Shri K. B. N. Singh and this had created considerable misunderstanding and dissatisfaction in the working of the High Court which seems to have necessitated or justified Shri K. B. N. Singh's transfer and this certainly implies some reflection on Shri K. B. N. Singh's behaviour and the inference is unescapable that the transfer is by way of punishment and that too is made without

disclosing the data or particulars to him amounting to unfair play. It is not possible to accept either of these two contentions for the reasons which I will presently indicate. It is not correct to say that the contesting respondents have been merely asserting baldly that the impugned transfer has been made in public interest without categorising the public interest served thereby. Actually two categories of public interest have been indicated by the Chief Justice of India in his counter-affidavit; so far as the shifting of Shri K. B. N. Singh from Patna High Court is concerned the reason indicated is that certain persons were exploiting their proximity to Shri K. B. N. Singh which had created considerable misunderstanding and dissatisfaction in the working of the High Court and surely remedying dissatisfactory working conditions in a High Court serves one kind of high public interest; and so far as his posting at Madras High Court is concerned, the Chief Justice of India felt that it would be in fitness of things that an experienced and senior Chief Justice like Shri K. B. N. Singh be posted as the Chief Justice of one of the premier High Courts in the country. It is difficult to countenance any suggestion that either of these considerations which weighed with the Chief Justice of India does not serve public interest. The first contention, therefore, must be rejected. Coming to the punishment aspect strenuously pressed by Counsel for Shri K. B. N. Singh I would like to observe that it will not be correct to draw an inference of the concerned Judge's connivance or complicity in every case where persons close to him exploit their proximity to him while handling their matters in the High Court and in the absence of any connivance or complicity on his part, such exploitation of close proximity would not imply any reflection on the Judge concerned. It is conceivable that undesirable activities are indulged in without his knowledge or consent — nay even against his wishes and sometimes despite counter measures adopted by him, and yet such exploitation of close proximity and the undesirable activities would spoil the atmosphere and lead to dissatisfactory working conditions in the High Court. In such a case if the atmosphere has to be improved and dissatisfactory working conditions have to be remedied it may become inevitable to transfer the concerned Judge without any blame attaching to him whatsoever; it is obvious that such a transfer will not carry any reflection on him. Further if the data or information, which leads to the discovery of dis-

satisfactory working conditions in the High Court, were also to indicate the concerned Judge's connivance or complicity in the exploitation then only the question of putting the same to him will arise but not otherwise. The instant case seems to be of that type, for, during his discussion with Shri K. B. N. Singh the Chief Justice of India had repeatedly told him that it was not his practice to take into account any baseless complaints, that he did not believe that his (Shri K. B. N. Singh's) conduct was blameworthy in any manner and even when he mentioned this particular aspect about certain persons exploiting their proximity to him which had led to needless misunderstanding and dissatisfactory working conditions in the High Court he specifically assured him that he was not to blame for it nor responsible for it. No material appears to have been placed before Chief Justice of India by anyone even remotely suggesting that there was any connivance or complicity on the part of Shri K. B. N. Singh in the matter of exploitation of proximity leading to dissatisfactory working conditions in Patna High Court and there is no reason why the statement of the Chief Justice of India that Shri K. B. N. Singh was not responsible nor was to blame for it should not be accepted. In the absence of any connivance or complicity on his part in the matter of the exploitation, no reflection on Shri K. B. N. Singh is implied simply by reason of his transfer, which must be regarded as having been made, with a view to remedying the dissatisfactory working conditions in that High Court and no unfair play was involved in the procedure followed by the Chief Justice of India. In the circumstances it is clear that the impugned transfer has been in public interest and not by way of punishment.

675. On the question whether there has been full and effective consultation between the transferring authority (the President) and the Chief Justice of India it is true that a mere recital in the impugned Notification dated 19th Jan., 1981 about such consultation will not be of much avail especially when the factum of such full and effective consultation has been put in issue but here the contesting respondents' case on that aspect does not rest merely on the recital to be found in the impugned Notification but they have produced sufficient material on record to show that there was full and effective consultation as contemplated by Art. 222 (1) before the impugned order was made. On the question as to whether there was consultation between the transferring authority on the one hand and

the Chief Justice of India on the other and if so, what transpired during such consultation Shri K. B. N. Singh obviously has no personal knowledge and one will have to consider what one or both the parties to the consultative process have to say on the matter. It is well-known that in writ proceedings the affidavits, counter-affidavits and rejoinder-affidavits filed by the parties constitute not merely their pleadings but also partake of the character of evidence in the case and it is from this angle that the counter-affidavits filed on behalf of the contesting respondents, particularly that of the Chief Justice of India, a party to the consultative process, will have to be examined. Keeping the recital about the consultation with him that is to be found in the impugned Notification aside, there is a positive statement on oath made by the Chief Justice of India in his counter-affidavit dated September 29, 1981 that there was full and effective consultation between him and the President of India on the question of Shri K. B. N. Singh's transfer from Patna to Madras and that every relevant aspect of that question, which would include the language difficulty involved as well as the personal difficulty of Shri K. B. N. Singh, was discussed by him fully with the President both before and after he had proposed the transfer and it is obvious that this statement of the Chief Justice of India partakes of the character of the evidence seeking to prove the factum and contents of the consultation. Far from there being anything on record which may detract from this averment, there is positive other material on record to corroborate the same. The correspondence file disclosed by the Union Government clearly shows that the question of Shri K. B. N. Singh's transfer was discussed and considered fully by and between the Chief Justice of India on the one hand and the Union Law Minister and the Prime Minister representing the transferring authority on the other not merely through correspondence but also orally in meetings and over telephone. Presumably basing himself on this correspondence file Shri Kankan in his counter-affidavit dated September 24, 1981 has denied that the impugned order was passed without effective consultation between the Chief Justice of India and the President of India (of course meaning the President as the constitutional head acting on the advice of Council of Ministers) and has further asserted that the relevant considerations were taken into consideration by the President (acting as such). It was argued that the data collected by the Chief Justice of India during his visit to Patna High Court in February, 1980 does not

seem to have been placed before either the Union Law Minister or the Prime Minister but such an argument has to be rejected because the Chief Justice of India's letter dated December 7, 1980 to the Union Law Minister, wherein the reference to the collection of such data by the Chief Justice of India as a result of his discussion with several lawyers and Judges of the concerned High Courts and to his having considered the same with greatest objectivity has been made, itself states that the same was written "in furtherance of" the discussion which both of them had on the previous day i.e. on December 6, 1980, on many an important matter concerning the High Courts. It was also argued that the statement of the Chief Justice of India in his counter-affidavit that he had discussed the question of impugned transfer with the President of India is vague inasmuch as it has not been clarified as to with whom from the side of the transferring authority he had these discussions, whether with the Union Law Minister or with the Prime Minister or with the President himself personally; this argument has also to be rejected, for the relevant correspondence disclosed by the Union Government clearly shows that the Chief Justice of India had these discussions about the impugned transfer both with the Union Law Minister and the Prime Minister and neither the Chief Justice of India nor Shri Kankan has suggested that the Chief Justice of India had discussed the question personally with the President of India. When the correspondence indicates clearly the two functionaries from the side of the transferring authority with whom the Chief Justice of India had discussions and there being no whisper either from the Chief Justice of India or from Shri Kankan that there were personal discussions with the President, it is ridiculous to suggest that the statement of the Chief Justice of India in that behalf is vague. With this material on record I did not appreciate the necessity or desirability of any clarificatory statement coming from the President that the issue was never discussed by the Chief Justice of India with him personally. What is more, it is surprising that in face of such correspondence showing discussion on the subject with the Union Law Minister the Solicitor General should have been instructed to make a statement which he did on November 12, 1981 to the effect "the Chief Justice of India mentioned to the Law Minister about his proposal to transfer Shri K. B. N. Singh". The twist given in the statement that the Solicitor-General was instructed to make cannot escape this Court's attention. Why was it neces-

sary? Be that as it may the material on record clearly shows that the impugned transfer was fully discussed by the Chief Justice of India with the Union Law Minister and the Prime Minister. It was also faintly argued that the last discussion between the Chief Justice of India and Shri K. B. N. Singh having taken place in the evening at about 7.30 p.m. on 8th Jan., 1981, the matter could not have been discussed further between the Chief Justice of India and the transferring authority before the effective and final decision was taken by the Prime Minister which is said to have been done by her on 9th Jan., 1981. The argument is merely required to be stated to be rejected, for even after the last discussion between the Chief Justice of India and Shri K. B. N. Singh was over there was ample time and opportunity for the Chief Justice of India to put across all that transpired between him and Shri K. B. N. Singh together with his reaction thereon either to the Union Law Minister or the Prime Minister or to both orally either in a meeting or on the telephone before the final and effective decision on the impugned transfer was taken by the Prime Minister. From the material produced on record, therefore, it is abundantly clear that there was full and effective consultation between the transferring authority on the one hand and the Chief Justice of India on the other in regard to the impugned transfer as contemplated by Article 222 (1) before the effective decision thereon was taken, and if the consultation has been full and effective as contemplated by Art. 222 (1), as is shown by the material produced on record, the contention that the normal procedure ought not to have been reversed and the proposal should have emanated from the President and not from the Chief Justice of India as is the case here loses its significance. Moreover, there is no hard and fast rule as to from whom a proposal for transfer should emanate.

676. On the last aspect as to whether the procedure followed by the Chief Justice of India ensured fair play in relation to Shri K. B. N. Singh or not the material on record clearly shows that the Chief Justice of India had discussed all the relevant aspects concerning the impugned transfer with Shri K. B. N. Singh including his personal difficulty pertaining to his mother's advanced age and serious illness. What the Chief Justice of India took a different view about it does not mean that any unfair play was involved. After all in his view public interest outweighed the considerations of personal difficulty as well as the language difficulty which were put

before him. As discussed earlier there being no charge nor any imputation against Shri K. B. N. Singh there was no question of giving him an opportunity to meet any. It is thus clear that the procedure that was followed ensured complete fair play qua Shri K. B. N. Singh.

677. It was next contended by Counsel for K. B. N. Singh that the Executive Instructions in Para 12 of the Memorandum of 1972, containing the procedure to be adopted in connection with transfers of High Court Judges issued by the Central Government, in the matter of consultation or ascertainment of the views of the Chief Ministers of the States involved in a transfer had not been followed in this case. The contention was, however, not pressed when the learned Solicitor-General after consulting the relevant files, made a statement at the Bar that in the instant case the Union Law Minister had consulted and/or ascertained the views of the Chief Ministers of Tamil Nadu, Kerala and Bihar on 3rd, 4th and 6th January, 1981 respectively in the matter of the proposed transfers. Further, in my view the question whether the Tamil Nadu Chief Minister's letter pointing out language difficulties was actually placed before the Chief Justice of India or not would not be material if the Chief Justice of India was apprised of the grounds of objection based on language difficulty and he had considered them and the material shows that the Chief Justice of India had taken into consideration the objections based on language difficulty.

678. Counsel for Shri K. B. N. Singh in the last resort faintly urged that simultaneously with the passing of the impugned order the provisions of Art. 222 (2) ought to have been complied with and since no order fixing compensatory allowance to Shri K. B. N. Singh was passed upon his transfer the impugned transfer order would be invalid. It is impossible to accept such a contention, for, Art. 222 (2) does not provide that the order fixing compensatory allowance to the transferee Judge has to be issued simultaneously along with the transfer order; all that it provides is that when a Judge has been or is transferred after complying with the requirements of sub-art. (1) he shall, during the period he serves as a Judge of the other High Court, be entitled to receive, in addition to his salary, such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix. It is obvious that such an order fixing the

compensatory allowance could follow and would have followed in the instant case within reasonable time but here the occasion to make such order got postponed because of the stay of transfer that was ordered by this Court.

679. In the result it is clear that the impugned transfer must be held to be a valid transfer under Art. 222 (1) of the Constitution.

680. Before parting with these cases I would like to place on record my sense of appreciation and gratitude to all the learned Counsel who have rendered great assistance to the Court by arguing their respective points with exceptional ability and skill. I have always held the view that the quality of a judgment rendered by a Court varies in direct proportion to the quality of assistance received by it from counsel appearing before it and whatever little I have been able to do in these cases it is mainly due to the excellent assistance received from counsel and I thank them. At the same time I cannot help keeping on record a feeling of uneasiness which I entertained during the hearing of Shri K. B. N. Singh's case because of the manner in which that case was conducted by the contesting respondents through the learned Solicitor General, for which I hasten to add, that the Solicitor General is not at all responsible, though on occasions he was required to do some tight-rope walking, obviously under instructions. On more occasions than one I was left in doubt whether they were really interested in having the transfer order upheld. The statement which the Solicitor General was instructed to make on November 12, 1981 in which a twist was given suggesting, contrary to the documentary record, that the Chief Justice of India had, instead of "discussing" the proposal of transfer, "mentioned" the same to the Law Minister, cannot be otherwise explained. I have already mentioned that I have failed to appreciate the desirability or necessity of the statement made on behalf of the President of India disowning the "personal discussion" with the Chief Justice of India on the issue of transfer, especially when the latter had not raised a whisper about such personal discussion. After all is said and done, it must be observed that while acting administratively the attitude and behaviour of the Chief Justice of India was befitting the paterfamilias of the Judiciary. The way he dealt with the cases of Shri S. N. Kumar and Shri K. B. N. Singh has been objective and judicious — by refusing to rely on unconfirmed reports, rumours or gossip in the case of the former,

and by following a procedure that ensured fair play in the case of the latter.

681. The other aspect, I would like to refer is the manner in which a section of the Press has behaved in this case. I am constrained to observe that a section of the Press while reporting the proceedings of this Court in this case seems to have, without fully realising the scope and purpose of the disclosure ordered by the Court, exceeded its limits of fair reporting and fair comment by discussing the merits and demerits of the grounds on which recommendations were made concerning the Judges or the truth or falsity of the disclosed material; assuming that this Court was intending to adjudicate on the merits or demerits of the grounds of the recommendations made or on truth or falsity of the materials even then how could the Press before this Court has finally adjudicated upon the issues involved, pronounce its verdict — which it almost did — on the high constitutional functionaries involved by holding a trial by Press? The disclosure, which became necessary in the highest public interest of administration of justice — for seeing that injustice was not perpetrated and justice was meted out to high judicial functionaries under the Constitution, was not intended for being used for such purpose. Such behaviour of a section of the Press has been most distressing and has unnecessarily affected the image of Judiciary and the high constitutional functionaries involved.

682. In conclusion I would pass the following order:

(1) Writ Petitions in Transferred Cases Nos. 19-22 of 1981 are allowed.

(2) The impugned Circular letter dated March 18, 1981 is quashed and struck down as impinging on judicial independence and as being violative of Arts. 222 (1) and 14.

(3) In future extensions to sitting Additional Judges should normally be for two years and no extension to any Additional Judge for less than a year be ever granted.

(4) The decision to drop Shri S. N. Kumar is quashed and his case is sent back to the President for reconsideration and passing appropriate orders after the requisite consultation is undertaken afresh, with due observance of adequate fair play.

(5) Since Shri K. B. N. Singh's transfer is held to be valid, Writ Petition No. 274 of 1981 and those in transferred Cases Nos. 2, 6 and 24 of 1981 are dismissed.

(6) Each party will bear its own costs in these cases.

DESAI, J.:— 683. March 18, 1981 till law courts and lawyers in their present form and structure survive, would be remembered as a day that raised a storm of controversy leading to a spate of writ petitions in different High Courts in the country. The Law Minister of the Government of India selected that fateful day for issuing a circular, forwarded it to the Chief Ministers of all States and the Governor of Punjab requesting them to obtain the consent of Additional Judges working in the High Court in their respective States with preference limited to three stations, for being appointed as permanent judges in High Court other than the High Court in which they are, at present, appointed and functioning. A similar consent was also to be obtained from those who may be recommended in future for appointment as judges of the High Court.

684. It appears that the first salvo was fired by Shri S. P. Gupta, Advocate practising in the Allahabad High Court who filed a writ petition in the Allahabad High Court impleading President of India, Union of India, Chief Justice of India, Chief Justice of Allahabad High Court and Governor of State as respondents praying for a writ, direction or order in the nature of mandamus directing the President to appoint judges of the High Court in accordance with the constitutional scheme etc. There was also a prayer for a direction to appoint three named judges as permanent judges but this prayer was not pressed. This petition was filed, it appears, on the very day on which the circular was issued. After it was admitted, the petition was twice amended with the leave of the Court, the first order being dated May 1, 1981 and the second being July 20, 1981. Respondent 1, President of India, Respondent 3, Chief Justice of India and Respondent 5, Governor of Uttar Pradesh were subsequently dropped and their names from the array of respondents were deleted. This petition stood transferred to this Court by the order dated May 1, 1981, and it was registered as Transferred Case No. 19 of 1981.

685. After the issue of the impugned circular dated March 18, 1981, some events occurred which may be briefly noticed. The initial term of appointment of three additional judges of

Delhi High Court, Mr. O. N. Vohra, Mr. S. N. Kumar and Mr. S. B. Wad expired on Mar. 6, 1981, and each of them was appointed as an additional judge for a period of three months. This short-term extension presumably provoked Shri J. L. Kalra and some others, practising advocates, to file Writ Petition No. 636 of 1981 on Mar. 26, 1981, in the High Court of Delhi impleading Union of India as the sole respondent. A number of prayers have been made in this petition, one which deserves mention is that a direction be issued that Shri N. N. Goswami, Shri Sultan Singh and Shri O. N. Vohra, three additional judges of the High Court of Delhi be appointed as permanent Judges and a further direction that the term of Shri S. N. Kumar and Shri S. B. Wad, additional judges functioning in the same Court be extended for a period of two years. By an order made by this Court on May 1, 1981, this writ petition stood transferred to this Court and is registered as Transferred Case No. 21 of 1981.

686. As a sequel to the issuance of the impugned circular dated Mar. 18, 1981, a special general meeting of the Advocates Association of Western India was held at Bombay on Apr. 3, 1981, where a resolution was adopted questioning the propriety of obtaining the consent of additional judges to be appointed as permanent judges in other High Courts in advance and further resolved to lodge a strong protest with the Union of India. A similar resolution appears to be adopted by the Bombay Bar Association at its Extraordinary General Meeting held on Apr. 7, 1981. Ultimately Shri Iqbal M. Chagla and three other advocates filed a Writ Petition No. 527/81 in the High Court of Bombay questioning inter alia that the circular issued by the Law Minister on March 18, 1981 be declared ultra vires and void and as a consequence, consent, if any given, and consequent action, if any, taken, be declared null and void. An injunction was sought restraining the respondents from implementing the impugned circular and ad interim relief in terms of this prayer was also sought. The respondents impleaded were the Law Minister, Union of India and ten additional judges of Bombay High Court. This petition was admitted and rule nisi was issued and ad interim in-

junction was granted. This led to filing of an appeal by Union of India before a Division Bench of the Bombay High Court. Subsequently by an order of this Court, this case stood transferred to this Court under Art. 139A and is registered as Transferred Case No. 22 of 1981.

687. Shri V. M. Tarkunde, former Judge of Bombay High Court and Senior Advocate practising in the Supreme Court, General Secretary of the Citizens for Democracy and President of the People's Union for Civil Liberties filed Writ Petition No. 882 of 1981 in the High Court of Delhi on April 22, 1981, impleading initially Union of India as the sole respondent. It appears that subsequently the Law Minister and one Mr. P. K. Kathpalia, Additional Secretary, Department of Justice were impleaded as respondents 2 and 3 respectively. The petitioner also filed CMP, No. 13425/81 requesting this Court to direct that Mr. Justice O. N. Vohra and Mr. Justice S. N. Kumar be impleaded as respondents. CMP was allowed by the order dated July 7, 1981. Shri O. N. Vohra and Shri S. N. Kumar, Additional Judges of Delhi High Court who were given extension for three months commencing from March 6, 1981, to June 5, 1981, were impleaded as respondents 4 and 5. Of the two additional judges so impleaded, respondent 5 Shri S. N. Kumar has participated in the proceedings and has appeared through his counsel Shri R. K. Garg. The principal question raised was that independence of judiciary being the basic and fundamental feature of our Constitution, any action of the executive which would be subversive of the independence of judiciary, must be declared unconstitutional. It was stated that the circular of the Law Minister of Mar. 18, 1981, directing the Chief Ministers of States to obtain consent of an additional judge for being posted as permanent judge in other High Court giving him an option to disclose his preference limited to three stations and a similar consent to be obtained in advance from a person to be recommended for appointment as a judge of the High Court is subversive of the independence of judiciary. It was submitted that the extension of the term of an additional judge or his appointment as a permanent judge cannot be

left to the unfettered discretion of the executive because it would make a serious inroad on the independence of judiciary. Another important contention raised in the petition was whether short-term extension of additional judges is permissible under Article 224 and whether it is open to the executive to appoint additional judges leaving vacancies in the permanent strength of the High Court judges unfilled, even though the arrears are mounting. A specific contention was raised with specific reference to the position of the Delhi High Court alleging that it would be contrary to the constitutional intent underlying Art. 216 to maintain half the strength of the Delhi High Court as additional judges. This petition under an order made by this Court stood transferred to this Court under Article 139A and is registered as Transferred Case No. 20 of 1981.

688. In all these petitions, Mr. K. C. Kankan, Deputy Secretary in the Department of Justice, Ministry of Law, Justice and Company Affairs has filed his counter-affidavit with regard to the circular of the Law Minister and other contentions. It was stated that the present government is vitally concerned in maintaining the independence of judiciary and in the administration of justice according to the rule of law. With regard to the circular dated March 18, 1981, issued by the Law Minister, it was submitted that the circular is not meant to be covert method to transfer judges from one High Court to other High Court circumventing the requirements of Art. 222 (1) or ratio of the decision in *Union of India v. S. H. Sheth*, (1978) 1 SCR 423 : (AIR 1977 SC 2328). It was in terms stated that the failure of the judge to give consent would not be a relevant factor while considering him for appointment as a permanent judge or for a second term as an additional judge, as the case may be. It was stated that the appointment of additional judges for two years or for shorter period has been done after following the constitutional provision in this regard and keeping the public interest in view. With regard to the second appointment of an additional judge after the expiry of the first term, it was stated that it is a fresh appointment and fresh warrant has to be

issued and judge has to take a fresh oath as prescribed and, therefore, the full round of consultation under Art. 217 will have to be gone through. Reference was made to the guidelines prescribed for the disposal of cases by a High Court Judge and these guidelines provide a yardstick for calculating the number of additional judges. It is also stated that the strength of the Delhi High Court was raised in June, 1979, and a proposal of the Chief Justice of Delhi High Court for sanction of two extra judges was approved. Short term appointments were sought to be justified on the plea that there were valid reasons for such short term appointments and privilege was claimed against disclosure of papers relating to appointment of additional judges. It was specifically denied that the circular was meant to be utilised for transfer of judges circumventing the requirements of Art. 222. It was stated that complaints have been received about the prejudicial attitude of certain judges including additional judges, bred by kinship and other local links and affiliations. Political links have also been mentioned in certain cases and various state authorities have expressed their reservations about continuance of some additional judges. These matters were generally mentioned to the constitutional authorities. There is an averment in the affidavit that it is not the intention of the Government to appoint every additional judge in another State. This is specifically referred to because a serious controversy developed that the Government wants to arm itself with power to pick and choose judges for transfer outside the State and that this would provide an opportunity for extending political patronage so that judges, to avoid harassment of being appointed to a High Court outside their State may lean towards the Government for their survival. Explaining the *raison d'être* it was stated that the purpose behind the circular dated March 18, 1981, was to take steps in the direction of having outsider in the High Court to help in the process of national integration and also to improve the functioning of various High Courts by having in each High Court the presence of a number of judges who would not be swayed by local considerations or affected by the issues which arouse passions and emotions. Support was

drawn for this statement from the 14th Report of the Law Commission and from the latest 80th Report of the Law Commission presided over by Mr. H. R. Khanna and from the study group set up by the Administrative Reforms Commission. It was in terms admitted that the additional judge is not a judge on probation. It was stated that short term appointments are made pending the final decision, a thing which would appear objectionable in view of the mandate of Article 224. Power was claimed by the executive to appoint any additional judge for any shorter period as may be considered justified. If conceded, this can lead to a logical absurdity, namely, from day to day, the situation very difficult even to conceive in any form of political society one may think of. However, a mitigating circumstance was pleaded that additional judges for shorter periods have been appointed in special circumstances and only when there are exceptional factors necessitating appointments for shorter periods. In respect of Shri O. N. Vohra and Shri S. N. Kumar, it was stated that the short-term appointment was made to enable the Government to take a final view having regard to the complaints that have been received against some of them after consultation with the constitutional authorities. The statement in the petition that the Chief Justice of Delhi High Court and Chief Justice of India both had recommended the appointment of these two judges for a further period of two years was denied. It appears that the Chief Justice of Delhi High Court had not recommended Shri S. N. Kumar for appointment as additional judge after expiry of his initial term of two years on Mar. 6, 1981. The incorrect averment in the petition has found its place in an order made by the Vacation Judge on June 6, 1981. At the appropriate place, it will be pointed out that Chief Justice of Delhi High Court had, for his reasons, declined to recommend appointment of Shri S. N. Kumar as an additional judge on the expiry of his first term on Mar. 6, 1981.

689. As almost identical contentions have been raised by Mr. Kankan in the various affidavits filed by him in every case, it is not necessary to recapitulate them here except recalling one averment made in his counter affidavit filed

on July 6, 1981, in reply to the petition filed by Shri Iqbal M. Chagla and others in Bombay High Court because it was the subject-matter of debate. In para 9 (VII) it is stated that the data collected pursuant to the circular issued by the Law Minister would be made available to the Chief Justice of India, Chief Justice of the High Court concerned and the Governor of the State. The submission was that the circular was issued for data collection is a subterfuge resorted to, to provide an innocent cloak to a dagger aimed at independence of judiciary.

690. It may be briefly mentioned here that Writ Petition No. 274/81 filed in this Court and Transferred cases Nos. 2, 6 and 24/81 were listed to be heard along with the present batch of cases with a view to avoiding the repetition of the arguments on points common to both sets of cases. In the first group of cases the question of construction of Arts. 217, 224 and other connected articles prominently figured in the context of circular of the Law Minister dated Mar. 18, 1981, seeking consent of additional judges for being appointed as permanent judges in other High Courts and the short term extensions given to Shri. O. N. Vohra, Shri. S. N. Kumar and Shri S. B. Wad, additional judges of Delhi High Court and the final non-appointment of Shri O. N. Vohra and Shri S. N. Kumar. The submission was that the circular of the Law Minister manifests a covert attempt to transfer additional judges from one High Court to other High Court without consulting the Chief Justice of India as required by Article 222 (1) and thereby circumventing the majority decision in Mr. Sheth's case. The Central theme was the scope, ambit and content of consultation which the President must have with the three constitutional functionaries set out in Art. 217 (1). In the second group of cases, the question arose in the context of transfer of Shri K. B. N. Singh, Chief Justice of Patna High Court as Chief Justice of Madras High Court consequent upon the transfer of Shri M. M. Ismail, Chief Justice of Madras High Court as Chief Justice of Kerala High Court by Presidential Notification dated Jan. 19, 1981, in exercise of the power conferred upon him by Art. 222. The controversy centred down the

scope, ambit and content of consultation that the President must have with the Chief Justice of India before exercising the power to transfer under Art. 222. Thus, the scope, ambit and content of consultation under Art. 217 as also one of Art. 222 which, as Mr. Seervai stated, was more or less the same though the different facets on which consultation must be focussed may differ in the case of transfer and in the case of appointment, figured prominently in both the groups of cases. The parameters of scope, ambit and content of consultation both under Arts. 217 (1), 222 and 224, were drawn on a wide canvas to be tested on the touchstone of independence of judiciary being the fighting faith and fundamental and basic feature of the Constitution. It was stated that if the consultation itself is to provide a reliable safeguard against arbitrary and naked exercise of power against judiciary, the procedure of consultation must be so extensive as to cover all aspects of the matter and it must be made so firm and rigid that any contravention or transgression of it would be treated as mala fide or subversive of independence of judiciary and the decision can be corrected by judicial review. Therefore, at the outset it is necessary to be properly informed as to the concept of independence of judiciary as set out in the Constitution.

691. The entire gamut of arguments revolved principally round the construction of Arts. 217 and 224 in one batch of petitions and Art. 222 in another batch but the canvas was spread wide covering various other Articles of the Constitution, analogous provisions in previous Government of India Acts, similar provisions in other democratic constitutions and reports of Law Commission. Rival constructions canvassed centred upon the pivotal assumption that independence of judiciary is a basic and fundamental feature of the Constitution which has its genesis in the power of judicial review which enables the court to declare executive and legislative actions ultra vires the Constitution. In this connection we are not starting on a clean slate as the contention in this very form and for an avowed object was widely canvassed in *S. H. Sheth v. Union of India*, (1976) 17 Guj LR 1017 (FB) and in

Union of India v. S. H. Sheth (AIR 1977 SC 2328). Some additional dimensions were added to this basic concept of independence of judiciary while both the parties vied with each other as in the past (see statement of Shri S. V. Gupte then Attorney General in Mr. Sheth's case), on proclaiming their commitment to independence of judiciary though in its scope and content and approach there was a marked divergence.

692. Petitioners in both the batches of petitions passionately asserted that independence of judiciary is the basic postulate of our Constitution and any interpretation of the articles in the fasciculus of articles relating to judiciary must keep it inviolate. The construction, asserted the petitioners, which would make any inroad on the absolute independence of judiciary must be rejected because the entire edifice of Parliamentary democracy as envisioned in our Constitution rests on the firm structural foundation of the independence of judiciary. It was asserted that Parliamentary democracy of Westminster model with a written constitution and with division of functions amongst the three branches of the Government, the executive, the legislature and the judiciary postulate that where a transgression of power takes place there must be a body of independent persons with power to correct deviations, so that all constitutional functionaries act within the framework of the power and perform duties as envisaged by the Constitution. This role, it was averred, rightly belongs and has been unreservedly assigned to the judiciary 'as a sentinel on qui vive' and in order that this branch which has a duty to check excess or transgression of or arbitrary exercise of power, functioned 'without fear or favour and solely committed to the upholding of the Constitution must be free wholly and unreservedly from the other more powerful organs of the Indian polity, namely, the executive and the legislature.

693. Developing this submission reference was made to various provisions of the Constitution and the interpretation put on some of those provisions by the decisions of this Court. It was urged that independence of judiciary has been put beyond the pale of controversy in the Court but this Court must spell out its contours and limits.

the fringes and the horizon, so that wherever an intrusion takes place or an erosion is threatened it can be checkmated by judicial review.

694. A reference to some of the important provisions of the Constitution would bear repetition though they have been enumerated at length in Mr. Sheth's case. Taking cue from the Act of Settlement of the United Kingdom and Section 220 (2) of the Government of India Act, 1935, whereby tenure of judges was altered from King's pleasure to one during good behaviour, in U. K. and India respectively, Art. 217 (1) and Art. 124 (2) ensure tenure during good behaviour up to the age of 62 and 65 years respectively to the High Court and Supreme Court Judges, Art. 202 (3) (d) and Art. 112 (3) (i) provide that expenditure in respect of the salaries and allowances of High Court Judges and the salaries and allowances and pensions payable to Judges of the Supreme Court of India is charged on the consolidated fund of each State and of India respectively, Art. 203 (1) and Art. 113 (1) ensure that so much of the estimates as relate to the expenditure charged upon the Consolidated Fund of a State and Consolidated Fund of India shall not be submitted to the vote of the legislative assembly and the Parliament respectively, High Court Judges and the Judges of the Supreme Court are assured salaries guaranteed by the Constitution as set out in Schedule II by virtue of Art. 221 (1) and Art. 125 (1) and a further assurance is held out by the proviso to Art. 220 and Art. 125 that the same shall not be varied to the disadvantage of a judge after his appointment, Art. 211 in respect of High Court Judges and Art. 124 in respect of Judges of the Supreme Court as also of a High Court immunise them in discharge of their duties from discussion in the legislature of a State and Parliament save and except where an address to the President is presented praying for removal of the Judge as provided in Art. 124 (4) and (5), Art. 215 and Art. 129 make the High Court and Supreme Court respectively a Court of Record with power of such Court including the power to punish for contempt of itself. The power to appoint officers and servants of the High Court and officers and servants of the Supreme Court is conferred on the Chief

Justice of the State under Art. 229 and upon the Chief Justice of India under Article 146 and conditions of service of the officers and servants of High Court as well as officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of the High Court or by the Chief Justice of India, as the case may be, but in each case this power is to be exercised subject to the provisions of any law made by the legislature of any State or the Parliament, as the case may be, and in case of rules relating to salaries, allowances, leave or pension would require in case of High Court the approval of the Governor of the State and in case of Supreme Court approval of the President.

695. By Articles 233 and 235 members of the subordinate judiciary are brought under the control of the High Court and except for initial entry and final exit they are under the direct control of the High Court.

696. In cases dealing with subordinate judiciary by as catena of decision commencing from State of West Bengal v. N. N. Bagchi, (1966) 1 SCR 771: (AIR 1966 SC 447) and ending with Shamsher Singh v. State of Punjab, (1975) 1 SCR 814: (AIR 1974 SC 2192) it has been authoritatively laid down that in matters concerning the conduct and discipline of District Judges, their further promotion and confirmations, disputes regarding their seniority, their transfers, the placing of their services at the disposal of the Government for ex cadre posts, considering their fitness for being retained in service and recommending their discharge from service, exercise of complete disciplinary jurisdiction over them including initiation of disciplinary inquiries and their premature retirement, the members of the subordinate judiciary are under the direct control of the High Court. In Shamsher Singh's case (AIR 1974 SC 2192 at p. 2207) the learned Chief Justice observed:

"The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court."

It has been said that subordinate judiciary have no two masters.

697. After reviewing all these provisions and the decisions in Mr. Sheth's

case, Chandrachud, J. (as he then was) in his leading judgment observed that: "it is beyond question that independence of the judiciary is one of the foremost concerns of our Constitution. Constituent Assembly showed great solicitude for the attainment of that ideal devoting more hours of debate to that subject than to any other aspect of the judicial provisions." "If the beacon of the judiciary were to remain bright, the courts must be above reproach, free from coercion and from political influence" (see *The Indian Constitution — Cornerstone of a Nation* by Granville Austin, pp. 164-65). Sardar Vallabhbhai Patel tersely observed that the judiciary should be above suspicion and should be above party influence. Dr. Ambedkar concluded the debate saying that "there would be no difference of opinion that the judiciary had to be independent of the executive".

698. In another judgment forming part of the majority view, Krishna Iyer, J. speaking for himself and Justices S. Murtaza Fazal Ali at p. 485, after referring to various provisions of the Constitution, observed that "these muniments highlight the concern of the founding fathers for judicial insulation, a sort of Monroe doctrine". Tunnung in his own words in *Shamsher Singh's* case that fearless justice is a prominent creed of our Constitution and the independence of judiciary is the fighting faith of our founding document, he reasserted that the creed of judicial independence is our constitutional 'religion.'

699. Justice Bhagwati in his dissenting judgment at p. 473 observed that 'independence of judiciary was held to be a part of our ancient tradition which has produced great judges in the past and judicial independence is prized as a basic value and so natural and inevitable that it has come to be regarded and so ingrained in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for any one to think otherwise.'

700. Having showered encomiums on the independence of judiciary, Justice Krishna Iyer was not oblivious to the fact that judiciary a non-elective institution, has an elitist approach with little or no accountability. Having been

immunised from any discussion in the Parliament or the Legislature of a State and by the sword of Contempt of Court Act from Public criticism, it remains within its insulated vaults and more often has been found to be utterly unaware of the mores of the day. Conceding that independence of judiciary must be ensured and its immunity from executive and legislative overt and covert pressures or intrusions, must be guaranteed in larger public interest, the role of judge power and the immunity of the judiciary must be studied, "with aware allegiance to the scheme and sweep of the Constitution with insightful homage to the soul of the Paramount Parchment and with sociological appreciation that economic and political order of which the legal order is but a juridical reflection is sharply pluralist. The apparatuses of activist justice, working under such societal strains and stresses and charged with engineering progressive change through the law, may have to enjoy more than traditional functional freedom. For, in a dynamic democracy with goals of transformation set up by the Constitution, the judge, committed to uphold the founding faiths and fighting creeds of the nation so set forth, has to act heedless of executive hubris, socio-economic pressures and diehard obscurantism.

701. Mr Sorabji reinforced the conclusion reached in Mr. Sheth's case that independence of judiciary is the fighting faith of the founding fathers when he drew our attention to 'the Government of Canada' by Dawson, 2nd edn., Revised 1954 wherein it is said that the unique functions which the judiciary perform in the Government make imperative that they should be given a position quite different from that of the great majority of Government officials. It was, however, conceded by the same author that the judges cannot remain completely unaffected by their environment and cannot and should not be indifferent to the effects of their decisions on the social and political needs of the nation. There will always be some interplay among the habits of mind of the judge, the society in which he lives, and the decisions which he renders. This view reflects what was urged as value packing in the matter of appointment of

judges to which a reference will be presently made. The author concludes that the 'fundamental decisions in a democracy arise from a constant interchange of desires and commands, tentative advances and retreats, experiments and consolidations, the adoption of one policy, the rejection of another, the haphazard and almost unconscious acceptance of a third, compromises without number, all forming a part of the extremely complex process of determining and applying public policy.' Awareness of these constitutional changing values must inform the judicial personnel and in the superior judiciary the value system of the judge unconsciously but invariably reflects in his judgments. Thus the coincident that what is disclosed by the people to the Parliament which in turn went to the Cabinet and to the administration and the resulting action, has to be remembered so that 'the stream of command—albeit somewhat uncertain and wandering, and sometimes showing little perceptible motion — and also a means whereby honesty and efficiency and devotion to public duty can be appraised and suitably recognised.' No doubt, people do see in judicial independence a greater promise of justice than could be obtained through the application of ordinary political sanctions but it has a continuous interplay of forces and interaction of various organs ultimately concerning on realisation of constitutional goals.

702. Attention was also drawn to 'Judges on Trial' by Shetreat, 1976 Edn., and after reading out the struggle for judicial independence, pointed reference was made to the fact that since Coke's disgrace the Crown could no longer expect to obtain the moral support which it had hitherto received from decisions pronounced by the Bench of the judges who were comparatively at least, with the men who held office subsequently to Coke's disgrace, independent of the favours and the anger of the Crown.'

703. Nor independence of judiciary is some a priori concept a fact when judges attempt on their own insulation is occasionally clouded or overlooked. Independence of judiciary under the Constitution has to be interpreted within the framework and the parameters

of the Constitution. There are various provisions in the Constitution which indicate that the Constitution has not provided something like a 'hands off attitude' to the judiciary. The power of appointment of High Court Judges and the Judges of the Supreme Court vests in the President and the President being a constitutional head, he is constitutionally bound to act according to the advice of the Council of Ministers. One can profitably refer to a number of Articles in the Constitution conferring power on other constitutional institutions such as the executive which when it acts within the limits of power will have a direct impact on the functioning of the judiciary. To briefly refer to some of these provisions, Art. 32 (3) confers power on the Parliament to frame a law, inter alia, empowering any other Court to exercise within local limits of its jurisdiction any of the powers exercisable by the Supreme Court under Art. 32. Art. 133 (3) confers power on the Parliament to enact a law enlarging the jurisdiction of the Supreme Court. Art. 135 preserves the existing jurisdiction of the Supreme Court but makes it subject to the law made by Parliament which might otherwise provide. Art. 138 enables Parliament to enlarge the jurisdiction of the Supreme Court in respect of certain matters. Art. 139 contemplates conferment on Supreme Court by a law of Parliament all powers to issue writs for any purpose other than those mentioned in cl. (2) of Art. 32. Art. 140 provides for parliamentary legislation even in regard to supplemental powers of the Supreme Court. Art. 130 enables the Chief Justice of India with the approval of the President to provide for sitting of Supreme Court at places other than Delhi. Similarly, Arts. 225, 230, 231 and 237 confer power on Parliament to make law directly impinging upon the jurisdiction of the High Courts. Art. 126 vests power in the President to appoint acting judges and it does not postulate consultation with any functionary in the judiciary. The position under Arts. 127 (1) and 128 point in the same direction, subject, of course, to the construction canvassed for on behalf of the petitioners which would be examined a little while after. This conspectus of articles, not meant to be exhaustive, do indicate that Par-

liament has power to regulate Court's jurisdiction and as Hart and Webster in the 'Federal Judicial System' at p. 317 said that "the bald truth is, is not it that power to regulate jurisdiction is actually a power to regulate rights to judicial process whatever they are and substantive rights generally."

704. Undoubtedly judiciary, the third branch of the Government cannot act in isolation. They are ensured total freedom, of course, after entering the office, from any overt or covert pressure or interference in the process of adjudicating causes brought before them and to this end they are ensured tenure, pay pension, privileges and certain basic conditions of service. The judiciary like any other constitutional instrumentality has, however, to act towards attainment of constitutional goals. This in one sense is conceded by Mr. Seervai who led on behalf of the petitioners when in his Sir Chimanlal Setalvad Lectures styled: 'The position of Judiciary under the Constitution of India,' he tersely observed as under:—

"The Court is essentially a check of the past upon the present. But it is the present that represents the will of the people and it is that will that must ultimately be given effect in a democracy. If the democratic bases of our system are to be respected, the review power of one non-democratic organ in our government should be exercised with self-restraint."

It would thus unquestionably appear that the independence of judiciary is not to be determined in all its ramifications as some a priori concept but it has to be determined within the framework of the Constitution. True, that the thrust is to ensure that adjudications are untrammelled by external pressures or controls and it was conceded that independence of judiciary under the Constitution is confined to the adjudicatory functions of the Courts and tribunals and they are insulated from executive control in that behalf. It is not unlikely that the total insulation may breed ivory tower attitude, a bishop delivering sermon from the pulpit and therefore no claim to be imperium in imperio can be extended to the judiciary or for that matter to any other instrumentality under the Constitution. It is not as if judicial independence is an absolute thing like a brooding omni-

presence. Nothing is more certain in a modern society, declared U. S. Supreme Court in the mid century, than the Principle 'that there are no absolutes'. Nor should judges be independent of the broad accountability to the nation and its indigent and injustice ridden millions. Therefore, consequently one need not too much idolise this independence of judiciary so as to become counter-productive,

705. A further submission was that the concept of judicial independence may be examined in the context of parliamentary democracy where other organs of the Government, namely, the executive and the legislature are elected people's representatives while we have eschewed the elective element in appointment of judges. This absence of elective element in judges with guaranteed tenure, conditions of service and immunity from criticism denies any method of accountability of judiciary and the power of judicial review often described as undemocratic (see Schwartz A Basic History of U. S. A. Supreme Court, p. 87) can set at naught the will of the people expressed through its chosen representatives. In order to mitigate the trend disclosed by total aloofness, the Constitution makes envisaged power of appointment in the President advised by the Council of Ministers an elected body so as to make judiciary accountable and responsible to the constitutional goals. It was urged that this methodology will permit 'value packing' in the judiciary. The expression 'Packing' raised a derisive laughter. It is a much misunderstood word. One must reject emphatically any packing of courts, of persons, of the belief, hue and colour of the party in power but it is equally undeniable that all the three organs of the Government must work towards realisation of constitutional goals and the judiciary has to be inspired by the values enshrined in the Constitution if rule of law is to run akin to rule of life and a feudal society is to be transformed into an egalitarian society by the rule of law, an introduction of the element of reflection of popular will so as to make judicial system more viable and effective as an instrument of change is inevitable and total aloofness of judiciary is inconceivable. While undoubtedly political packing must be abhorred in putting the in-

dependence of judiciary on pedestal one cannot lose sight of the fact that the judiciary must keep pace with the changing mores of the day, its decision must be informed by values enshrined in the Constitution, the goals set forth in the fundamental law of the land, peoples' yearning desire for a chance for the better and the promised millennium. An activist role in furtherance of the same is a *sine qua non* for the judiciary. If value packing connotes appointment of persons otherwise well qualified as required by the constitution but having the additional qualification of awareness of the high priority task of eradication of poverty, removal of economic disparity, destroying the curse of illiteracy, ignorance, exploitation feudal overlordship, coupled with conscious commitment to administering socio-economic justice, establishment of a just social order, an egalitarian society, then not only the value packing is not to be frowned upon nor thwarted by entrenched establishment prone people but it must be advocated with a crusader's zeal. And judiciary cannot stand aloof and apart from the mainstream of society. This will ensure its broad accountability to injustice ridden masses and therefore it is not unnatural that the status quoists can enter their caveat to value packing but which does not commend. While appointing each individual the constitutional philosophy of each individual ought to be a vital consideration and if this is labelled as value packing, it is neither unethical nor unconstitutional nor a weapon to strike at independence of judiciary.

706. What should be the ideal method for selecting personnel entrusted with the task of dispensing justice has been an endless source of discussion. In the democracies the world over till today there are two known methods of selection appointment and election. As election method has not been accepted by the Constitution, it need not detain us. Constitution provides for appointment of judges of the High Court and the Supreme Court by the highest executive in the country, the President. And even in this sphere, in view of the provisions contained in Art. 74, the President will be guided by the advice of the Council of Ministers. Undoubtedly, therefore, the power to appoint

judges vests in the executive. This power was specifically conferred after a long debate to which reference will be presently made. But before coming down to the debates of the Constituent Assembly bearing on the subject, a brief survey of the methodology adopted by various democratic countries in the matter of appointment of judges would prove illuminating. In U. S. A. all the federal court judges are appointed by the President subject to confirmation by a simple majority vote of the Senate. The Attorney General has a decisive voice in the nomination made by the President. In the later months of the Truman Administration, the 12 member committee of federal judicial set up of the American Bar Association has come to play an increasingly significant role in the appointive process of the federal judiciary in the U. S. A. but the power still vests in the President whose nomination must be ratified by the Senate meaning thereby the power is in the executive with a legislative veto over it. In the United Kingdom Lord Chancellor is the Queen's chief adviser on the selection. Lord Chancellor presides from the Woolsack over the House of Lords. He is a member of the Cabinet. He is also the head of the Judiciary and thus combines in his person the three-fold function of executive, legislative and judicial. Even though thus the power is in executive, Richard M. Jackson in his 'Study on the Machinery of Justice in England,' noticed that political considerations have hardly entered the process of judicial selection since 1907. In France the President of the Republic who is charged by the Constitution to be "guarantor of the independence of judicial authority," selects the judges. They are chosen either by the 11 member *Council Supérieur de la Magistrature* in the case of *cour d' Appel* and *Cour de Cassation*, or by the Minister of Justice who may consult with, or receive advice from, the High Council in the case of lower courts. The High Council consists of the President of the Republic, the Minister of Justice, and nine persons with legal background chosen by the President for a once-renewable term of four years (see *The Judicial Process* by Henry J. Abraham p. 31). Garner, in his 'Political Science and Government' at p. 726 notices that in nearly all countries other than the

U. S. A., the judges are appointed by the executive and even in the U. S. A., it is the method followed for the selection of the federal judges. In countries having the cabinet system of Government this in effect means appointment by the Minister of Justice. In Foot-note No. 107, he notices that in Belgium the judges of the Court of Cassation must be appointed from two lists of nominees, each containing twice as many names as there are vacancies to be filled, one presented by the court itself, the other by the Senate. This system represents a combination of co-operation, election and appointment. In principle, it has much to commend and it has been advocated in France by various jurists and commissions on judicial reform. Garner at p. 728 recollects the statement of Dean Hall in his study wherein he thus evaluates the system of appointment by the executive: "Of all the methods of selecting judges, of which we have actually had considerable experience in this country, that of appointment by the executive has unquestionably produced the ablest and most satisfactory courts." Prof. Laski in his *Grammar of Politics*, p. 545, notices that there are two methods of selection election and nomination, and in England where practically all judicial appointments are under the control of the Lord Chancellor the nomination system is followed and there is similar practice in France, Italy and Germany where all judicial appointments are nominated by the executive. He proceeds to point out that of all methods of appointment, that of election by the people at large is without exception the worst. He notices with satisfaction that most of the great judges in recent English history, men like Blackburn, Bowen, Watson, Macnaghten, were entirely unknown to the public outside and they were all appointed by nomination. He concludes that by a process of elimination the choice is thrown back upon nomination as the best method available for choice. This method is also not fruitful because it leaves the door too wide open for measurement of fitness in terms of political eminence rather than judicial quality and he illustrates this statement by pointing out that Lord Halsbury used his power of nomination to elevate members of his own party, As

a *via media*, he suggests a compromise by recommending that the appointment should be made on the recommendation of the Minister of Justice with the consent of a standing committee of judges which would represent all sides of their work. Be that as it may, this birds's eye view of the world phenomena should be sufficient to convince us that power to appoint judges where election method is eschewed is always vested in the executive and that it has not been found to be subversive of independence of judiciary. At this stage, it would be advantageous to recall that in the 80th Report of the Law Commission of India, it has been frankly admitted that most of the High Courts to which a reference was made by the Law Commission about the existing system of appointment of judges, have in their replies to the questionnaire, expressed the view that the existing system is by and large sound. Therefore, it is not possible to accept a sweeping statement that the vesting of the power of appointment in the executive is subversive of independence of judiciary.

707. I would here briefly refer to the relevant debate in Constituent Assembly bearing on this topic. Winding up the debate on the articles concerning judiciary, Dr. Ambedkar observed that: —

"With regard to the question of concurrence of the Chief Justice, it seems to be that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have, and I think to allow the Chief Justice practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore think that that is also a dangerous proposition." C. A. D., Vol. 8 p. 258 What is specifically moved and rejected while drafting the Constitution cannot be introduced by the back door through the process of interpretation. A specific amendment was moved to the draft

Art. 193 (corresponding to Art. 217 of the Constitution). The proposed amendment reads as under :

C. A. D. Vol. 8, p. 674 :—

"That for, clause (I) of Art. 193, the following shall be substituted:—

(I) Every judge of a High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court concerned after consultation with the Governor of the State concerned and with the concurrence of the Chief Justice of India and shall hold office until he attains the age of sixty-three years." (Underlining mine).

708. A similar proposal was also contained in the memorandum representing the views of the Federal Court and of the Chief Justice representing all the Provincial High Courts of the Union of India submitted to the Constituent Assembly. (See Shiva Rao: The Framing of India's Constitution, Select Documents, Volume 4, page 195). The implication of the amendment is that proposal for appointment of a judge of High Court can only be initiated upon the recommendation of the Chief Justice which would imply that no one else can initiate the proposal for appointment of a High Court judge, an aspect which has some relevance on the construction of Art. 217 (1) but for the present discussion the importance is of the word 'Concurrence' in the proposed amendment. If the amendment had been accepted no appointment of a judge of High Court could be made unless the Chief Justice of India concurred in the appointment. In other words, if the Chief Justice of India does not approve the proposal, he would have a veto on the proposal and his lack of concurrence would kill the proposal. The power of appointment which at present vests in the President would thus stand transferred to the Chief Justice and if such a situation emerged it would have accorded great strength to the submission. Be it noted that this amendment was negatived. In other words, the Constituent Assembly in terms rejected any veto to be vested in the Chief Justice of India in the matter of appointment of a High Court judge. And it is too late in the day to contend that debates in Constituent Assembly do not

provide an aid to construction of articles of constitution or it is impermissible to refer to them. (See State of Mysore v. R. V. Bidap (1974) 1 SCR 589: at p. 592; (AIR 1973 SC 2555 at p. 2556); Union of India v. H. S. Dhillon, (1972) 2 SCR 33; (AIR 1972 SC 1061) and Sagnata Investment Ltd. v. Norwitch Corporation, (1971) 3 WLR 133 at p. 137).

709. In this context, Mr. S. P. Gupta, petitioner appearing in person contended that much of the evil flowing from the power of appointment of judges of High Courts and Supreme Court being vested in the President would be eliminated if by a process of interpretation the Court can eliminate the binding character of the advice that may be tendered to the President in discharge of his function of appointing the judge. Art. 74 (1) provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. A proviso has been added by the Forty-fourth Amendment Act, 1978, which enables the President to require the Council of Ministers to reconsider such advice either generally or otherwise but makes it obligatory on the President to act according to such advice tendered after reconsideration. The contention is that the President in discharge of his function of appointing judges of Supreme Court and High Courts is to act on his own after consultation with the constitutional functionaries set out in Arts. 124 and 217 and is not to act according to the advice offered by the executive in this behalf. This would have necessitated the ascertainment of the position of the President in our Constitutional scheme but a decision of the seven judges Constitution Bench of this Court in Shamsher Singh's case (AIR 1974 SC 2192) has authoritatively concluded this point. A. N. Ray, C. J. speaking for himself, Palekar, Mathew, Chandrachud and Alagiriswami, JJ. has held that the President is a constitutional or formal head and he must exercise his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. An exception was noted in the case of Governor where the Constitution has conferred upon him an obligation to exercise his

function in his discretion but there is no such provision in case of President and it was concluded that the decision of any Minister or Officer under the rules of business made under Art. 77 (3) is the decision of the President. In a concurring judgment Krishna Iyer, J. speaking for himself and Bhagwati J. succinctly observed that it is the function of the Council of Ministers to advise the President over the whole of the Central field and nothing is left to his discretion or excepted from that field by this article. After referring to the debates in the Constituent Assembly, Iyer, J. concluded as under: (at p. 2230)

"We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles, shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations."

These exceptional situations need not be enumerated because they do not touch upon the subject under discussion. Add to this the consistent view of this Court that the position of the President under the Indian Constitution is akin to the position of the Crown under the British Parliamentary system (See *Ramjawaya Kapur v. State of Punjab*, (1955) 2 SCR 225 at pp. 236-237: (AIR 1955 SC 549 at p. 556). *A Sanjeevi Naidu v. State of Madras*, (1970) 3 SCR 505 at p. 511: (AIR 1970 SC 1102 at p. 1106) *U. N. R. Rao v. Indira Gandhi*, (1971) Suppl. SCR 46: (AIR 1971 SC 1002). In the case of *U. N. R. Rao*, the Constitution Bench held that Art. 74 (1) was mandatory and, therefore, the President could not exercise the executive power without the aid and advice of the Council of Ministers. The larger Bench overruled the decision of this Court in *Sardarilal v. Union of India* (1971) 3 SCR 461: (AIR 1971 SC 1547) Mr. Gupta, however, relied upon the decision of this Court in *Jayantilal Amritlal Shodan v. F. N. Rana*, (1964) 5 SCR 294: (AIR 1964 SC 648) some observations from which may at first blush seem to support the conclusion reached in *Sardari Lal's* case. However, once the decision in *Sardari Lal's* case

is overruled, observations in *Shodan's* case may be hardly of any assistance. Now, even Mr. Gupta concedes that the power to appoint judges of the Supreme Court and High Court conferred by Arts. 217 (1) and 224 is executive power and the function is executive function. But after an elaborate reference to the debates in the Constituent Assembly and especially the stage at which an instrument of instructions was sought to be prepared for providing guidelines to the President as to the manner of discharging his function in the matter of appointment of judges of High Courts and Supreme Court, it was urged that while exercising the power in the matter of appointment of judges of High Courts and Supreme Court the President was to act not according to the advice of the Council of Ministers. Too much reference to piecemeal debates at the drafting stage, provisions in the draft Constitution and views expressed by different speakers during the debates in the Constituent Assembly is likely to raise a picture in support of some of the provisions of the Constitution which may be misleading. After a long debate, discussion, suggestions, amendments, the end product namely, the provision finally inserted in the Constitution must be examined. The history of the provision may occasionally assist in illuminating the blurred contours. But an over emphasis on the history and debates divorced from the provision which finally emerged after mature deliberation would not help in bringing out the clear intent underlying the provision. Drawing inspiration from the scheme of Secs. 13 and 14 of Government of India Act, 1935, an idea to prepare an instrument of instructions was certainly mooted but finally shelved. In this connection, it would be advantageous to remember that in the memorandum of May 13, 1947, prepared by the Constitutional Adviser for the use of the Union Constitution Committee, the principal provision embodied in this respect stated that there should be a Council of Ministers to aid and advise the President in the exercise of his functions, but it went on to add "except in so far as he is required by this Constitution to act in his discretion." A note was appended to this clause which referred to the

discretionary powers of the President. Certain special responsibilities were set out in the memorandum in respect of which, according to the note, President was required to act in his discretion. While discharging his functions in respect of his special responsibilities wherein he was required to act in his discretion, a Council of State whose composition was set out in the memorandum was proposed to be set up. At a later stage, a suggestion was made that the subject-matter of appointment of judges of High Court and Supreme Court should be included in the instrument of instructions. The draft of instrument of instructions was also prepared by the Drafting Committee. The instrument listed six categories of appointment in regard to which the President was required to consult the Advisory Board. Of the six categories, two are: The Chief Justice and other judges of the Supreme Court and the Chief Justice and the other judges of the High Court. Finally the very idea of instrument of instructions and setting up of the Council of State or Advisory Board was dropped. (See Shivarao: The Framing of India's Constitution, Vol. 4, Pages 338, 374, 491 and 492.) A long debate spreading over sometime took place as to where the power to appoint judges must be centered. A very passionate plea was made for centering this power in the Chief Justice of India. As has been pointed out above this suggestion was specifically negatived and the power was conferred on the President. Thus, if the power to appoint judges is conferred on the President and that power is an executive power, and in the absence of a provision in the Constitution which permits the President to act in his discretion, bereft of the advice of the Council of Ministers, it is not possible to hold that in the matter of appointment of judges of High Court and Supreme Court, the advice offered under Art. 74 is not binding on the President. Where the President is not expected to act on the advice of the Council of Ministers a clear indication is given in the Constitution. To illustrate the point, a reference to Article 103 would be profitable. Art. 103 provides that if any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in Cl. (1) of Art. 102, the question shall

be referred for the decision of the President and his decision shall be final. Sub-article (2) provides that before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion. The Constitution itself has made it obligatory upon the President not to act on the advice of the Council of Ministers but in accordance with the opinion given by the Election Commission. In other words, the opinion given by the Election Commission is binding on the President. Similarly, Art. 217 (3) confers power on the President to decide the question of age of a judge of the High Court if any such question arises, after consultation with the Chief Justice of India and the decision of the President shall be final. The question arose in *Union of India v. Jyoti Prakash Mitter*, (1971) 3 SCR 483: (AIR 1971 SC 1093) as to the nature of the function discharged by the President while determining the question of age of a High Court judge. After noticing that the President by Art. 74 of the Constitution is the constitutional head who acts on the advice of the Council of Ministers in exercise of his function, this Court held that the President acting under Art. 217 (3) performs a judicial function of grave importance under the scheme of our Constitution. It was, therefore, held that he cannot act on the advice of his Ministers. Once the function of the President while exercising power under Art. 217 (3) is held to be judicial it follows as a necessary corollary that the President has to act on his own after consultation with the Chief Justice of India but he cannot act on the advice of the Council of Ministers because a person discharging a judicial or quasi-judicial function cannot act at the behest or dictate of some other authority. But it cannot be said that while exercising the power of appointment of judges of the Supreme Court and High Courts, the President is either performing a judicial or quasi-judicial function. It is admittedly an executive function and howsoever one may like to wish away the interference of the Council of Ministers in the matter of appointment of judges of High Courts and Supreme Court, the framers of the Constitution after having examined various aspects of the matter conferred power on the

President rejecting simultaneously the veto of Chief Justice of India. Once this function is held to be an executive function, Article 74 would come into operation with all its rigours and the President will have to act on the advice of Council of Ministers.

710. Turning now to the group of cases in which circular dated Mar. 18, 1981 issued by the Law Minister, short term extension given to Shri S. N. Kumar, additional judge of Delhi High Court and his subsequent non-appointment on June 6, 1981 figure prominently, what is put in the forefront is position, privilege and status of an additional judge appointed under Art. 224. Art. 224 is such an inseparable adjunct of Art. 217 that it was not possible to lay down precisely the construction of Art. 224 divorced from or dehors Art. 217. Therefore, as a first step, one must now dwell upon the proper and precise construction of Arts. 217 and 224. Construction of a constitutional provision is of long term utility and therefore to eschew the heat and passion and dust of raging controversy, it is always considered prudent to approach the question of construction in abstract and thereafter the fact of a given case may be examined in the light of the construction put on a provision of the Constitution.

The fasciculus of articles in Chapter V, part VI, provide for a High Court for each State. Art. 216 provides for constitution of High Court. It reads as under :

"Every High Court shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint."

Draft Art. 192 corresponding to Art. 216 may be referred to here. It reads as under :

"Every High Court shall be a court of record and shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint."

There was a proviso to the draft Art. 192 which has not been adopted while enacting Art. 216. Art. 217 provides for appointment and conditions of office of a judge of the High Court. It reads as under :

"217. Appointment and conditions of the office of a Judge of a High Court —

(1) Every judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting judge, as provided in Art. 224, and in any other case, until he attains the age of sixty-two years :

Provided that —

(a) a judge may, by writing under his hand addressed to the President, resign his office;

(b) a judge may be removed from his office by the President in the manner provided in cl. (4) of Art. 124 for the removal of a judge of the Supreme Court;

(c) the office of a judge shall be vacated by his being appointed by the President to be a judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession.
Explanation — For the purpose of this clause—

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;

(b) in computing the period during which a person has held judicial office

in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

(3) If any question arises as to the age of a judge of High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final."

Article 222 confers power on the President to transfer a judge from one High Court to another. Art. 224 provides for appointment of additional and acting judges. It reads:

"224. Appointment of additional and acting Judges (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional judges of the Court for such period not exceeding two years as he may specify.

(2) When any judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a judge of that Court until the permanent judge has resumed his duties.

(3) No person appointed as an additional or acting judge of a High Court shall hold office after attaining the age of sixty-two years."

Article 224 initially enacted in the Constitution corresponding to Draft Article 200 was deleted by the Constitution (Seventh Amendment) Act, 1956 and present Art. 224 was substituted in its place. By the Constitution (Fifteenth Amendment) Act, 1962 original Art. 224 deleted in 1956 was reintroduced as present Art. 224A.

711. Article 217 confers power on the President to appoint a judge of the High Court after consultation with the

Chief Justice of India, the Governor of the State and in case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court. The power to appoint a judge of a High Court vests in the President but it is hedged in with a condition that it can be exercised 'after consultation with' the three constitutional functionaries set out in the article. The use of the expression 'after consultation with' instead of 'in consultation with' was harped upon to indicate that the expression 'after consultation with' means that the power of the President remains intact but before exercise of the power the duty is cast upon him to consult the three functionaries. If on the other hand the expression 'in consultation with' was used it may have indicated that the President shared his power with the three constitutional functionaries. Looking to the language of Article 217, I see no distinction in the use of the two expressions which may have an impact on the construction of the article. The power is the power to appoint and the limitation on the power is to consult the three functionaries.

712. Ultimate power of appointment unquestionably vests in the President. Before the power to appoint is exercised the President is under a constitutional obligation to consult the three constitutional functionaries.

713. In practice the procedure for appointment has more or less proceeded along the lines as indicated by the Law Commission in its 14th Report, Vol I, p. 71. Briefly recapitulated, it appears that the Chief Justice of the High Court forwards his recommendation to the Chief Minister who in turn forwards his recommendation in consultation with the Governor to the Minister of Justice. Formerly it used to be Home Minister. If the Chief Minister does not agree with the recommendation of the Chief Justice he makes his own recommendation but in such a situation the Chief Justice is given an opportunity to make his comments on the recommendation made by the Chief Minister. Either agreed or the rival recommendations are then forwarded to the Minister of Justice who forwards the recommendation to the Chief Justice of India. After obtaining opinion of the Chief Justice of India the Minister submits his advice to the President as to the selection to be made.

The Law Commission noticed that this procedure places the Chief Justice in an awkward position. In practice occasionally the Chief Justice may have a judge appointed at the instance of the local executive and against his own preference. In order to obviate executive interference in the matter of appointment of judges the Law Commission recommended that Art. 217 must be suitably amended to provide for appointment of a High Court Judge on the recommendation of the Chief Justice of the High Court which would in practice lead to a situation where one not recommended by the Chief Justice can never be appointed as a High Court judge. Undoubtedly Chief Justice of the High Court would be the most competent person to evaluate the merits, ability and efficiency of a person recommended but as noticed by the Law Commission there may be and frequently there are other matters relating to the person recommended which the State executive would alone be in a position to know and of which they may inform the Chief Justice. Such other matters may include, factors such as the local position of the person proposed, his character and integrity, his affiliations, which may have considerable bearing upon his efficient functioning as a judge and all these may at all be within the knowledge of the Chief Justice of the High Court. Approaching the matter from this angle the Law Commission rejected the submission that the State executive should have no share in the decision making process for appointment of a judge of the High Court and ultimately expressed a considered opinion that where the Chief Justice of the High Court recommends a person for a judgeship, the State executive should have an opportunity to offer its comments upon that recommendation but that such consultation with the State executive should be limited to other factors such as have been enumerated hereinbefore. It may be mentioned that this recommendation of the Law Commission was not accepted by the Government. The fact remains that even a body like the Law Commission was of the considered opinion that it would not be conducive to appointment of suitable persons to totally exclude the State executive in the decision making process for appoint-

ment of a judge of the High Court. Fourteenth report was submitted in 1958 but as late as 1980 in Eightieth Report the Law Commission has reaffirmed the view that the present procedure is good. Therefore, it is not possible to accept rather an extreme argument that participation of the executive in the decision making process for appointment of a judge would be subversive of the independence of the judiciary. In fact, viewed from another angle also it would be impermissible to exclude participation by the State executive in this process. The power to appoint a judge of the High Court is in the President. When appointed by the President the judge would be working as a judge of the High Court to which he is appointed. His salary, pension, allowances, etc. would be chargeable on the Consolidated Fund of the State. Probably influenced by these considerations the Constitution itself provides for giving a share to the State executive in the decision making process and it would be contrary to the intendment of the Constitution to exclude it by process of interpretation.

714 The Constitution-makers attached a high degree of importance to the office of a judge of the High Court. By a conscious effort they were insulating the judiciary against executive interference and, therefore, made the task of removal of a judge once appointed very difficult, if not impossible. It was conceded on all sides that the Judges (Inquiry) Act, 1968 has provided such an elaborate and cumbersome procedure that it would be rather next to impossible to impeach a judge. Once, therefore, someone is appointed as a judge of the High Court under Art. 217, he is to be suffered even though his continuance may not be conducive to the fair administration of justice. Extreme care was, therefore, focussed on the question of initial appointment, probably in order to see that error of judgment of one or the other constitutional functionary may not go unnoticed. Three high constitutional functionaries were involved in the process of appointment of a judge of the High Court, and each one, namely, the Chief Justice of the High Court, the Governor of the State, are the highest judicial and executive functionaries in the State and the Chief Justice of India holder of the

highest judicial office in the country, were to be consulted before the President took the step of making an appointment under Art. 217. When three such high constitutional functionaries participate in the process of consultation there would be a remote or minimal chance of some infirmity being overlooked or any vital consideration relevant to the process of appointment being ignored and the best man will be selected. In the ultimate analysis consumers of justice are interested in securing undiluted justice free not only from bias or subservience but free from predilections, aberrations, preconceived notions and personal philosophies of incumbent of the office of a judge. In a country ruled by rule of law, respect for the law is a *sine qua non* and the respect for law would increase and enhance directly in the proportion to the work of judges in law courts which would inspire confidence. Mr. Justice Arthur T. Vanderbilt in the "Challenge on Law Reforms" (Princeton: Princeton University Press, 1955), pp. 4 and 5 vividly stated which bears quotation :

".....it is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts, their respect for law will survive the short comings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society."

There seems to be, therefore, no doubt that actuated with a burning desire that the best one is selected for appointment, while vesting the power in the highest executive of the country three high constitutional functionaries were involved in the decision making process. The State executive, therefore, must participate as intended by the Constitution in this process and its role cannot be minimised by the specious plea that it might erode independence of judiciary.

715. Experience gained for a period of three decades in working Art. 217 undoubtedly with some rare exceptions would show that the framers of the Constitution envisaged that by a process of discussion amongst themselves, by cross fertilisation of information from each other, if these three high con-

stitutional functionaries reached a consensus it will eliminate even the microscopic error in making the appointment. Undoubtedly, in saying this the role of the President in making the final appointment is not to be minimised.

716. But Mr. Garg contended that looking to the position of the Chief Justice of India as the incumbent of the highest office at the apex of the judiciary, in the event of an unfortunate, albeit undesirable situation of the difference of opinion amongst the three constitutional functionaries, the view expressed by the Chief Justice of India must have primacy. This submission may be examined from two independent standpoints. First, is there anything in the language of Art. 217 which places Chief Justice of India on a pedestal in relation to the other two constitutional functionaries? And secondly, is the Chief Justice of India in a position more advantageous compared to other two functionaries to be infallible in his view? Brusquely stated, does he have a veto over the view expressed by the other two constitutional functionaries? The last question can be answered at once. In the earlier portion of this judgment a statement by Dr. Ambedkar opposing an amendment to draft Art. 193 (corresponding to Art. 217) making concurrence of Chief Justice of India for appointment a *sine qua non* describing it as a dangerous proposition has been noticed. What is specifically rejected cannot be brought in by the back door.

717. Article 217 on its own language and intendment repels the contention. The President is under constitutional obligation to consult the three constitutional functionaries. Each is on par. They are coordinate authorities. There is no relative hierarchy. At any rate, the appellate jurisdiction of the Chief Justice of India functioning as a Judge of the Supreme Court over a decision of the Chief Justice of the High Court would not provide an indicia that the view of the Chief Justice of India in administrative matters has predominance or overriding effect over the view of the Chief Justice of the High Court. It must be recalled that in the process of drafting the Constitution there was some suggestion that the Supreme Court shall have administrative supervision over the High Court and this suggestion was rejected. Initiation of proposal for ap-

pointment of High Court is not a judicial function of the Chief Justice of the High Court. While performing this function Chief Justice of the High Court is not under the administrative subordination of the Chief Justice of India. Further, as the system functions, proposal for appointment of a High Court judge is initiated by the Chief Justice of the High Court. The person recommended may be a member of the Bar or from the subordinate judiciary, say a District Judge. As the High Court has both administrative and judicial control over the subordinate judiciary, the Chief Justice of the High Court is more knowledgeable about the capacity, ability and eligibility of a District Judge for being considered for the post of High Court Judge. Chief Justice of India will have very little information about the capacity, eligibility and quality of a Dist. Judge. Similarly, while recommending a person from the Bar in the State, Chief Justice of the High Court is more advantageously placed compared to Chief Justice of India. And, Chief Justice of India will have to depend upon his sources of information which may not either exclude grapevine or hearsay. He has little or no opportunity of seeing the member of the Bar functioning as a lawyer in the Court. Cumulatively, therefore, Chief Justice of the High Court is more advantageously placed compared to the Chief Justice of India in this behalf. About the various other factors which enter into the verdict, the State executive will be more favourably placed than the Chief Justice of India because it has its own instrumentalities for inquiry and information. Therefore, the view of the Chief Justice of India cannot have any primacy in this behalf.

718. Reference in this connection to an observation in Shamsher Singh's case (1975) 1 SCR 814 : (AIR 1974 SC 2192) that "in practice the last word in such sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order" (at p. 873 of SCR) : (at p. 2228 of AIR) is not apposite. Shamsher Singh belonged to the subordinate judiciary and while examining his case reference was made to Union of India v. Jyoti Prakash

Mitter, (1971) 3 SCR 483 : (AIR 1971 SC 1093) in which case the question of determination of the age of a judge and the construction of Art. 217 (3) figured. Art. 217 (3) obliges the President to consult the Chief Justice of India before deciding the question as to the age of a judge of the High Court. The view expressed therein would not support the contention about primacy, because unlike Art. 217 and similar to Art. 222, Chief Justice of India is the only constitutional functionary required to be consulted by the President while discharging his function under Art. 217 (3).

719. Mr. Seervai in this context urged that the Chief Justice of India has been given the position of primacy because his training as a judge gives him a judicial outlook which would help him to consider the appointment of judges in a judicial spirit. Further, the Chief Justice of India having reached the highest position in the judiciary is free from even a suggestion that his action was actuated by a desire to secure a promotion for himself in the judicial hierarchy. Add to this the consideration that if parochial and local considerations are to be excluded in the appointment of High Court judges, the Chief Justice of India is more likely to exclude such considerations than the Chief Justice of High Court. To say that high constitutional functionaries like the Chief Justice of a High Court would not be free from such shortcomings set out above and that the Chief Justice of India would be free from such shortcomings appears to be an unwarranted assumption. It is well known that some Chief Justices declined to come to the Supreme Court and had they come at least one of them was likely to be the Chief Justice of India by vertical movement according to seniority. If he declined to become the Chief Justice of India and continued to remain Chief Justice of High Court, merely because he opted for High Court judgeship would not be sufficient to reject his opinion, or merely because Chief Justice of India who opted to come to the Supreme Court and became the Chief Justice of India, his view as Chief Justice of India should have greater weight. The submission is not basically sound to overreach the

plain untendment of Art. 217. It was said that if the submission that the view of the Chief Justice of India should be accorded primacy is rejected in the unfortunate event of divergence of opinion between the Chief Justice of India and the Chief Justice of High Court, the executive would function like an umpire and that this would erode independence of judiciary and to avoid this undesirable situation the Court must lean in favour of according primacy to the view of the Chief Justice of India. In support of the submission, the expression 'paterfamilias' used by me in my judgment in Mr. Sheth's case in reference to the Chief Justice of India was relied upon and it was urged that this very description would unerringly point in the direction of the primacy being accorded to the view of the Chief Justice of India. Undoubtedly, I described the Chief Justice of India as paterfamilias of judiciary. And that was in the context of the consultation which the President must have with the Chief Justice of India before exercising the power under Art. 222. But let it not be overlooked that there was no question of primacy to be accorded to the view of the Chief Justice of India with regard to the advice preferred by him when consulted under Art. 222 because he is the only constitutional functionary required to be consulted. The very expression 'primacy' envisages two or more co-ordinate authorities, one having a preferential position over the other. Such a situation does not arise under Art. 222 and, therefore, turn out of context the use of the expression paterfamilias would not help. Therefore, it is not possible to accept the submission that the view of the Chief Justice of India when consulted under Art. 217 would have primacy over the view of the Chief Justice of the High Court.

720. Interestingly a reference in passing may be made to the divergent views on this aspect even amongst the petitioners. Art. 222 which confers power on the President to transfer a judge of the High Court to another High Court provides that the power to transfer can be exercised in consultation with the Chief Justice of India. While hearing the petition challenging the transfer of Chief Justice K. B. N. Singh of the Patna High Court to

the Madras High Court, Dr. Singhvi appearing for Mr. K. B. N. Singh vehemently traversed the argument of Mr. Garg that the view of the Chief Justice of India must have primacy and it was said that no such primacy as is contended for can be accorded to the view of the Chief Justice of India. Specific submission was that if the proposal for transfer is initiated by Chief Justice of India it would be violative of Article 222. If Art. 222 which confers power on the President to transfer a judge from one High Court to another High Court is hedged in with a condition that it can be exercised after consultation with the Chief Justice of India and this consultation has been held to be an adequate safeguard against improper transfer in Mr. Sheth's case, and even though that being the only safeguard, it was submitted that the view of the Chief Justice of India cannot have primacy; how would it be proper to accord primacy when Article 217 mandates consultation with three constitutional functionaries including the Chief Justice of India? Primacy has the flavour of veto and if conceded the authority to be consulted would become the final decision making authority. No canon of construction permits such a thing to be done. As stated by Dr. Ambedkar the Court cannot assign to one authority powers explicitly granted to another. This will be elaborated at a later stage. Therefore, also, the contention about primacy of the view of the Chief Justice of India must be negatived.

721. The next limb of the argument is as to whether the proposal for appointment can be initiated by the Chief Justice of the High Court or the Chief Justice of India only or it can be initiated by any of the four constitutional functionaries adumbrated in Art. 217. In this context the practice followed till the 14th Report of the Law Commission and till the 80th Report has been set out earlier in this judgment. Even, the Law Commission, after noticing the defects and drawbacks in the procedure followed for appointment under Art. 217 ultimately recommended that Art. 217 be suitably amended so that the proposal for appointment of a High Court judge must initiate upon the recommendation of the Chief

Justice meaning thereby that the Chief Justice alone would be able to initiate the proposal. It expressly stated that it should not be open to the State executive to propose a nominee of their own and forward the name of such nominee to the Centre. In its view, if the State executive disagrees with the recommendation of the Chief Justice for such other reasons as mentioned in the Report it should be open to it to disagree with the recommendation and request the Chief Justice to make a fresh recommendation. The weighty recommendation of Law Commission that a proposal for appointment of a High Court Judge can originate only upon the recommendation of the Chief Justice was in terms negated by the Constituent Assembly. C. A. D. Vol. 8, p. 674. There is nothing in the language of Art. 217 that the proposal cannot be initiated by any of the four constitutional functionaries set out in the article. If elaborate provision was made for appointment of a High Court Judge with a view to securing the appointment of the best available man for the time being it would not be conducive to effectuating the purpose underlying the article if the proposal can be initiated by the Chief Justice of the High Court alone. Cases are not unknown where the Chief Justice of the High Court having his own philosophy adopted the same as his yard-stick to determine suitability for appointment and thereby excluded from his consideration a sizeable section of the Bar. Similarly, the Chief Justice of India can also initiate a proposal because if he finds someone practising in the Supreme Court as one suitable for appointment to the High Court, we see nothing objectionable or improper in his initiating the proposal. Similarly, there could not be a blanket embargo on the State executive initiating the proposal. We agree that the State executive should not make its own recommendation and forward it directly to the Centre. The State executive initiating the proposal must first forward it to the Chief Justice of the High Court who would be better informed about the practising advocates as well as the District Judges subordinate to the High Court, and seek the views of the Chief Justice. The views of both may be forwarded to the Chief Justice of India.

The process of consultation must go on whatever new facts relevant to the consideration are elicited or obtained by any of the constitutional functionaries for consideration of the other constitutional functionaries and this may ultimately lead to a possible consensus, amongst all the constitutional functionaries and translate the purpose underlying Art. 217 into reality by appointing the best man to this high office. The submission that any proposal from the State executive or even from the Central Executive for consideration of the other two constitutional functionaries would make a serious inroad on the independence of judiciary is to ignore the role assigned to these two constitutional functionaries in the process of appointment. However, the consultation must be not merely formal but of substance and the scope and the content of the consultation will be presently examined.

722. But before spelling out the scope and content of consultation envisaged by Art. 217, it is necessary to refer to Art. 224. Frankly, the scope, ambit and the underlying purpose of Art. 224 has consumed maximum time at the hearing of these matters. In the draft constitution there was no provision similar to present Art. 224, which was introduced by Constitution (Seventh Amendment) Act, 1956. However, Art. 192 of the Draft Constitution provided for constitution of a High Court consisting of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint. There was a proviso to the article which provided that the judges so appointed together with any additional judges appointed by the President in accordance with the next following provisions of the Chapter shall at no time exceed in number such maximum as the President may by order fix in relation to that Court. Art. 216 corresponding to draft Art. 192 without proviso has not cast any obligation on the President to fix maximum number of judges that can be appointed in a given High Court. It provides for a flexible situation in that the President may from time to time appoint such other Judges when deemed necessary to appoint. If the number was fixed by the Constitution, every time a constitutional

amendment would become necessary if more Judges were required to be appointed. Pragmatism and flexibility informed the approach of the Constituent Assembly in deleting the proviso and thereby removing the obligation of the President to fix maximum number of judges in relation to each High Court. Art. 224 makes provision for appointment of additional Judges. The concept of additional Judges also figured in the proviso to draft Art. 192. Therefore, when the draft constitution envisaged appointment of additional judges, the expression 'additional judge' may be understood in contradistinction to permanent judge or an acting judge or recalling of a retired High Court Judge. The expression 'permanent judge' in relation to High Court Judge is to be found in Art. 220 which prohibits a permanent Judge of a High Court from pleading or acting in any court or before any authority in India except the Supreme Court and the other High Courts. One can legitimately say that the framers of the Constitution envisaged appointment of an Additional Judge in the High Court in contradistinction to a permanent judge or acting judge. A retired Judge of a High Court who is requested to sit and act as a Judge of the High Court is not deemed to be a Judge of the High Court, and can be given no label or nomenclature and is certainly not an Additional Judge as contemplated by Art. 224.

723. Article 224 (1) enables the President to appoint additional judges of a High Court if the conditions enabling the exercise of power are satisfied. There are two situations, contingencies or eventualities in which alone an additional judge can be appointed in a High Court and they must pre-exist before an additional judge can be appointed. These are: (1) if by reason of any temporary increase in the business of a High Court; or (2) by reason of arrears of work therein, it appears to the President that to deal with the aforementioned situations it is necessary to increase the number of High Court judges for the time being, he may do so and may proceed to appoint duly qualified persons to be additional judges of the court for such period not exceeding two years, as he may specify. There is thus the power to appoint additional judges with a limitation on power that it can be exercised if

one or the other or both of the aforementioned pre-conditions for the exercise of the power are satisfied. If one or the other or both of the pre-requisites are satisfied the President may proceed to appoint an additional judge but in the absence of both there is no power in the President to appoint an additional judge in the High Court. Appointment cannot be made for a period exceeding two years and before or while making the appointment the number of judges in the High Court may be increased for the time being, that is, not permanently. Recalling Art. 217 (1) which confers power on the President to appoint a judge of the High Court, one can say without the fear of contradiction that the expression 'Judge' in Art. 217 includes an additional judge. If the pre-conditions set out in Art. 224 are satisfied and the President proceeds to exercise the power to appoint an additional judge, he can appoint only such person who is qualified. The eligibility qualifications for being appointed as a judge of the High Court are set out in sub-Art. (2) of Art. 217 and it is unnecessary to recall those qualifications save and except saying that the qualifications for a judge to be appointed under Art. 217 or an additional judge to be appointed under Art. 224 (1) are the same. However, the tenure of a judge appointed under Art. 217 and one appointed under Article 224 materially differ. A High Court Judge appointed under Art. 217 is entitled to hold office until he attains the age of 62 years, but in the case of an additional judge the period has to be specified and the maximum period that can be specified by the President for which he can hold office is two years. The view that the expression 'judge' in Art. 217 includes an Additional Judge is reinforced by the fact that while introducing Art. 224 by Constitution (Seventh Amendment) Act, 1956, a consequential amendment was inserted in Art. 217. In the absence of the amendment, an additional judge would enjoy tenure till he reached the age of sixty-two years. In order to avoid any confusion in this behalf the words "shall hold office in case of an additional judge or acting judge as provided in Art. 224 and in any other case, until he attains the age of 62 years" were added in Art. 217. If the expression 'judge' in Article 217 were not to include an additional judge it would be redundant to incorporate the maximum

tenure of two years prescribed in Art. 224 for an additional judge in Art. 217. It was however, foreseen that if the necessary amendment was not incorporated in Art. 217 one could have argued with confidence that even the additional judge would retire on attaining the age of 62 years. Therefore, to put the matter beyond the pale of controversy while introducing Art. 224 in 1956 a consequential amendment was made in Art. 217 that the tenure of an additional judge shall be as set out in Art. 224 and that it cannot exceed two years. It is not necessary to refer to the tenure of an acting judge as envisaged in Art. 224 (2) because that aspect is not relevant to the present discussion. So far there is no controversy.

724. It may be mentioned that an additional judge appointed under Art. 224 and a judge of a High Court appointed under Art. 217 as far as pay, privileges, duties, obligations, adjudicatory powers are concerned, are on par, the glaring difference being in the tenure. But, in this context our attention was drawn to *Krishan Gopal v. Prakash Chandra* (1974) 2 SCR 206: (AIR 1974 SC 209). An election petition was filed in the Madhya Pradesh High Court which in course of time came to be assigned to Suraj Bhan, J. who had retired on Feb. 2, 1971, but the Chief Justice of Madhya Pradesh High Court, after obtaining previous consent of the President, requested Suraj Bhan, J. to sit and act as a Judge of that Court under Article 224A of the Constitution. Before the allocation of the election petition to Suraj Bhan, J. the same was being heard by Vyas, J. and when an intimation was sent to the petitioner that his petition was allocated to Suraj Bhan, J., he objected to the same. Suraj Bhan, J. rejected his application upholding the order of allocation of the petition to him. This order was challenged by a petition under Art. 226 of the Constitution for the issuance of a writ of mandamus directing Suraj Bhan, J. to forbear from giving effect to the order of Chief Justice. A Bench of the Madhya Pradesh High Court dismissed this writ petition. Upon a certificate under Art. 132, an appeal was filed in this Court. In this case construction of Article 224A came up before this Court. Two contentions were urged on behalf of the appellant. They were: (i) that a person requested to sit and act as judge of the High Court under Article 224A

was not a judge of the High Court for the purpose of Section 80A of the Representation of the People Act, and (ii) that even assuming that he was a judge for the purpose of Section 80A of the Act, the election petition could not, after it had been entrusted to a permanent judge, be allocated to a judge appointed under Art. 224A. This Court rejected both the contentions but finally observed as under (at p. 216 of AIR):

".....All the same, looking to the special facts and circumstances of this case, we are of the opinion that it is fit and proper and in the interest of justice that the election petition filed by the appellant be tried by another learned judge of the High Court who may be assigned for the purpose by the Chief Justice of that Court, even though we find that the additional or acting judges or those requested under Article 224A of the Constitution to sit and act as judges of the High Court, if assigned for the purpose by the Chief Justice, are legally competent to hear those matters."

This question is hardly of any assistance on the question of eligibility, capacity and competence of an additional judge to undertake any adjudicatory process of any matter assigned to him by the Chief Justice and no distinction can be made between a permanent judge, if one appointed under Article 217 can be so designated and an Additional Judge appointed under Article 224.

725. If an additional judge can only be appointed either by reason of temporary increase in the business of the High Court or by reason of arrears of work therein, what would be the position of such an additional judge at the expiration of his period of two years constitutionally fixed if the temporary increase and/or the arrears to deal with which he was appointed remain unabated? In other words, if the temporary increase to clear which he was appointed continues to remain uncleared or the arrears to tackle which he was appointed not only neither decrease nor wholly get eradicated but remain at the same level or may be found mounting up what would be the right to further continuance of the additional Judge? Some vital questions arise qua the position and continuance of an Additional Judge.

726. The questions posed are of such dimension and magnitude in the field of constitutional law and of such far-reaching effect, defying simple and straightforward solutions because extreme position was adopted on both sides. Wisdom and circumspection should therefore be our watchwords.

727. The questions posed are: Is the Additional Judge, given the continued existence of situation which necessitated his initial appointment, entitled as a matter of right to be re-appointed for a further period of two years? If in the meantime there is a vacancy in the permanent strength of the High Court, is the additional judge without anything more entitled to be appointed as permanent Judge? If an additional Judge was appointed by reason of any temporary increase in the business of the High Court or by reason of arrears of work therein or if the temporary increase has become a permanent feature of the High Court and if the arrears have not only not been reduced but are mounting up meaning thereby that the pre-requisites, existence of which enabled the President to exercise the power of appointment of additional judge, continue to exist, is he entitled to be re-appointed as a matter of right? Could he be deemed to be permanently appointed? Answer posed on the other side was that he had no right to be considered nor is he deemed to be appointed as permanent judge even if he is available and it would be open to the President to appoint anyone else without considering the case of the additional judge whose tenure has come to an end. In other words, he has neither weightage nor a right to be considered. He is on par, according to the learned Attorney General, with any other person in the Bar or in the subordinate judiciary.

728. One submission may be disposed of at the outset. Conceding the contention of Mr. Seervai that the position, powers, privileges and jurisdiction of permanent and additional judges of High Court and the qualifications for their appointment are the same, but the marked contrast in the *raison d'être* of their appointment and the tenure for which they are appointed cannot be overlooked. The present agonising situation arose from a common understanding of the requirements of Art. 224

both by the judiciary and the executive in making appointments of High Court judges since 1956 till today. Every High Court has a sanctioned strength of permanent judges and additional judges. Save rare exceptions, not easily noticeable, whenever a vacancy arose in the permanent strength, the seniormost additional judge was offered the permanent vacancy and in the vacancy so caused in the strength of additional judges a fresh appointment was made. When I say seniormost additional judge, I only refer to the length of period for which the judge has worked and one who has worked for the longest duration amongst additional judges is described by me as seniormost. If the tenure of an Additional Judge specified by the President in the warrant of appointment expires and there is no vacancy in the permanent cadre of High Court judges obviously such additional judge was usually offered a further tenure of ordinarily two years.

729. While making a fresh appointment the procedure followed was one prescribed in Article 217. Article 224 cannot be divorced from Article 217 because an additional judge appointed under Article 224 is a judge within the meaning of the expression in Art. 217 and such an additional judge before entering upon his office has to make and subscribe an oath or affirmation according to the form set out in the Third schedule. Article 224 obliges the President to specify the tenure of the additional judge for such period not exceeding 2 years. Now, therefore, if the additional judge with the knowledge of the specified period of tenure enters upon his office, makes and subscribes to the oath and starts functioning as a judge of the High Court, undoubtedly when the period expires, if nothing else takes place he ceases to be a judge of the High Court. Assuming that he has to be appointed again, the whole gamut of consultation as constitutionally ordained in Article 217 has to be gone through again. Harsh though this may appear, it is an inescapable situation flowing from the provisions of the Constitution. Now if the process of consultation starts over again, undoubtedly the various constitutional functionaries are bound to express their opinion on the relevant merits and demerits of the judge and

the expression of opinion would be more or less on the same lines as when a person is being appointed for the first time as a judge of the High Court. Whatever canon of construction one may resort to, it is not possible to hold that the consultation in respect of an additional judge who has been once appointed and whose tenure has expired and being eligible, is being considered for appointment afresh for a fresh tenure, the relevant consideration which would govern the decision for appointment would be different, save and except saying that the constitutional functionaries will have the additional benefit of the experience of the person concerned as a Judge of the High Court for the period he was appointed and he worked.

730. Three different contentions have been advanced in this behalf and each one will have to be separately examined. One submission of Mr. Garg strongly supported by Mr. Seervai, and learned advocates for the other petitioners is that the Additional Judge is not on probation and, therefore, his eligibility or all those relevant considerations in service jurisprudence which are taken into account while offering a substantive appointment of a probationer could not be brought into consideration. The contention is that his qualifications for being appointed as a judge have once been examined and accepted; when he was appointed as additional judge these considerations cannot be re-examined. And at any rate, it is not open to the Chief Justice of the High Court to sit in appeal over the judgments of the judge concerned and reach his own conclusions about the judicial capacity as flowing from the judgments of the judge. Another limb of the submission is that in order to ensure independence of judiciary, an additional judge who has functioned as a Judge and has had numerous occasions to deal with a litigant, namely, the executive which has the power to make fresh appointment, should not be at the mercy of the executive and, therefore, it was urged by Mr. Seervai that if one or the other of the two pre-conditions in Art. 224 which enabled the President to exercise the power of appointing an additional judge continues to exist a fresh appointment must either follow as a matter of right or if the conditions for exercise of

the power continue to exist he must be deemed to have been appointed as a permanent Judge. The submission is that the permanent judge is appointed for the routine work of the High Court including the work to deal with the arrears and if the work load is sufficient for the permanent strength at the time of initial appointment and continues to disclose the same position, the initial appointment of the Additional Judge was not within the purview of Art. 224 but it must be deemed to have been within the purview of Article 217 and, therefore, such a judge would be a permanent Judge. On the other hand, the learned Attorney General contended that if the appointment is made within the four corners of Art. 224, the assumption is that the Judge so appointed would either deal with the problem arising out of the temporary increase in the business of the High Court or tackle the arrears to clear which he was appointed and it is not a relevant consideration whether he has succeeded or not succeeded and it would be open to the Government to appoint him or to appoint anyone else completely ignoring any claim of such an additional Judge whose tenure has expired. It was asserted with emphasis that such an additional judge has no right to be reconsidered and the situation at the expiry of his tenure is the same as it was at the time of his entry and he or any other person could have been appointed and he is not entitled to be considered in priority or preference to any other person who can be picked up from the Bar or from the subordinate judiciary. Extreme illustrations were given to make good either point of view by both sides but the illustrations hardly if ever provide a reliable yard-stick to interpret a constitutional provision.

731. In an emotionally surcharged voice we were told that there were more than 65 additional judges on April 1st, 1980 all over the country whose fate is in balance and, therefore, the Court should be very careful and circumspect in putting such construction on Art. 224 which would not leave these 65 additional judges to the vicissitudes of executive smile or frown. On the other hand we were told that the whole conspectus of the Articles with which the Court is dealing with in these matters

were debated over a long period in the Constituent Assembly and the trend indicates that speaker after speaker repeatedly asserted that the mechanism for appointment of judges must be so devised that the best in the country is available for this high constitutional office and that the checks and balances provided must be such as to weed out and eliminate the unworthies. It was, therefore, said that such rigid construction should be avoided which would enable an additional judge who has made himself thoroughly undesirable during the period of his tenure should not be foisted (to be foisted?) upon the society and the consumers of justice because the door against his exit is tightly bolted. We have thus to steer clear of all these extreme propositions,

732. We were told that constitutional conventions and practice are a sure guide to ascertain, decipher and unravel the intendment of the various articles. The constitutional conventions and practice as an aid to construction were canvassed because Article 224 has been so implemented under a common belief albeit mistaken of the executive and judiciary that the present impasse is the end-product of it.

733. The proviso to draft Article 192 envisaged appointment of additional judges but the tenure of such additional judges was not specified. However, when the Constitution was adopted and Article 216 took place of draft Article 192, the proviso was deleted. Article 216 casts an obligation on the President to appoint a Chief Justice and such other judges from time to time as he deems it necessary to appoint. Therefore, the power to appoint coupled with a duty to appoint has been cast on the President. It is not necessary to consider whether this duty can be enforced by a mandamus. An extreme illustration was taken that the President may appoint one Chief Justice and one additional judge and the consumers of justice would suffer inordinate delay in disposal of their cases if the judiciary denies to itself power to issue a mandamus to the President to perform his function to appoint such number of judges keeping in view the institution, disposals and arrears, to be able to dispose of cases speedily and within a reasonable time. Such an illustration

overlooks a vital point that the arrears in the courts are not attributable solely to the inadequate number of judges in each High Court. It would be merely adding to the length of this judgment if all the causes more vital than the inadequacy of the number of judges contributing to the mounting arrears are enumerated here. But I cannot resist the temptation of referring to what Mr. Seervai bluntly stated to the Court that to a considerable extent the senior members of the Bar are responsible for the sorry state of affairs more so because the courts have refused to enforce the provision in Order XVII, R. 2, Civil P. C. namely that non availability of counsel is not a ground for adjournment. Present malaise in this court was also touched upon by him. Be that as it may, the Committee appointed by the Government presided over by the then Chief Justice of India, Shri J. C. Shah, extensively examined the question of mounting arrears in the High Courts and found that the inadequacy of number of judges in each High Court is relatively a minor factor contributing to the mounting arrears but there are more weighty factors which are to be tackled with.

734. In a parliamentary democracy with a written Constitution in which three organs of the Governments are clearly marked out, it becomes a primary duty of the State to provide for fair and efficient administration of justice. Justice must be within the easy reach of the lowest of the lowliest. Rancour of injustice hurts an individual leading to bitterness, resentment and frustration and rapid evaporation of the faith in the institution of judiciary. Two vital limbs of the Justice system are that Justice must be within the easy reach of the weaker sections of the society and that it must be attainable within a reasonably short-time, in other words, speedily. Leaving aside other factors contributing to the arrears in courts, it cannot be gainsaid that in each High Court adequate number of Judges must be appointed and the situation in each High Court must be regularly reviewed by the President so as to efficiently discharge the duty cast on him by Article 216. In the course of hearing a statement was made on behalf of the Union of India that the Govern-

ment is taking steps to review the strength of each High Court to determine the adequate strength of each High Court and then to take steps to make appointments according to the targets so devised. As this statement is a solemn undertaking to this court, it may be reproduced in extenso:

"The Union Government has decided to increase the number of posts of permanent judges in the various High Courts keeping in view the load of work, the guidelines prescribed and other relevant considerations. In fact in 1980 itself, on the basis of institution, disposal and arrears of cases and the guidelines prescribed, the Governments of seven States where the problem was more acute, had been addressed to consider augmentation of the Judge strengths of their High Courts. It has been decided that where necessary the guidelines prescribed will be suitably relaxed by taking into account local circumstances the trend of litigation and any other special or relevant factors that may need consideration. The Union Government will take up the matter with the various State Governments so that after consulting the Chief Justices of the High Courts, they expeditiously send proposals for the conversion of a substantial number of posts of Additional Judges into those of permanent judges.

2. The Union Government has also decided that ordinarily further appointments of Additional Judges will not be made for periods of less than one year."

But to say that a litigant who wants his case to be disposed of as early as possible being convinced that his case is not handled by the Court for want of adequate number of judges can bring an action to issue a mandamus to the Government to appoint adequate number of judges requires more elaborate arguments and in view of the statement it is not necessary to deal with the submission. An additional error in the submission founded on a mistaken belief is that all shortcomings and infirmities in the system can be remedied by judicial process. There is no greater error than entertaining such unwarranted belief. Courts cannot cope with all

infirmities in the system. That is the admonition of Frankfurter, J. I quote:

"In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of people's representatives, (Baker v. Carr (1962) 369 US 186 at 270). Failure to perform duty of appointing adequate number of Judges in High Courts cast on the President by Art. 216 would make him answerable to the Parliament and not to the Court,

735. The problem of arrears is much too complex to be referable to one single cause, namely, inadequate strength. Obligate the President by a mandamus to appoint adequate number of Judges in High Courts and this intractable problem defying solution would evaporate like the morning dew, betrays woeful lack of appreciation of Parkinson's Law that a large number of Judges may result in further mounting of arrears. Not the number, the system is cancer ridden. The justice delivery system of this country is utterly alien to the genius of this country. This is a smuggled system from across the shores imposed upon us by the empire builders for their own political motives and during the foreign rule a class came into existence which has enormously benefited by this justice delivery system to the detriment of teeming millions and, therefore, they have become the protagonists of the system. A society composed of 70% illiterates living in rural backward area having some simple easily solveable problems by the common sense approach of local populace is being served with a highly complex time-consuming, cost-mounting, justice delivery system evolved over centuries for a cent per cent literate society. What a paradox? The utter failure of the system stems from the fact that it is an alien system unsuited to our genius. It has become static and non-functioning if not counter-productive. Both the Judges and the lawyers failed to suitably revise the system to suit the needs of a republican form of Government and egalitarian society with emphasis on socio-economic justice. We administer justice in a foreign language not understood by a very large number of litigants. If the litigant is present in the Court he hardly understands what is going on. The judgments are written

in a foreign language and the seeker of justice hardly knows what has happened to his cause or controversy which he has brought before the Court. In search of justice he is chasing a mirage, in the process spending his hard-earned fortune. This is the basic draw-back and this aspect can be examined in meticulous detail but this is neither the place nor the environment for elaboration.

736. Examining first the contention whether an additional Judge is on probation during the period of his initial tenure or till he is offered a permanent vacancy, it must at once be said that in the case of a High Court Judge, a high constitutional functionary holding a high constitutional office the expression 'probation' is wholly inept and inappropriate and apt to prove misleading. Such words from the service jurisprudence would be of no assistance. One must keep in view the scheme envisaged by the Constitution for deciding the position of the additional Judge.

737. Before the scheme is examined the common error of executive and judiciary in making appointments of High Court Judges for a period commencing from 1956 till today must be examined. Article 224 was not meant to provide an entry door for becoming a Judge of a High Court under Art. 217. Art. 224 was for a specific and specified purpose. When the Constitution came into force in January 1950 present Art. 224A was Article 224. Article 224A enables the Chief Justice of a High Court with the previous consent of the President to request any person who has held the office of a Judge of a High Court to sit and act as a Judge of the High Court. It was believed that whenever work-load in the High Court temporarily goes up, retired Judges of the High Court may be requested to sit and act as Judges of the High Court and the problem of work-load in the High Court can be solved. In 1956 it was found that this system has not worked satisfactorily. This becomes clear from the 'objects and reasons' set out in the Bill seeking to amend the Constitution by inserting Article 224 in its present form. Therefore, the present Art. 224 was introduced and as pointed out earlier, it was meant to confer power on the President to increase for the time

being the number of Judges in a High Court and to appoint additional Judges to fill in the increased strength. This power can be exercised if one or the other of the two pre-requisites set out in Article 224 is satisfied, namely, temporary increase in the business of a High Court or by reason of arrears therein. The Article was enacted to meet these two specific situations only. In practice it appears and not controverted by anyone, in fact admitted, that the article was worked as if an entry in the High Court for a permanent judgeship is via Article 224, namely, by first being appointed as an additional Judge and then when a vacancy occurs in the permanent strength of the High Court, to be appointed as a permanent Judge. This has been invariably the practice save in rare cases ascertainable by microscope. Every one was ordinarily, first appointed as an additional Judge and in course of time even after once, twice or thrice being appointed as an additional Judge till the vacancy occurred in the permanent strength that one became a permanent Judge. This is clearly contrary to the intendment of Art. 224, and the present malaise arises out of this impermissible, yet without exception or with rare exception, use of Article 224 both by the executive and the judiciary. This has also led to inaction on the part of the President in not reviewing regularly and at regular intervals the permanent strength of the High Courts. Even Chief Justices were unconcerned about the undesirable situation in that they have asked for increase in the strength of additional Judges. In 1979, Chief Justice of Delhi High Court even with 10 additional judges asked for two more without any attempt at reviewing the strength of permanent Judges. If permanent strength was reviewed from time to time the renewal of tenure of an additional Judge twice or thrice could have been avoided. If an additional Judge was appointed to deal with temporary increase in work and his term is renewed twice or thrice and the temporary increase has become a permanent feature of the High Court, what was needed was increase in the permanent strength of the High Court. It is unbecoming for a High Court Judge to be on two years' tenure repeatedly. That is clearly contrary to what was intended by Art. 224.

738. Ordinarily an additional Judge save in rare cases was always offered a permanent judgeship unless he himself wanted to opt out. In order to curb and thwart an undesirable practice of a person returning to the Bar after adorning the Bench for a short-time, a system of taking an undertaking from an additional Judge, that if offered he will accept the permanent judgeship was commenced upon a note of the former Chief Justice of India, Mr. Wanchoo, though the practice does not appear to be universal. The tendency to return to the Bar after adorning the Bench for some time was to be thwarted. The undertaking was devised to meet this situation. This would however show that save in rare exceptional case, first appointment was as an additional Judge. An additional Judge will have a fixed tenure and can safely return to Bar with a perceptible added advantage because it was felt that there was no other way except to offer first appointment as an additional Judge, and therefore a system of taking the undertaking was devised. But again save in rare exceptional cases an additional Judge on the occurring of a vacancy in the permanent strength was always offered a berth. From this invariable practice, a firm belief, therefore, developed that an additional Judge enters upon office with almost an unwritten albeit incontrovertible assurance to be appointed a permanent Judge. Howsoever strong the belief may be, it is not borne out by the constitutional provision. After all, the appointment was as an additional Judge within the constraints and limitation of Art. 224 and no canon of construction would permit the Court to treat the appointment as one under Art. 217. If, therefore, the tenure was of two years, on the expiry of it the appointment will have to be a fresh appointment and for making such a fresh appointment, consultation as ordained by Art. 217 is inescapable. Once the consultation starts, all possible hazards in the process of consultation cannot be wished away and the appointment has to be afresh.

739. It would be at this stage worthwhile to examine the submission that constitutional convention and practice provided a reliable aid to construction of

constitutional provisions. It was also urged that in interpreting a constitutional provision implications arising from the Constitution have to be borne in mind. The submission is that the Court should not dismiss the universal practice invariably followed for a quarter of a century in the matter of appointment of additional and permanent Judges of the High Court as a common error or common understanding of the scope, content and ambit of Art. 224, but the Court must proceed on the basis that both the executive and the judiciary who have a vital role to play in the matter of appointment of additional and permanent Judges of the High Court unambiguously understood Article 224 to provide the only entry door for permanent judgeship and made recommendations leading to appointments on the clearest and unquestionable understanding that once an additional Judge is appointed in course of time when a vacancy arises in the permanent strength he would become the permanent Judge. In other words, from the day of his entry he is more or less a permanent Judge and there was no question of examining his merits and demerits on the expiration of each tenure during the period of his additional judgeship leading in a given situation to his non-appointment.

740. Constitutional interpretation has been a fruitful subject of discussion amongst Judges, jurists and authors. Number of canons have been devised for interpretation. Language being, an imperfect vehicle of translating thoughts and intendments, when the legislature finishes its task and produces a legislation in more general terms, while applying its various provisions to cases and controversies brought before the Court, a debate always ensues as to what was intended by the legislature in using a certain expression. 'A word is not crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used', Holmes, J. in *Towne v. Eisner*, (1917) 245 US 418 at p. 425. Word when used in a certain context may mean a different thing than used in a different context and

therefore, while construing particular word or expression in a statute it is better to read the statute as a whole and ask oneself the question: 'In this state, in this context, relating to this subject-matter, what is the true meaning of the word' (1948-2 All ER 995 at p. 998). If this is true of an Act of Parliament, it is equally true of the fundamental law of the land, viz., the Constitution.

741. Aids to construction help in finding out the intendment of the provisions. It is the duty of the Court to ascertain the intendment of a provision which comes up for construction. What was the purpose in enacting the provision and whether it was to meet or remedy a certain situation or provide for a certain eventuality, are all relevant considerations in ascertaining the intendment of the constitution. Ascertain the underlying purpose and give such construction to the provision as would effectuate the purpose. One such aid, it was urged, is the prevalent conventions and constitutional practices. Where a Constitution has worked for a reasonably long time, conventions which grow up relevant to the constitutional provisions or the constitutional practice can be a torch-bearer in ascertaining the intendment of the provisions because over a period the provision has been so understood and worked that it can be safely said that it was correctly and wisely understood and accurately applied. Coupled with this is the fact that implications which arise from the structure of the Constitution itself or from the constitutional scheme may be legitimately made. An implication was raised from the federal character of the Australian Constitution in *Lord Mayor, Councillors and Citizens of the City of Melbourne v. The Commonwealth*, (1947) 74 CLR 31 at p. 70, wherein it was observed that the intention is to be plainly seen in the very frame of the Constitution, namely, the federal character of the Constitution. As a corollary the provision contrary to the implications to be derived from the federal character of the Australian Constitution was challenged as ultra vires in *State of Victoria v. Commonwealth of Australia*, 122 Commonwealth LR 353, wherein the State of Victoria had challenged the power of Parliament of the Commonwealth requiring the State to

pay pay-roll tax upon wages paid by it to its employees in certain departments claiming that the legislation was contrary to the implications of the Australian Constitution. A question was raised in that case as under :

"Does the fact that the Constitution is federal carry with it implications limiting the law making powers of the Parliament of the Commonwealth with regard to the States".

The question was answered in the affirmative both on principle and authorily :

742. Similarly, in *Commercial Cable Co. v. Govt. of Newfoundland*, (1916) 2 AC 610, the Privy Council read a limitation on the prerogative power of the Governor conferred by the Letters Patent imposed by the constitutional practice of the colony. The Privy Council again in *British Coal Corporation v. The King*, 1935 AC 500 after referring to its Constitution under the Act for the Better Administration of Justice in His Majesty's Privy Council and further referring to the provisions set out in the Act for the conduct of appeals, observed that the Judicial Committee as established by the Act after hearing the appeal could make a report of recommendation, to His Majesty in Council for his decision, the nature of such report or recommendation being always read out in the open court. Proceeding further it was held that even if the Judicial Committee of the Privy Council is regarded as a judicial body or court, all it can do is to report and recommend to His Majesty in Council by whom alone the order in council, which is made to give effect to the report of the Committee, is made. Having determined the legal position of the Judicial Committee, it was further held as under to which specific reference was made :

"But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred".

743. Similarly, in *Re. Alberta Legislation*, (1938) 2 Dominion LR 81 at p. 107 it was held that the Parliament of Canada possesses authority to legislate for the protection of the right of free-

dom of press. That authority, it was said, rests upon the principle that the powers requisite for the protection of the Constitution itself arise by necessary implication from the British North America Act as a whole. A little further it was observed that the provincial legislature is not entitled to interfere with the working of parliamentary institutions of Canada as contemplated by the provisions of British North America Act and the Statute of Dominion in Canada. Such limitation, it was held, is necessary in order to afford scope for the working of such parliamentary institutions and in this region of constitutional practice it is not permitted to a provincial legislature to do indirectly what cannot be done directly. This decision was followed in *Saumur v. City of Quebec and Attorney General of Quebec*, (1953) 4 Dominion LR 641 at p. 672.

744. In the *State of South Australia v. The Commonwealth*, (1942) 65 CLR 373 at p 447, it was held that some implications arise from the structure of the Constitution itself, but it is inevitable also that these implications can only be defined by a gradual process of judicial decision.

745. In *U. N. R. Rao v. Smt. Indira Gandhi*, (1971) Supp SCR 46: (AIR 1971 SC 1002) a question was in terms raised that the Court should interpret Article 75 (3) according to its own terms regardless of the conventions that prevailed in the United Kingdom. Rejecting this contention, the Court observed as under: (at p. 1003 of AIR),

"If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a parliamentary system of government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed."

This would show that in arriving at the true intentment of Article 75 the Court not only took assistance of the form of Government established in India by the Constitution but simultaneously referred to the conventions in the United Kingdom and other coun-

tries having similar political system being adjuncts of parliamentary form of Government.

746. Implication but not the spirit arising from the Constitution is another aid to construction. After referring to some of the Canadian decisions, Sikri, C.J. pointed out in *Kesavananda Bharati Sripadagalavaru v. State of Kerala*, (1973) Suppl SCR 1 at p 152: (AIR 1973 SC 1461) that some of the Judges in Canada have implied that freedom of speech and freedom of the Press cannot be abrogated by Parliament or Provincial legislatures from the words in the Preamble to the Canadian Constitution, i.e. "with a Constitution similar in principle to that of the United Kingdom". Examining the submission in that case about implied and inherent limitations on the amending power of Parliament, Shelat, J. recalled the statement that the rule is established beyond cavil that in construing the Constitution of the United States, "what is implied is as much a part of the instrument as what is expressed" (American Jurisprudence (2d.), Vol. 16, p. 251) and after reviewing a large number of foreign decisions it was observed that the concept of implications can be raised from the language and context of the various provisions (see p. 258). At page 316 Hegde, J. observed that implied limitations on the powers conferred under a statute constitute a general feature of all statutes. The position cannot be different in the case of powers conferred under a Constitution. A grant of power in general terms or even in absolute terms may be qualified by other express provisions in the same enactment or may be qualified by the implications of the context or even by consideration arising out of what appears to be the general scheme of the statute.

747. In Chapter III, Sir Ivor Jennings in *The Law and the Constitution*, refers to the conventions of the Constitution. At p. 80, the author observes as under:

"Political institutions', said John Stuart Mill, 'are the work of men; owe their origin and their whole existence to human will. Man did not wake on a summer morning and find them sprung up. Neither do they resemble trees, which, once planted, 'are aye growing',

while men 'are sleeping'. In every stage of their existence they are made what they are by voluntary human agency'. But men being what they are, they tend to follow rules of their own devising; they develop habits in government as elsewhere. And when these men give place to others, the same practices tend to be followed. Capacity for invention is limited, and when an institution works well in one way it is deemed unnecessary to change it to see if it would work equally well in another. Indeed, people begin to think that the practices ought to be followed. It was always so done in the past, they say, why should it not be done so now? Thus within the framework of the law there is room for the development of rules of practice, rules which may be followed as consistently as the rules of law, and which determine the procedure which the men concerned with government must follow."

Constitutional convention is broadly defined as rules of political practice which are regarded as binding by those to whom they apply but which are not laws as they are not enforced by the Courts (p. 121). It may be an aid to construction but not positive rule of law, breach of which is remediable by Court action. It must, however, be remembered that the conventions grow around and upon the principles of a written Constitution. The conventions generally grow where the powers of the Government are vested in different persons or bodies or where, in the words of Sir William Holdsworth, the Conventions of the Eighteenth Century Constitution. 17 Iowa Law Review, p. 162, there is a mixed Constitution. But conventions do presuppose the law and any convention contrary to the written context is of no validity. The conventions are built in the first instance, on the foundation of law but once they are established, they tend to form the basis for the law. It may, however, be noticed that these rules of law which are conventions are a mere matter of practice and their effect must change with the changing circumstances of national life. That apart what is sought is not enforcement of the convention in the Court but its being invoked as an aid to construction of Art. 224. Does it help in that behalf? W. A. Wynes in Legislative, Executive and Judicial Powers in Aust-

ralia, p. 29, foot note 20, noticed that in the Commonwealth v. Colonial Combining, etc. Co. Ltd., (1922) 31 CLR 421 at Pp. 438-439, Isaacs, J., drew attention to the duty of the Judiciary to recognise and give effect to new positions and circumstances in the national life. The conventions of the Constitution, he said, are not to be omitted from construction in its interpretation.

748. Implications arising from the provisions of the Constitution, constitutional conventions and constitutional practice all stand on a different footing. A constitutional convention when spread over a long period, of immemorial antiquity, followed invariably becomes entrenched as a rule of law but any convention contrary to the written provision is of no validity. Implications may arise from the context in which a provision is placed or the use of the language in the provision or from the nature of the power claimed vis-a-vis the whole constitutional scheme. That was how implied limitations on the power of Parliament to amend the Constitution were spelt out in Keshavananda Bharati's case (AIR 1973 SC 1461). Constitutional practice may be spelt out as a course of conduct over a reasonably long period which may indicate how the authorities charged with a duty to implement the Constitution have worked out or implemented a certain provision of the Constitution.

749. To begin with as pointed out earlier, a constitutional convention must be founded on some provision of law. They provide 'the flesh which clothes the dry bones of the law, they make the legal situation work, they keep in touch with the growth of ideas; a constitution does not work itself, it is worked by men. It is an instrument of national co-operation and the spirit of co-operation is as necessary as the instrument. Conventions are rules elaborated for effecting that co-operation, (The Law and the Constitution by Sir Ivor Jennings, p. 81). As Oppenheimer in the Constitution of the German Republic p. 9, observes, that 'conventions which have already begun to quite a considerable extent, not only to supplement, but also to modify, if not actually supersede express provisions' grow within a short time. It would thus distinctly

appear that any convention contrary to the provision of the Constitution and its basic intendment cannot be given effect to as a convention. Its genesis must be in the provision itself.

750. If Art. 224 conferred power on the President to appoint Additional Judge only in the specified situations set out in the article and for a fixed limited duration beyond which even the President had no power to appoint, it cannot be said that because the way in which the article has been worked, a constitutional convention has grown up that every additional Judge right from the day of his entry irrespective of his two years' tenure would be deemed to be appointed as a permanent Judge or would be entitled as a matter of right to a renewal of his tenure till a permanent vacancy. Such a construction of Art. 224 would run counter to the plain intendment of the Constitution and no such convention can be spelt out as would pro tanto amend Art. 224. Nor any such implication can be raised that an Additional Judge is deemed to be appointed as permanent Judge or he is entitled as of right to a renewal of his tenure till a permanent berth is found for him.

751. Frankly, there is some force in the submission that a practice has grown up for over last quarter of a century (1956-81) that whenever an additional judgeship is offered to a person, he accepts it in the reasonable belief that in course of time he would get a berth as a permanent Judge. It may generate hope in him and his expectations could be said to be well founded and reasonable more so it is, save in rarest of rare cases, invariably done so far. At the minimal most he is entitled to be first considered for a fresh tenure of two years or when the permanent vacancy arises for appointment to that permanent vacancy before any rank outsider is considered given the situation that the pre-requisites which necessitated his initial appointment continue to exist.

752. No cases were pointed out to us that where there were additional Judges in the High Court and a permanent vacancy occurred someone was appointed who had not functioned as an additional Judge. An additional Judge was usually offered permanent judgeship. Maybe

there might be some rare cases in which some fortunate few were directly appointed as permanent Judges but no case was brought to our notice where there were additional Judges in a High Court and a permanent vacancy occurred and overlooking the claims of all additional Judges either a member of the Bar or a District Judge was directly appointed to that permanent vacancy. Therefore, there is no gainsaying the fact that a practice was followed for over 25 years that an additional Judge was always first considered and he was entitled to be considered for a fresh tenure if there was no permanent vacancy and if there was a vacancy in the permanent strength, for being appointed as a permanent judge. A contention of the learned Attorney-General to the contrary that he has no priority, preference, weightage or right to be considered and that he is on par with any other man who can be brought from the market would be subversive of the constitutional scheme and must be rejected. An additional Judge who has worked for the period of his tenure has a weightage in his favour compared to a fresh appointee and any process of appointment while filling in a vacancy must commence with the additional Judge whose tenure has come to an end and has led to the vacancy.

753. Two consequential limbs of the same submission may be dealt with here. If Art. 216 postulates fixing of a permanent strength of the High Court and review of the strength at regular intervals and if Art. 224 enables the President to appoint additional Judges in the two contingencies mentioned therein, would it be open to the President to appoint an additional Judge when there is a vacancy in the permanent strength of the High Court. The constitutional scheme is that ordinarily there should be permanent Judges of the High Court. Article 224 is an enabling provision conferring power on the President to appoint additional Judges to meet a specific situation, namely, a temporary increase in the work of the High Court or the arrears in the High Court. Ordinarily, therefore, the Constitution envisages appointment of permanent Judges. Permanent Judges are appointed to deal with the regular work of the High Court and the strength is fixed keeping in view

the institutions and disposals and minimum work-load which each Judge is supposed to handle. When permanent strength of the High Court is fixed and there is a vacancy, it would mean that for the routine work of the High Court the number of Judges is inadequate and, therefore, it is incumbent upon the President to fill in the vacancy unless it can be made out that the workload in the High Court does not justify the appointment. But if the permanent vacancy is not filled in and the President proceeds to appoint an additional Judge, which can only be done if there is a temporary increase in the work of the High Court or if there are arrears, it would mean that the regular work is not sufficient for the sanctioned strength of permanent Judges and vacancy may remain unfilled, an additional Judge is necessary as if temporary increase in the work of High Court or arrears cannot be dealt with by permanent Judges. Two situations cannot co-exist. Additional Judges can be appointed when the permanent Judges while dealing with the regular work of the High Court are unable to deal with such temporary increase in the work of the High Court or clear the arrears. If the permanent strength is reduced by not filling in a vacancy and it is considered not necessary to fill in such vacancy it would only imply that not only regular work of the High Court is being adequately handled but any other work in the High Court can also be handled by the number of Judges then working in the High Court. In such a situation appointment of additional judge cannot be justified and in the absence of pre-conditions set out in Art. 224 the appointment of an additional judge would be plainly outside the purview of Art. 224 and contrary to the intendment of Art. 224. Therefore, when a permanent post is vacant an additional judge cannot be appointed.

754. But having said this, it must also be conceded that an additional Judge even if appointed, could not be deemed to be a permanent Judge. If the President appoints an additional Judge and specifies his tenure as two years in the warrant of appointment, it is not open to the appointee to ignore the tenure and to expect the appointment as being of a permanent Judge. A reference in this

connection was invited to the Waterside Workers' Federation of Australia v. J. W. Alexander Ltd. (1918) 25 CLR 434 (Aus). Section 12 of the Commonwealth Conciliation & Arbitration Act provided for the appointment of a President. The provision was to the effect that "the President shall be appointed by the Governor-General from amongst the Justices of the High Court. He shall be entitled to hold office during good behaviour for seven years.....". The Constitution provided for tenure of High Court Judges during good behaviour and they were not removeable except by the Governor-General in Council on address from both houses of Parliament praying for such removal on specified grounds (see p. 72). The contention was that if the President was to be justice of the High Court and the tenure was only for a period of seven years, this was contrary to S. 72 of the Constitution and the appointment is invalid and that the appointment being non-severable from the main Act, the whole Act was invalid. The Chief Justice who presided over the Bench held that the word 'appointed' is used in the sense of assignment and the life tenure is not whittled down by making a specific appointment for a certain period. Views contrary to the view of the Chief Justice are also expressed but this decision hardly helps in resolving the problem posed in this case.

755. If the President even by a misconception of a situation, makes an appointment specified in Art. 224 limited for a duration of two years, it is inconceivable that the appointee can ignore the tenure and claim to be appointed as a permanent Judge. Undoubtedly consultation for the purposes of Art. 224 and for appointing a permanent Judge under Art. 217 is of the same width and dimension and the constitutional functionaries involved in the process of appointment are all the same, nonetheless power of the President to appoint for a fixed duration in a given situation even if the situation is shown not to exist, cannot be understood to mean that the President had some other power under some other Article and is deemed to have acted under that Article. In such a situation it may possibly appear that the initial appointment was bad. It was, however, urged that while pur-

porting to appoint an additional Judge under Art. 224 the clear and unmistakable intention was to appoint a permanent Judge, this intention cannot be defeated by use of such words as 'additional' and 'for two years'. The Court must give effect to the intention. It was said that the Judge was appointed not because there was temporary increase in the work of the High Court or the arrears therein but to deal with the cases in the High Court and in such a situation the appointment has to be under Art. 217. If it is so, the Judge would be deemed to be appointed a permanent Judge with the tenure prescribed in Art. 217. The submission is that the intention was to exercise power under Art. 217 but by a mistaken understanding it was treated under Article 224 and the tenure was, therefore, limited to two years but this is done in disregard of the duty of the President under the Constitution, and the Court should not disregard the intention and must enforce the duty. Specific submission is that in a conflict between a qualified intention and an obligatory duty, the Court would enforce the latter. Reliance was placed on *Sewpujan Rai v. Collector of Customs*, 1959 SCR 821 (AIR 1958 SC 845), wherein the Collector of Customs ordered confiscation of gold and imposed penalty of Rs. 10 lacs on payment of which gold was to be released. Penalty was levied with two conditions and it was conceded that he had no power to impose conditions. The question was whether the whole order was void, or two impermissible conditions could be severed and order upheld. This Court held that the impermissible conditions were severable and they were struck down and order was upheld. In this connection, reliance was also placed on the decision of *Y. Mahabooob Sheriff v. Mysore State Transport Authority*, (1960) 2 SCR 146 (AIR 1960 SC 321) wherein the question was whether a permit granted for one year was according to law. Section 58 (1) (a) read with Sec. 58 (2) of the Motor Vehicles Act enabled the Authority to grant permit for a period not less than three years. It was urged that order granting permit was bad being outside the provision. This Court held that the intention to grant permit was manifest and giving effect to the intention directed

the Authority to issue a permit for a period not less than three years and not more than five years as the Authority may specify. I fail to see how these would render any assistance in this case. Here the President has specifically set out in the warrant of appointment that the Judge is appointed as 'additional Judge' for 'a period of two years'. Even if the pre-requisite for exercise of power was absent and, therefore, it was an impermissible exercise of power under Art. 224, there was no intention to appoint a permanent Judge which this Court by a deeming fiction can enforce. Doctrine of severability is not attracted. The intention not shown to be to appoint permanent, as two years' tenure furnishes contrary indication the submission that Court must enforce it must be negated.

756. I may then turn to the next submission incidental to the points under discussion. It was said that if an additional judge has to be appointed either for dealing with the temporary increase in the work of the High Court or for tackling arrears in the High Court the Constitution-makers believed that the situation has reached such a stage that an additional judge if appointed for a period of two years would be able to bring relief. It may be that the problem may not be wholly solved within the period of two years but the reasonable expectation was that a period of two years would provide adequate length of time to the additional judge to deal with the problem for tackling which he is appointed. Therefore, Article 224 provides for a tenure not exceeding two years. By and large save with very recent rare exceptions the appointment of additional judge in the first instance has always been for two years. And it should be so, because no one is unaware of the three dimensional problem of arrears corroding the vitals of the justice delivery system and presenting a formidable threat to it. There is no short-cut and there are no readymade solutions and the problem cannot be overnight wished away. In fact, with sadness the agonising fact must be confessed that no serious efforts have been made to tackle the problem and whatever spasmodic or sporadic attempts have been made have proved counter-productive. It was,

therefore, assumed that a period of reasonable duration such as two years would give adequate opportunity to an additional judge appointed for a specific task and the approach in appointment would be a result oriented approach. If this was the underlying assumption in enacting Article 224, the appointment of short-term duration of six months or in the two cases before us, of three months, is inconsistent with the intendment of Article 224 and unbecoming of the dignity of a High Court Judge. Article 224 confers power on the President. It is enacted for a specific purpose. There is an underlying purpose while conferring such power on the President. To effectuate that purpose not only a power of appointment is given but the President is authorised to make such an appointment for a period not exceeding two years. If when making the appointment of an additional judge it must be deemed to have been assumed that there is such temporary increase in the work of the High Court or there are such arrears that it has become a compelling necessity to appoint additional judges to deal with the situation, the appointment for such a ridiculously short duration of three months or six months appears not only to be an exercise in futility but is inconsistent with the intendment of Article 224. Appointment under Article 224 can only be made as repeatedly pointed out, to meet the specific contingencies. Such appointment cannot be made for the purpose of making inquiry into the suitability, eligibility or fitness of the incumbent additional judge at the time of consideration of his appointment for a fresh term. In this behalf both the judiciary and the executive are in the same bracket. In the case of Mr. S. N. Kumar and Mr. O. N. Vohra, the Chief Justice of India recommended an extension for a period of six months in order to gain time to make inquiries in respect of complaints which appear to have been mentioned by the Law Minister in the correspondence. This is utterly impermissible. Chief Justice of India could not have recommended extension of six months, not for dealing with temporary increase nor for tackling arrears, but for gaining time to complete his inquiry. The Law Minister in his turn presumably must have advised the President to grant extension for three months.

Such short-term appointments are wholly inconsistent and contrary to the clear intendment of Art. 224 and unbecoming of the dignity of a High Court Judge. I am not prepared to believe even on a hypothetical case that in foreseeable future a situation may arise when an appointment of an additional judge is necessary for such ridiculously short term of three months or six months to dispose of temporary increase in work or to tackle arrears. If such a situation can be imagined, better let that work be dealt with by permanent judges rather than appointing persons to such high constitutional office for a ridiculously short period.

757. To put the position beyond the pale of controversy, it must be emphasised, even at the cost of repetition, that whenever the tenure of an additional judge is about to expire, sufficiently in advance the process of consultation for considering his case for appointment as envisaged by Article 217 must start and it must proceed along the hitherto chalked out lines. It has to be completed sufficiently in advance before the tenure is to expire and a decision has to be taken. If the incumbent of the office is considered suitable for a fresh tenure, keeping in view the only two relevant considerations, namely, the existence of the temporary increase in the work of the court or the continued existence of the arrears for resolving or tackling which the judge was appointed, his fresh tenure should be fixed. If on objective consideration it appears that the situation is not likely to improve even within a period of two years, normally the fresh tenure should be of two years unless a contrary legitimate decision verifiable on objective facts is reached that the problem can be resolved within a short period which should in no case be less than one year. One cannot appoint the lowest grade servants on such a short term duration of six months or three months. It violently hurts the dignity of a Judge of a High Court to be appointed for a period of six months or three months and that during this period he is not supposed to clear the arrears to deal with which he was appointed but during the period of three months either the executive or the

Chief Justice of India will be holding their inquisitions to consider his future suitability, a decision which these two high constitutional functionaries could not reach, within a period of two years for which initially the additional judge was appointed. We emphatically declare that short-term extensions of three months or six months are beyond the intendment of Article 224. Ordinarily, as herein indicated the fresh tenure must be for two years subject to the overriding consideration that if an honest and legitimate opinion can be formed by all the constitutional functionaries that the temporary increase in the High Court or the arrears to tackle which the additional judge was appointed could be resolved to the satisfaction of all within a period of say one year, the duration can be of one year but not less than that in any case.

758. In passing it was briefly stated there can be a short term appointment when in a near future a vacancy in the permanent cadre of the High Court is likely to occur. That approach is hardly relevant because even if the additional judge is appointed, say for a period of one year, and a vacancy occurs within three months of his appointment, there is no bar in law in offering him the permanent appointment and if the workload still justifies, to appoint someone else as an additional judge.

759. The stage is now reached where it would be appropriate to deal with the scope and content of consultation as envisaged by Art. 217. It may be recalled that Article 222 also provides for consultation with the Chief Justice of India when the President proposes to transfer a judge of a High Court to another High Court. The question posed is whether consultation as envisaged by Article 217 and consultation envisaged by Article 222 is the same or there is some marked divergence in it. Mr. Seervai in terms said that 'scope and ambit of consultation' with constitutional functionaries both under Article 217 (1) and Article 222 (1) is the same only content may differ because the purpose of consultation under both the articles is different, to wit, under Article 217, consultation is to be had for appointment as High Court Judge while under Art. 222 (1) consultation is for the purpose of transfer of a High Court Judge from one

High Court to another High Court. There are a number of articles in the Constitution which provide for consultation with different authorities. Article 124 (2) provides for appointment of a judge of the Supreme Court by the President after consultation with the Judges of the Supreme Court and of the High Court in States as the President may deem necessary and the proviso to Article 124 (2) makes it obligatory on the President to consult the Chief Justice of India in case of appointment of a Judge other than the Chief Justice of India. The marginal note of Art. 143 which confers advisory jurisdiction on the Supreme Court specifies the power of the President to consult Supreme Court. Article 217 provides for consultation with the Chief Justice of the High Court, Chief Justice of India and the Governor of the State while making appointment of a Judge of the High Court. Article 222 provides for consultation with the Chief Justice of India before transferring a Judge of the High Court to any other High Court. Article 233 provides for appointment of the District Judges by the Governor of the State in consultation with the High Court. Article 234 provides for recruitment of persons other than District Judges to the judicial service in accordance with the rules made by the Governor in that behalf after consultation with the state Public Service Commission and with the High Court exercising jurisdiction in relation to the State. Article 320 (3) makes consultation obligatory with the Union Public Service Commission and State Public Service Commissions, in respect of matters specified in the article. The word 'consultation' has thus been used in different contexts and different authorities are required to be consulted for different purposes before exercise of certain power. Obviously, therefore, the scope and content of consultation may vary from situation to situation. The word 'consult' has been defined to mean 'to discuss something together, to deliberate', deliberation being the quintessence of consultation. The word 'consult' would take its colour and its content and scope will depend upon the context in which it is used. If the consultation is for appointment all those relevant considerations which enter the verdict before an appoint-

ment is made would be the subject-matter of consultation. If the consultation is for transfer of a High Court Judge under Article 222 (1) the word 'consultation' would mean examination of all those relevant aspects to be presently mentioned including the consequences of transfer. Chandrachud, J. affirmed the observation in *Chandramouleshwar Prasad v. Patna High Court* (1970) 2 SCR 666: (AIR 1970 SC 370), on what constitutes consultation within the meaning of Article 233 (1). It reads as under (at p. 2348 of AIR 1977 SC 2328):

"Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more cannot be said to have been issued after consultation".

This observation provides the content and ambit of the process of consultation. Though this observation has been made in the context of Article 233 (1) but it is accepted as applicable to consultation in Article 222 (1) and in my opinion it is good law even for Article 217 (1). At another stage it was observed that 'deliberation is the quintessence of consultation'. That implies that each individual case must be considered separately on the basis of its own facts. Iyer, J. in his concurring opinion in *Mr. Sheth's case* (AIR 1977 SC 2328), recalling the observation in *Chandramouleshwar Prasad's case* (AIR 1970 SC 370) extracted hereinbefore, observed that consultation in order to fulfil its normative function must be real, substantial and effective consultation based on full and proper materials placed before the constitutional functionaries. In the context of consultation for transfer he examined various facets on which consultation must be focussed and concluded that the Government must forward every possible material to the Chief Justice of India so that he is in a position to give an effective opinion. Maybe, the opinion of the Chief Justice of India may not be binding on the Government but it is entitled to great weight and is

normally to be accepted by the Government in order to avoid the charge that the power is exercised whimsically or arbitrarily. These observations on the scope and content of consultation in the context of Article 222 would *mutatis mutandis* apply to the scope and ambit of consultation in Art. 217. To recall the words of Justice K. Subba Rao in *R. Pushpam v. State of Madras*, AIR 1953 Mad 392 the word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution, would provide a rational, legal and constitutional yardstick to measure and ascertain the scope and content of consultation as contemplated in Art. 217 (1). It must not be forgotten that the consultation is with reference to the subject-matter of consultation, and therefore, the relevant facets of the subject-matter must be examined, evaluated and opined upon to complete the process of consultation.

760. Reverting to Art. 217 (1), the consultation is for the purpose of appointment of a Judge of High Court. The constitutional functionaries to be consulted are the Chief Justice of the High Court, Governor of the State and Chief Justice of India. Attention must first be focussed on what are the relevant considerations apart from the qualifications prescribed in the Constitution while making a proposal for appointment of a High Court Judge. The questions, one would pose to oneself are: (i) does he satisfy the qualifications prescribed in Art. 217 (2); (ii) whether he is of sufficiently mature age which is generally considered a good guide form a sombre approach in a law court; (iii) is he of unimpeachable integrity; (iv) has he a spotless character; (v) is he a man of reliable habits; (vi) what is his equipment in law; (vii) does he subscribe to the social philosophy and values enshrined in the Constitution; (viii) does he suffer from any insurmountable aberrations; (ix) does he disclose a capacity to persuade and be persuaded; (x) would he have a team spirit; (xi) has he a quick grasp, a smart intellect and a compassionate heart. These are only illustrative and not exhaustive. As pointed out earlier, the

Chief Justice of the High Court who would ordinarily and generally speaking be the initiator of the proposal would evaluate the candidate in his mind from all these angles and set out his opinion in the proposal formulated by him. The State executive will focuss on the aspects other than his legal acumen and equipment, his grasp, his ability to deal with complex legal problems being brought before him, because in that behalf the Chief Justice is more advantageously placed. Undoubtedly, on character and integrity with the resources at the command of the State it could express its opinion. If it has some other opinion which runs counter and contrary to what the Chief Justice of the High Court has stated, it must inform the Chief Justice of the High Court of whatever is in its possession and permit the Chief Justice of the High Court to react. After this two-way discussion has followed, the proposal may be sent to the Union Minister of Justice who in turn must pass it on to the Chief Justice of India. The Chief Justice of India, free from local, parochial, regional, caste considerations prevailing at the State level would in meticulous detail examine all aspects of the matter. If he has reliable sources for collecting further information it would be open to him to do so. If he collects something which appears to be not known either to the Chief Justice of the High Court or the State executive, he may set out the same and refer the proposal back for the consideration of the aforementioned two authorities. After this exhaustive discussion — not expected to be the oral or telephonic discussion or personal discussion — there is a meeting of the minds on relevant aspects of the matter with possible differences of opinion, the same has to be dealt with by the Minister of Justice who may in turn give his advice, not examinable by the Court, to the President. The consultation has to be meaningful, purposeful, result oriented and of substance. Much water has flown below the bridges when initially it was said that when a duty is cast to consult the authority, one who has to consult, has to inform of its proposal to the authority to be consulted and wait for some time for reply and forget the whole thing. After the decision in Mr.

Sheth's case it is now the law of the land that wherever the President can exercise power in consultation with the Chief Justice of India or other constitutional functionaries, the consultation has to be on all relevant aspects which would enter the final verdict. All the parties involved in the process of consultation must put all the material at its command relevant to the subject under discussion before all other authorities to be consulted. Nothing can be kept back. Nothing can be withheld. Nothing can be left for the eye of any particular constitutional functionary. To recall the words of Justice Iyer in Mr. Sheth's case (1978-1 SCR 433 at p. 506). (AIR 1977 SC 2328 at p. 2328), all necessary facts in support of the proposed action of transfer must be communicated to him and all his doubts and queries must be adequately answered by the Government. The President has, however, a right as rightly conceded by Mr. Seervai upon consideration of all relevant facts to differ from the other constitutional functionaries for cogent reasons and take a contrary view. Chandrachud, J. in his judgment stated as under:—

"Article 222 (1) which requires the President to consult the Chief Justice of India is founded on the principle that in a matter which concerns the judiciary vitally, no decision ought to be taken by the executive without obtaining the views of the Chief Justice of India who, by training and experience, is in the best position to consider the situation fairly, competently and objectively. But there can be no purposeful consideration of a matter, in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and the right decision taken. It must, therefore, follow that while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President, the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to ex-

press his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter, of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Art. 222 (1), therefore, means full and effective, not formal or unproductive consultation." So far there is no controversy.

761. The learned Attorney-General, however, contended that the consultation is obligatory when the President proceeds to exercise his power of appointment but in the case of non-appointment consultation is not obligatory. There is an apparent fallacy in this submission. This argument proceeds on the erroneous assumption that there is something like a process of appointment and a distinct and independent process of non-appointment. Can one start a process of non-appointment either in case of a fresh appointee or in case of a fresh tenure of an additional judge who has already served as High Court judge for the period for which he is appointed by the President under Article 224? What has to start is a process of appointment. The Chief Justice when there is a clear vacancy, has to initiate the proposal for appointment. He may think of selecting someone from the Bar or from the subordinate judiciary. But what he initiates is a proposal for appointment. It is unthinkable that the Chief Justice of High Court would start a proposal for non-appointment for the first time. Such a situation is possible in case of an additional judge, an aspect to be presently examined. But save such a situation what happens is that the Chief Justice of the High Court thinks of certain names and ultimately reaches his own decision and initiates his proposal for appointment. This is a process of appointment. The proposal is forwarded to the State executive as consultation with the Governor is obligatory. Assuming the Governor does not agree, is it that the further examination of the proposal

must come to an end? That is not the constitutional scheme. The Governor may disagree or set out his valid reasons for disagreeing with the proposal of the Chief Justice but he cannot put an embargo on further examination of the proposal by the other constitutional functionaries. If the view advanced by Attorney General that once one of the constitutional functionaries does not assent to the proposal the proposal falls there and cannot be further examined is accepted, it would be putting the power of veto on a constitutional functionary only entitled to be consulted. On a true interpretation of Art. 217, the proposal must move further. It must reach the Chief Justice of India and the Minister of Justice. There might be differences of opinion as they have surfaced in the case of Mr. S. N. Kumar and Mr. O. N. Vohra. That is inevitable when four constitutional functionaries are involved in the decision making process. Ultimately the President may not accept the proposal and drop the proposal resulting in non-appointment. The non-appointment is the end product of a process of appointment. There is nothing like an independent process of non-appointment.

762. This aspect becomes vital in the case of additional judge. When initial term for which the additional judge was appointed is about to expire, if one can legitimately think of a process of non-appointment, the Chief Justice of the High Court may sit silent till the last day and the judge walks out. Does he have a veto sub silentio over other constitutional functionaries? The answer is an emphatic no. It must be the obligatory duty of the Chief Justice to initiate the proposal. Maybe, his initiation of the proposal may start with a recommendation that he is not in favour of a fresh term for the concerned additional judge. He is entitled to express his opinion. Proposal has, however, to be proceeded further and must be sent to the Governor of the State who with his own opinion endorsed in the proceeding should forward the same to the Minister of Justice and who in turn must send it to the Chief Justice of India. No constitutional functionary merely entitled to be consulted has a right to kill the proposal on his own. If there are differences of opinion qua a person amongst the three constitutional

functionaries entitled to be consulted, it is inevitable in the very scheme of things that the President will have to choose keeping in view the fundamental assumption underlying this complex scheme that the best must be appointed and the doubtful must be eliminated. Therefore, there is nothing like a process of non-appointment in respect of which consultation can be eschewed.

763. How far the provision contained in Art. 124 would be helpful in ascertaining the scope of consultation in Art. 217 as also the contention about primacy of the opinion of the Chief Justice of India and the response to the argument on behalf of the respondents that the three constitutional functionaries to be consulted are co-ordinate authorities. In fact, reference to Arts. 124 and 126 is only incidental because the construction of these two articles did not figure directly in the contentions canvassed in these cases. Attention was drawn to them to point out that there are situations envisaged by the framers of the Constitution where the President, the highest executive in the country, may proceed to appoint Chief Justice of India, the highest at the apex of the judicial hierarchy, without consultation with any functionary in the judicial branch of the State. Article 124 provides for establishment and constitution of Supreme Court. Sub-Article (2) provides that every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. There is a proviso which is material. It reads as under:—

“Provided that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted.”

Sub-Article (2) of Art. 124 which provides for appointment of every judge of the Supreme Court will comprehend appointment of Chief Justice of India also. Incidentally it was also pointed out that upon a superficial view of Art. 124, Chief Justice of India may be appointed by the President without consultation with any functionary in the judicial branch. Art. 126 caters to a

situation where an Acting Chief Justice of India is required to be appointed. It provides that when the office of the Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other judges of the Court as the President may appoint for the purpose.

764. Now, power is conferred on the President to make appointment of judge of Supreme Court after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary. The submission is that the expression ‘may deem necessary’ qualifies the expression ‘consultation’ and that if he deems otherwise the President can proceed to make appointment of the Chief Justice of India without consultation with any of the judges of the Supreme Court and of the High Courts. In other words, it was submitted on behalf of the respondents, the President has a discretion to consult or not to consult Judges of the Supreme Court and High Courts before making appointment of Chief Justice of India. It was pointed out that where consultation is obligatory it is specifically provided and reference was made to the proviso extracted hereinabove wherein it is stated that it would be obligatory upon the President to consult the Chief Justice of India before making appointment of a judge of the Supreme Court other than the Chief Justice of India. Undoubtedly, the proviso leaves no option to the President but to consult the Chief Justice of India while making appointment of a Judge of the Supreme Court other than the Chief Justice of India, but it is rather difficult to accept the construction as suggested on behalf of the respondents that in making appointment of the Chief Justice of India the President is at large and may not consult any functionary in the judicial branch of the State before making appointment of Chief Justice of India. The expression ‘may deem necessary’ qualifies the number of judges of the Supreme Court and High Courts to be consulted. What is optional is selection of number of judges to be consulted and not the consultation because the expression ‘shall be appointed after consulta-

tion' would mandate consultation. An extreme submission that the President may consult High Court judges for appointment of the Chief Justice of India omitting altogether Supreme Court judges does not commend to us, because the consultation with such of the judges of the Supreme Court and of the High Courts would clearly indicate that the consultation has to be with some judges of the Supreme Court and some judges of the High Courts. The conjunction 'and' is clearly indicative of the intention of the framers of the Constitution. If there was disjunctive 'or' between Supreme Court and High Courts in sub-article (2), Art. 124 there could have been some force in the submission that the President may appoint Chief Justice of India ignoring the Supreme Court and after consulting some High Court judges. Undoubtedly, sub-article (2) does not cast an obligation to consult all judges of the Supreme Court and all judges of the High Courts but in practical working the President in order to discharge his function of selecting the best suitable person to be the Chief Justice of India must choose such fair sprinkling of Supreme Court and High Court judges as would enable him to gather enough and relevant material which would help him in decision making process. Mr. Seervai submitted that this Court must avoid such construction of Art. 124 which would enable the President to appoint Chief Justice of India without consultation with any judicial functionaries. That is certainly correct. But then he proceeded to suggest a construction where, by a constitutional convention, any necessity of consultation would be obviated and yet the executive power to be choosy and selective in appointment of Chief Justice of India can be controlled or thwarted. He said that a constitutional convention must be read that the senior-most amongst the puisne Judges of the Supreme Court should as a rule be appointed as Chief Justice of India except when he is physically unfit to shoulder the responsibilities. This constitutional convention, it was said, when read in Art. 124 (2) would obviate any necessity of consultation with any functionary in the judicial branch before making appointment of Chief Justice of India and yet would so circumscribe the power of the President as not to enable

the executive to choose a person of its bend and thinking. In this very context it was pointed out that Art. 126 permits the President to appoint even the junior-most judge of the Supreme Court to be an Acting Chief Justice of India and it was said that such an approach or such construction of Art. 126 would be subversive of the independence of the judiciary. It was said that if the junior-most can be appointed Acting Chief Justice of India, every judge in order to curry favour would decide in favour of executive. And as far as Article 124 is concerned it was said that if the convention of seniority is not read in Art. 124 (2), every judge of the Supreme Court would be a possible candidate for the office of Chief Justice of India and on account of personal bias would be disqualified from being consulted. There is no warrant for such an extreme position and the reflection on the judges of the Supreme Court is equally unwarranted. On the construction as indicated above there will be positive limitation on the power of the President while making appointment of Chief Justice of India and it is not necessary to read any limitation on the power of the President under Art. 126 while making appointment of a judge of the Supreme Court as Acting Chief Justice of India. But the observation is incidental to the submission and may be examined in an appropriate case. And the question of construction is kept open.

765. If it is held that an additional Judge before he is not appointed for a fresh term on the expiry of his initial term of appointment has a weightage in that he has a right to be considered before he is dropped and that this consideration must proceed along the line of consultation under Art. 217 with three constitutional functionaries and if in the ultimate analysis he is not appointed without completing the process of consultation, is the decision open to judicial review? Simultaneously, the question would be whether in the case of a first appointment from the Bar when the Chief Justice may proceed to cast his glance on the Bar for selecting the best person and initiate the proposal for appointment of a particular person which gets stuck up or dropped before completing the process of consultation,

is such a decision subject to judicial review? Is the Court in a position to grant any relief? There is no doubt in my mind on one point that whenever a proposal for appointment is initiated by any of the constitutional functionaries before it can be killed at any stage the process of consultation must go through in its entirety. When I say that the process of consultation must go through in its entirety I mean that the initiator of the proposal must forward the proposal to other constitutional functionaries according to the channel and the proposal must reach ultimately the President. It is not open to any of the constitutional functionaries entitled to be consulted to sit tight over the proposal without expressing opinion on the merits of the proposal and by sheer inaction kill the proposal. Viewed from this angle when a term of additional Judge is about to expire it must be deemed obligatory on the Chief Justice of the High Court in which the additional Judge is functioning to initiate the proposal very much in time for completing the process of consultation through various stages before the period of initial appointment expires. Maybe, that the Chief Justice is not willing to recommend him for his own reasons. He may say so and forward his own view through the appropriate channel of communication for consultation. The Chief Justice of the High Court has no veto by sheer inaction to deal with the fate of an additional Judge. That is not the role assigned to him and he cannot arrogate the same to himself by own inaction. It may be that in case of a fresh appointment the Chief Justice may not initiate the proposal at all because he may not be inclined to fill in the vacancy. But it is equally possible that in such a situation any other constitutional functionary entitled to be consulted in the matter of appointment of a Judge of the High Court can initiate the proposal and the proposal must move along and reach each constitutional functionary entitled to be consulted ultimately culminating in the proposal reaching the President with all the collected material in the process of consultation. So far there is no controversy. The question is, if in case of an additional Judge in whose favour there is a weightage and he is entitled

to be considered as held above, a proposal is killed or an affirmative decision is reached not to appoint him without completing the process of consultation in its letter and spirit, would the additional Judge be entitled to question the validity of the decision and would the decision be subject to judicial review. The answer is in the affirmative. This right to question the decision and the power in the Court to grant relief whatever may be the form in which the relief may be moulded, flows directly from the right of the additional Judge to be considered for being appointed for a fresh term or as a permanent Judge. Right to be considered for a further term or as permanent Judge necessitates full and effective consultation. Any drawback, defect or deficiency in the process of consultation may invalidate the decision. Such invalid decision when questioned, the court may not be able to direct appointment, but the court can certainly give a direction to complete the process of consultation which may leads to a different result because the assumption is that high constitutional functionaries involved in the process of consultation will act bona fide and in the highest tradition of fair administration. If the decision is shown to be based on extraneous or irrelevant considerations or mala fide such executive decision is always open to judicial review. I need not affirm this well-established proposition by precedents. The case of a seniormost District Judge may be on par with the additional Judge. But the same cannot be said for a fresh appointee. He was not entitled to be appointed. He had no right to the post. When a person is being selected from the Bar, even if a proposal is initiated and is killed without completing the process of consultation there being no right in such person to the post or he is not entitled as a matter of right to be appointed, the decision not to appoint him will not be a subject-matter of judicial review, because it is not possible to grant him any relief.

766. Having examined the true meaning and effect of the relevant articles of the Constitution and keeping in view what is discussed hereinabove, it is now time to turn to the two petitions, one filed by the four Bombay Advocates brought before this Court in Transfer-

red Case No. 22/81 and the second filed by Shri V. M. Tarkunde in the High Court of Delhi and brought before this Court in Transferred Case No. 20/81. These two cases specifically challenge the constitutional validity of the circular dated March 18, 1981, sent by the Law Minister, Government of India, to the Governor of Punjab and the Chief Ministers of all States in India, and secondly granting of short-term extension to three Judges of Delhi High Court, Sarvashri O. N. Vohra, S. N. Kumar and S. B. Wad, and subsequently not appointing Shri O. N. Vohra and Shri S. N. Kumar by not granting them a fresh tenure of High Court Judgeship.

767. Law Minister appears to have stirred up the hornet's nest by the impugned circular dated March 18, 1981. This circular in its preamble recites that repeated suggestions have been made to the Government by several bodies and forums including the States Reorganisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one third of the Judges of a High Court should as far as possible be from outside the State in which the High Court is situated. With a view to taking first step towards this goal the circular was issued. The circular desired the Chief Minister of each State and the Governor of Punjab to obtain from all the additional Judges working in the High Court of the State their consent to be appointed as permanent Judges in any other High Court in the country. An opportunity was given to such Judges to name three preferences in which each of them would like to be appointed as permanent Judge. A further request was that whenever in future a proposal is made for initial appointment as a High Court Judge it must be accompanied by the consent of the person so recommended to be appointed to any other High Court in the country coupled with the preference limited to three. It was made abundantly clear that option to give preference does not imply on the part of the Government commitment either to appoint the person concerned or to appoint him neces-

sarily at anyone of the three preferences. A copy of the letter was also sent to the Chief Justice of each High Court. Constitutional validity of this circular is questioned in the petition filed by Shri Iqbal M. Chagla and others. The submission is that with a view to circumventing the ratio in the majority judgment in Mr. Sheth's case (AIR 1977 SC 2328) this is a covert attempt at transferring Judges under coerced consent. The web of the argument was woven around the alleged covert attempt by the circular to transfer each Additional Judge to a High Court other than the High Court in which he is functioning. The circular was read and re-read before the Court. Having examined it with microscopic meticulousness I find it impossible to read any overt or covert attempt at transferring Judges from one High Court to other High Court by this Circular. There is not even a whisper of transfer in the circular. But in this connection our attention was invited to the statement made by Law Minister in connection with calling attention motion on the impugned circular in Lok Sabha on April 16, 1981. In course of the discussion Law Minister appears to have stated that if there is a complaint against an additional Judge, 'it has to be examined on merit and a decision taken. The decision could be either to drop a person based on evidence or to see if he could be transferred. Lok Sabha Debates Fifth Series, Vol. XVI, No. 42, Column 271. At a later stage it would be made abundantly clear that transfer power conferred by Art. 222 cannot be exercised by the executive to punish a Judge because of complaints against him which may on enquiry be found to be of substance. But that is another aspect. Circular is not devised as a weapon of mass transfer outside the Constitution. But use of word 'transfer' in the discussion cannot be read torn out of context. A little later at column 273 Law Minister states that Chief Justice of India inquired whether it was the intention of the Government to transfer each and every Judge and this showed that Chief Justice of India was labouring under a mistaken impression that circular was devised for mass transfer but Law Minister explained to him that it is not a case of transfer at all but it is a case of fresh appointment

and it is not the intention to appoint every Additional Judge outside. The later part of the statement has raised another crop of controversy to be presently dealt with but there is no whisper of transfer in the circular. As has been pointed out earlier, an additional Judge has a maximum tenure of two years. At the end of two years he gets a fresh appointment, either as a permanent Judge or an additional Judge for a further period of two years. The consent for fresh appointment is a must. It is open to an additional Judge whose tenure comes to an end to decline the fresh appointment at least in the High Courts where undertaking is not taken to accept permanent appointment, if offered. If he is, therefore, to be appointed again, necessarily it can be done with his consent. The consent to be obtained is of additional Judge. Additional Judge is now being told that, it is possible that he may be appointed in some other High Court, and that therefore, while giving consent for being appointed for a fresh term or as permanent Judge he is informed that he may be appointed in some other High Court and that he may give his consent with the knowledge of it. The fresh appointment is not a transfer. In fact, in the course of this judgment it will be succinctly thrashed out that a Judge who is transferred cannot be said to be appointed afresh to the High Court to which he is transferred. Once it is held that the circular was not a covert way of transferring a Judge because transfer was not even on the distant horizon, the whole edifice of argument built over the decision in Mr. Sheth's case tumbles down. To be specific, a fresh appointment cannot be bracketed with a transfer more so when the submission that transfer implies fresh appointment has been rejected in the past and is being rejected by this judgment. Consent is sought from an additional Judge whose tenure is about to expire and to whom a fresh tenure is to be offered. Ipso facto, it will be a fresh appointment. Initial tenure having come to a close, he is offered a fresh appointment, in another High Court. It being a fresh appointment, it is being done with his consent. In case of such a fresh appointment one cannot say that the additional Judge is transferred on the expiry of

his first tenure, to another High Court where he is appointed afresh with a fresh tenure. The concept of transfer is foreign to the situation. Once the alleged noxious feature of transfer being in the circular is taken out, there is nothing in the circular which would be in contravention of any particular constitutional provision.

768. It was also stated that the expression 'obtain' in the circular has the element of coercion and a consent ceases to be consent if it is obtained under coercion. It was said that consent and coercion go ill together because forced assent would not be consent in the eye of law. It was said that the threat implicit in the circular becomes evident because the Chief Minister, the strong arm of the executive is being asked to obtain consent. If every little thing is looked upon with suspicion and as an attack on the independence of judiciary, it becomes absolutely misleading. Law Minister, if he writes directly to the Chief Justice or the Judge concerned, propriety of the action may be open to question. Chandrachud, J. has warned in Mr. Sheth's case (1978) 1 SCR 423: (AIR 1977 SC 2328) that the executive cannot and ought not to establish rapport with Judges (p. 456 CD) (of SCR): (at p. 2349 of AIR). Taking this direction in its letter and spirit, the Law Minister wrote to the Chief Ministers. The Chief Minister in turn was bound to approach the Chief Justice. This is also known to be a proper communication channel with Judges of High Court. In this context the expression 'obtain' would only mean request the Judge to give consent if he so desires. If he gives the consent, well and good, and if does not give, no evil consequences are likely to ensue. I am not impressed by the submission of the learned Attorney-General that one who gives consent may have some advantage over the one who does not. I do not see any remote advantage and if any such advantage is given and if charge of victimisation is made out by the Judge not giving consent, the arm of judicial review is strong enough to rectify the executive error.

769. It was, however, said that what is not stated in the circular is more objectionable and of devastating effect

than what is stated. It was urged that omission to mention in the circular that one who would not give consent would not suffer any evil consequences or would not be placed at a comparative disadvantage to one who gives consent, and this would precisely convey a threat to the Judge either to give consent or suffer consequences because the negative assurance is not offered. That is hardly the correct way of reading the circular. Let it be noted that no positive advantage was to accrue to one who gives his consent. If any positive advantage was to be given to one who gives consent and if it had been spelt out, there would have been some force in this submission but mere omission to mention any evil consequences flowing from not giving consent would not necessarily imply that such would be the case. Similarly, the statement in the circular that giving an opportunity to indicate preferences would not imply that the Government would be bound to give the additional Judge an appointment or he would be at least given a station of his choice out of the three preferences indicated by him would mean that while unilaterally obtaining consent on one hand, there was no quid pro quo that the appointment would be given. This is clearly reading the circular with coloured glasses and the submission is unwarranted by the language used in it. If an option to indicate preferences is given and option is exercised, undoubtedly that by itself cannot obligate the Government to appoint an additional judge for a fresh term or a new entrant either as additional or a permanent judge, because various factors will have to be taken into consideration over and above his consent and preferences in making the appointment. Consent is asked for at a stage prior to the decision to appoint is taken. Therefore, this caution was absolutely necessary and has been rightly stated that it implies any promise to do a certain thing. It was then urged that if every additional judge was not to be posted outside the State, the executive will have an opportunity to pick and choose, favourites protected, disfavoured pushed out and this would strike a heavy or a near fatal blow at the independence of judiciary. Apprehension voiced is utterly unwarranted because in every appointment of an additional judge

to permanent judge in any High Court the Chief Justice of India is to be consulted and his views would always receive the weight they enjoy. Therefore, once Chief Justice of India gives his considered opinion with respect to every proposal, the element of picking and choosing is effectively curbed or controlled. With these observations, I broadly agree with the view taken by Bhagwati J. in his judgment that there is nothing in the circular which would render it constitutionally invalid.

770. Turning now to the petition filed by Shri V. M. Tarkunde in which Shri S. N. Kumar has been joined as respondent 5 and who has participated in the proceedings questioning the validity of the short term extension granted to him and his subsequent non-appointment. Shri Kumar was appointed an additional judge of Delhi High Court for a period of two years by a Presidential Notification dated March 6, 1979. His term was to expire on March 6, 1981. The Chief Justice of Delhi High Court by his letter dated February 19, 1981, addressed to the Law Minister, did not recommend an extension for Shri Kumar. While stating that the pendency in the Court still justified the appointment of additional judges, he considered it his painful duty not to recommend Shri Kumar for three reasons: (i) that there have been serious complaints against Shri Kumar both orally and in writing and on examination he was of the opinion that the 'complaints were not without basis'; (ii) responsible members of the Bar and some of his colleagues whose names he was reluctant to mention have also complained about Shri Kumar; (iii) that Shri Kumar has also not been very helpful in disposing of cases. He said that he has no investigating machinery to conclusively find out whether the complaints were genuine or not but all the same the complaints have been persistent. A copy of this letter was sent to Chief Justice of India. Response of the Chief Justice of India as evident from his note dated March 3, 1981, and his letter dated March 14, 1981, was that he would like to look carefully into the charges against Shri Kumar because in his view the letter of Chief Justice of Delhi High Court dated February 19, 1981, 'was too vague to accept that Shri Kumar lacks integrity'. Con-

sistent with his desire to look carefully into the charges and to gain time for the same he recommended that the term of Shri O. N. Vohra, Shri S. N. Kumar and Shri S. B. Wad be extended for six months. This is how the ball was set rolling for short term extension. The duration for the which extension was to be given and the reasons for such short term extension are both contrary to the mandate of Article 224 as has been pointed out earlier. As a matter of fact, taking cue from the recommendation of the Chief Justice of India, the Law Minister improved upon it by granting extension of three months which would expire on June 6, 1981. To continue with the Chronology, by the letter dated March 19, 1981, the Law Minister conveyed to the Chief Justice of Delhi High Court the reaction of the Chief Justice of India to the observations made by the Chief Justice for not recommending extension of Shri Kumar especially the charge of vagueness and requested the Chief Justice to offer his comments on the question of continuance or otherwise of Shri Kumar in the light of the view expressed by the Chief Justice of India. On March 28, 1981, the Chief Justice of Delhi High Court replied to the letter dated March 19, 1981, of the Law Minister. In this letter the Chief Justice of Delhi High Court informed the Law Minister that he had since received a letter from the Chief Justice of India asking him to furnish him with "details and concrete facts in regard to the allegations against Justice Kumar". This has reference to the letter of Chief Justice of India dated March 14, 1981, to Chief Justice of Delhi High Court. He proceeds further to state that 'he has since had an opportunity to discuss the entire matter in detail with the Chief Justice of India'. This sentence was relied upon by the learned Solicitor-General to submit that the Court should note that prior to March 28, 1981, the Chief Justice of Delhi High Court met the Chief Justice of India and discussed the entire matter in detail with the Chief Justice of India with reference to the recitals in his letter dated February 19, 1981. He said that read in juxtaposition, the only permissible inference is that at this meeting there was full and elaborate discussion with regard to what Chief Justice of Delhi High Court had written in

his letter dated February 19, 1981, by which he had declined to recommend the extension of the term of Shri Kumar. It was, therefore, said that the three reasons which prompted the Chief Justice of Delhi High Court not to recommend Shri Kumar must have been thoroughly discussed and thrashed out because the expression 'entire matter in detail' would leave no room for doubt that nothing was withheld, nothing was assumed and every aspect was gone into. The Chief Justice of Delhi High Court proceeds further to state that after this discussion which appears to have taken place on March 26, 1981, he addressed a letter dated March 28, 1981, to the Chief Justice of India, a copy of which was annexed to the letter dated March 28, 1981, to the Law Minister. Thus on March 28, 1981, the Chief Justice of Delhi High Court wrote two letters, one to the Law Minister and another to Chief Justice of India and a copy of the letter to Chief Justice of India was annexed to the letter addressed to the Law Minister. Reverting to the letter dated March 28, 1981, written by the Chief Justice of Delhi High Court to the Chief Justice of India, it may be noted that in this letter the Chief Justice of Delhi High Court in terms says that since receiving the letter dated March 14, 1981, with regard to Mr. Justice Kumar, he had also had an opportunity to discuss this 'delicate matter' with the Chief Justice of India. He refers to the three points made by him in his letter dated February 19, 1981, which means that at the meeting on March 26, 1981, the very three points referred to by the Chief Justice of Delhi High Court in his letter dated February 19, 1981, came up for discussion and the discussion was in details and the matter is styled as delicate because it involved the painful task of talking about the integrity of a colleague. But there is a further averment in the letter which leaves no room for doubt that during this meeting integrity and general conduct of Shri Kumar was discussed between them. With regard to the other point about Shri Kumar not being helpful in the work of the High Court he appears to have enclosed a statement of disposals of Shri Kumar. Even in this letter it is conceded that the Chief Justice of Delhi High Court has no investigating agency of conclusively find out

whether the complaints are genuine or not. Then he proceeds to make a point that in such a delicate matter as reputation of a colleague working in the High Court, 'there would be some who would support the allegations and there will be some who would refute them', and, therefore, an affirmative decision of a conclusive nature is by its very nature not possible. The Chief Justice of Delhi High Court also noticed the divergence of opinion that may be expressed by different people. One thing that emerges clearly from this correspondence is that question of character and integrity of Shri Kumar came up for detailed discussion between the Chief Justice of Delhi High Court and the Chief Justice of India at their meeting on March 26, 1981. I propose to ignore any other complaint against Shri Kumar or inadequacy of his disposals because these aspects are not relied upon for non-appointment of Shri Kumar. Ultimately, the decision not to appoint him was founded upon his reputation about integrity. On April 15, 1981, the Law Minister wrote to Chief Justice of Delhi High Court requesting him that it may be that he may not have investigating machinery to conclusively establish the truth of the complaints against Shri Kumar, nevertheless he must have had some material which provided the basis on which he concluded that Shri Kumar's reputation for integrity was not above board and recommended that he may not be continued, and it would be necessary for the Government to have the material and his comments. There is some reference to a complaint by Shri Sabir Hussain against Shri Kumar in this letter but I propose to ignore it because it is hardly relevant save and except saying that it was relied upon by the learned Solicitor-General to urge that the Chief Justice of Delhi High Court had acted most objectively and in a wholly unbiased manner. That may come later on.

771. In the meantime on April 22, 1981, a writ petition was filed by Shri V. M. Tarkunde in the Delhi High Court questioning the validity of the Circular of the Law Minister dated March 18, 1981, and in this writ petition, inter alia, relief was sought in the form of a direction to convert 12 posts of additional judges in Delhi High Court into permanent judges and to appoint Shri N. N.

Goswami, Shri Sultan Singh and Shri O. N. Vohra as permanent judges and to appoint Shri S. N. Kumar and Shri S. B. Wad, additional judges of Delhi High Court for a full term of two years. By an order made by this Court on May 1, 1981, this case stood transferred to this Court. When the matter was pending before this Court an order was made on May 8, 1981, directing the Union of India to decide not less than 10 days before June 6, 1981, whether any of the three additional judges which included Shri S. N. Kumar should be appointed for a further term as additional judge or they should be appointed as permanent judges or otherwise.

772. In the meantime on May 7, 1981, in response to the letter dated April 15, 1981, of the Law Minister, the Chief Justice of Delhi High Court has written a long letter and which has been the subject-matter of intensely ferocious controversy both as to the significance of its contents, propriety of the request contained in the letter not to show the same to the Chief Justice of India and the violation of the constitutional mandate of consultation as prescribed by Article 217, in the letter not being shown to the Chief Justice of India enabling him to offer his comments and taking a decision not to appoint Shri Kumar. The letter dated May 7, 1981, is a long epistle. At the top it is mentioned "Secret (for personal attention only)". The Chief Justice of Delhi High Court refers to his meeting with the Chief Justice of India on March 26, 1981, and then proceeds to state that as is desired by him, he wrote his letter dated March 28, 1981, a copy of which was forwarded to the Law Minister. The expression 'as desired by him' has been a subject-matter of rival contentions. The learned Solicitor-General urged that this statement clearly conveys that the Chief Justice of India himself desired after discussion at the meeting on March 26, 1981, that the Chief Justice of Delhi High Court should not refer to the details of discussion and, therefore, wrote his letter dated March 28, 1981, to the Law Minister in abstruse terms. The specific suggestion is that even in the letter dated March 28, 1981, the Chief Justice of Delhi High Court did not furnish details to the Law Minister as it was so desired by the Chief Justice of India. Then he proceeds to

state that somewhere early in May 1980, one of his colleagues met him and said that he was rather perturbed about information with him to the effect that if a substantial amount was paid to Shri Kumar, suits brought by a particular party against an insurance company would be decided in favour of the party. The Chief Justice states that he did not pay much attention to the earlier reports but when this was brought to his notice and he not being the Chief Justice at that time, he thought that after summer vacation to save Shri Kumar from any embarrassment, he should be put on a jurisdiction other than original jurisdiction and accordingly when he became the Acting Chief Justice and constituted the Benches for the second half of 1980, Shri Kumar was assigned to a Division Bench on the appellate side. He then proceeds to state that even though Shri Kumar was assigned the work of the Division Bench, he carried with him amongst others, three suits Nos. 1409 of 1979, 1417 of 1978 and 1408 of 1979 filed by Jain Sudh Vanaspati Ltd. and Jain Export Pvt. Ltd. against the New India Assurance Co. Ltd. He further states that in August 1980 the same colleague talked to him and another colleague joined saying that doubts were being expressed about the integrity of Shri Kumar vis-a-vis the aforesaid cases and some others. As the Chief Justice was an Acting Chief Justice, he did not want to take any precipitate action but he, however, made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations. This impelled the Chief Justice to look into the allegations more carefully when it transpired that it was not only the three suits mentioned hereinabove but other single Bench matters were also retained by Shri Kumar on his board despite being put in the Division Bench. He points out there was a long list of such suits carried by Shri Kumar with him and that some of the parties in the suits were rich and influential parties including some former Princes. He proceeds to state that in January, 1981, he looked into the matter a little more deeply and made further inquiries and even though some lawyers were non-committal, others however asserted with some force that Shri Kumar's reputation was not above board. This led to his

discussing the matter with some of his colleagues besides the two who had earlier spoken to him, and they also said that unconfirmed reports have been circulating in the Bar which were not very complimentary to Shri Kumar. This made the Chief Justice to conclude that reputation for integrity of Shri Kumar 'was not what should be for a Judge of the High Court'. He then proceeds to refer to the complaint of Shri Sabir Hussain against Shri Kumar in which he exonerates Shri Kumar. He deals with the quantum of work disposed of by Shri Kumar, an aspect which is not relevant for the present purpose. There is some reference to the conduct of Shri Kumar in his work as a judge in the Court. He concludes the letter by saying that he has already expressed his view that Shri Kumar should not be continued but it is for the Government to decide whether it would like Shri Kumar to continue as a Judge of the Delhi High Court. Undoubtedly, this letter has not been brought to the notice of the Chief Justice of India.

773. Thereafter the Law Minister wrote to the Chief Justice of India on May 21, 1981, enquiring from him whether he had completed his inquiry in regard to the complaints regarding Shri Kumar's integrity and general conduct which the Chief Justice of Delhi High Court had discussed with him as mentioned by him in his letter dated March 28, 1981. He requested the Chief Justice of India to forward the advice in regard to the continuance or otherwise of Shri Kumar and Shri S. B. Wad. To this letter the Chief Justice of India replied by his letter dated May 22, 1981, in which after referring to the three points made by the Chief Justice of Delhi High Court in his first letter dated February 19, 1981, for not recommending continuance of Shri S. N. Kumar, he proceeded to state that the Chief Justice of Delhi High Court met him on March 26, 1981, and amongst others, he stated that he doubted the integrity of Shri Kumar because even though his assignment was changed he still continued to hear part-heard cases on the original side. The Chief Justice of India then proceeds to state that he has made the most careful and extensive enquiries in regard to both these matters and he was satisfied that

there was no substance in any one of them. He proceeded to state that he made enquiries not only from the members of the Bar but from the sitting Judges of the Delhi High Court which showed that it is a common practice in the Delhi High Court that even after the allocation of a judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases on which a substantial amount of time has been already spent. In his view, therefore, Shri Kumar did nothing out of the way or unusual in taking up part-heard cases after the allocation of his work was changed. He specifically disagreed with the view of the Chief Justice of Delhi High Court for non-continuance of Shri Kumar and further proceeded to assert that not one member of the Bar or of the Bench doubted the integrity of Shri Kumar, and on the other hand several of them stated that he is a man of unquestionable integrity. He concluded the letter by saying that Shri Kumar's term should be extended by a further period of three months. I have not been able to appreciate the last line of this letter as to why a further three months' extension is recommended. If Shri Kumar's integrity in the opinion of the Chief Justice of India was beyond reproach, the fact whether he was slow in the disposal of work or other minor considerations should not have come in the way of the Chief Justice of India recommending a full term extension. It appears, however, that this three months' extension was recommended because some reports of the intelligence branch in respect of Shri Kumar were also forwarded to the Chief Justice of India and probably the Chief Justice of India was to respond to the same. That the Chief Justice of India did by his letter dated May 29, 1981, and after having expressed his opinion with regard to the details of the report — not disclosed to the Court — the Chief Justice of India recommended a full term extension for Shri Kumar.

774. The sole contention raised by Shri R. K. Garg in this behalf is that the consultation envisaged by Art. 224 read with Art. 217 (1) must be full and meaningful and if that is the criterion, failure of the Law Minister, may be on the request of Chief Justice of Delhi High Court, to disclose the letter dated May 7, 1981, of the Chief Justice of

Delhi High Court or its contents to the Chief Justice of India would unmistakably show that the process of consultation was not complete and, therefore, the consequent decision not to appoint Shri Kumar by not giving him any extension beyond June 6, 1981, is violative of the constitutional mandate and, therefore, invalid. Keeping aside for the time being the propriety of the request made by the Chief Justice of Delhi High Court that his letter dated May 7, 1981, should not be shown to the Chief Justice of India, what is required to be determined is whether the contents of the letter and more particularly the reasons and materials which prompted the Chief Justice of Delhi High Court to come to the conclusion that the reputation for integrity of Shri Kumar was not what should be for a judge of the High Court, were brought to the notice of the Chief Justice of India at any point of time and whether he had a chance to think and deliberate over it. And if the answer is in the affirmative, mere failure to show the letter dated May 7, 1981, would not invalidate the decision. Without going into the further details in this behalf it clearly transpires that at the meeting between the Chief Justice of India and the Chief Justice of Delhi High Court on March 26, 1981, there was a specific discussion of all the three points, including one of lack of integrity of Shri Kumar. Once the question about the integrity of Shri Kumar came up for discussion between these two high constitutional functionaries with a specific reference to the view of the Chief Justice of Delhi High Court not to recommend Shri Kumar for further continuance, the conclusion is inescapable that all aspects bearing upon the integrity of Shri Kumar must have been discussed between the two high constitutional functionaries. That is why the Chief Justice of Delhi High Court says in his letter dated March 28, 1981, that he had discussed the entire matter in detail with the Chief Justice of India. This is further borne out by what the Chief Justice of India writes in his letter dated May 22, 1981, that at the meeting between them on March 26, 1981, the reasons which prompted the Chief Justice of Delhi High Court not to recommend continuance of Shri Kumar were discussed and this discussion included the com-

plaint of Chief Justice of Delhi High Court about Shri Kumar's integrity. There is a specific reference to Shri Kumar keeping to himself the part-heard cases after his assignment was changed, in the letter of the Chief Justice of India. This clearly indicates that there was threadbare discussion on this point and the discussion would include the material which the Chief Justice of Delhi High Court had and which he would necessarily refer to, to justify the view taken by him. There is another internal evidence to bear out this conclusion. Shri Kumar himself filed an affidavit on July 17, 1981, much before the hearing commenced in this case and much before disclosure of the relevant correspondence was ordered by this Court. In this affidavit he clearly refers to his retaining some of the part-heard cases after his assignment was changed and this list includes the three suits referred to in the letter of the Chief Justice of Delhi High Court dated May 7, 1981. What has prompted this explanation about the aforementioned three suits by Shri Kumar much before the disclosure was directed and he had a chance to look into the correspondence would be self-evident. The only permissible inference is that in his meeting with the Chief Justice of India which he refers to in para 18 of his affidavit he must have been informed by the Chief Justice of India that with reference to his handling of the aforementioned three suits and his tugging on to it after his assignment was changed gave rise to the belief that it was being done with some ulterior motives and the Chief Justice of India could have only gathered this information from the Chief Justice of Delhi High Court at their meeting on March 26, 1981. This is further internal evidence to buttress the conclusion that everything including all details set out in the letter dated May 7, 1981, concerning Shri Kumar's integrity was the subject-matter of discussion between the Chief Justice of Delhi High Court and Chief Justice of India at their meeting on March 26, 1981. If that be so, the conclusion is inescapable that the consultation is complete. Consultation need not take any particular form. The essence of consultation is deliberation. And if the two high constitutional functionaries met for the avowed object of discussing

continuance of Shri Kumar with specific reference to the doubt about his integrity, it would be reasonable to hold that all aspects were considered, gone into and thrashed out. In this view of the matter non-showing of the letter dated May 7, 1981, to Chief Justice of India would not detract from the fullness of consultation as required by Art. 217. For these reasons and some more discussed by Bhagwati, J. with whom I agree, it must be held that there was full and effective consultation on all relevant points including those set out in the letters dated May 7, 1981, and the submission must accordingly be rejected.

775. Before I conclude, I would like to record by disapproval of the request made by the Chief Justice of Delhi High Court to the Law Minister for not showing the letter dated May 7, 1981, to the Chief Justice of India. If independence of judiciary is likely to be threatened it may or may not emanate from the executive or from some outside agency but it would be corroded by the action of the members of the judiciary itself, by internal corrosion, and if proof for this were needed, it is demonstratively supplied by a very improper request made by the Chief Justice of Delhi High Court to the Law Minister not to show the letter dated May 7, 1981, to the Chief Justice of India. I am unable to conceive a situation where in the correspondence, assertions, statements, expression of doubts concerning a high judicial functionary like a judge of the High Court can be made by the Chief Justice of a High Court which he is not willing to show to the Chief Justice of India. I am not implying any hierarchy. I put them on par and accord status and dignity to the high offices occupied by both. They may differ. Healthy difference is the life blood of honest opinion. But it is unthinkable albeit wholly improper for a Chief Justice of a High Court to write to the Law Minister something which he is not prepared to show to the Chief Justice of India. This conduct, if allowed to pass uncensored, would give rise to such fissiparous tendencies which would wholly undermine the independence of judiciary.

776. I also feel that the way in which the Chief Justice of Delhi High Court has dealt with the case of Shri O. N.

Vohra leaves much to be desired. The Chief Justice of Delhi High Court seems to be completely unaware of his duty and obligation while recommending or refusing to recommend a colleague for extension. He holds no position superior to a High Court Judge functioning in his Court. He is only first amongst equals enjoying the status not on merits but on accident of seniority. He is not supposed to sit in judgment over the decisions of his colleagues. Where does he get this authority passes comprehension? Mr. O. N. Vohra took a dignified stand and did not participate in this squabble, undignified as the whole episode appears to be. Had he come and participated, may be the Chief Justice of Delhi High Court would have found his position so untenable that there would have emanated a strong censure about the method and manner of his dealing with his colleagues. These may appear to be strong words but they still fail to express my feelings adequately. I say no more.

777. There was one more submission which may be noticed in passing and I refer it only for future purpose. If a Chief Justice of a High Court gets information reflecting upon the character and integrity of a colleague or complaints about his behaviour in the Court, fair play in action demands that before relying upon it and taking a step of far-reaching consequence concerning the career and dignity of the colleague, he should in confidence talk to the colleague. In these days when relations between the Bench and the Bar have sunk abysmally low, that rumours, canards, character assassination flourish in the grapevine, if credence is to be given to such rumours because about integrity usually foolproof facts are not available, but reputation for integrity being relevant, apart from any principle of natural justice which does not surface in this discussion, fair play in action demands that they should first be brought to the notice of the colleague not for his explanation but even for future rectitude. If the whole thing stops the decisive action can be deferred. If it continues to flourish the Chief Justice of a High Court in discharge of his constitutional duty of recommending or not recommending continuance of an additional judge may proceed to act as he considers befitting the high dignity

of the office he holds; but to make assertion in secret and confidential letters without giving the slightest inclination to the colleague and then to shrink back to the extent of not permitting the same to be shown to the paterfamilias in the judiciary scales the height of impropriety. Let the past be buried and by-gones be by-gones but in future, a conduct and approach commensurate with the high office held by the Chief Justice of High Court must inform his action. Fair play in action is the watchword of judiciary and if it is extended to all others, a colleague in the High Court should not be at a comparative disadvantage.

778. I would, therefore, like to recall what happened in the course of hearing of these matters. At one stage the Bench unanimously suggested to the learned Attorney-General that even accepting his contention that the consultation was full and meaningful and there was no defect or deficiency in it, a person who has worked as a Judge of a High Court for two years and three months should not be made to leave the institution with a wrench that a raw deal has been done to him and, therefore, Government of India may show the letter dated May 7, 1981, to the Chief Justice of India, request him to give his comments on the same and after considering the same in the light of the comments of the Chief Justice of Delhi High Court may mould the final decision concerning Shri Kumar. The learned Attorney-General replied that the Government of India has no objection to showing the letter dated May 7, 1981, to the Chief Justice of India. That is poor solace because the letter since disclosure had become public property, the media having published the same. But the learned Attorney General informed us that the Government of India was not prepared to reconsider the decision. Apart from the judiciary and the public, Government of India must be equally sensitive and considerate about maintaining both the dignity and independence of judiciary. It would add to the stature of the Government of India and reject unsubstantiated criticism that unwarranted attacks are made on the judiciary by the executive if the letter dated 7th May 1981 is shown to the Chief Justice of India and his comments are invited and then a decision is taken

whether or not to reappoint Shri Kumar as an additional Judge.

779. While holding that there was full, effective and meaningful consultation, and on this account the petitions in this group are liable to be dismissed, I suggest that the Government of India may show the letter dated May 7, 1981, to the Chief Justice of India, request him to give comments and after receiving the comments, decide whether Shri Kumar should or should not be appointed as an additional judge of Delhi High Court. This is not a direction but merely a suggestion for the acceptance of the Government if thought fit.

780. In the second group of cases the first is writ petition No. 274/81 filed by an Advocate practising in the Supreme Court, Miss Lily Thomas, impleading therein the Union of India represented by the Secretary, Ministry of Law as the sole respondent and in which the only prayer in the last paragraph is that this Court may be pleased to give true interpretation of Article 222 of the Constitution of India. In the body of the petition it was averred that the President of India in exercise of the power conferred by Article 222 (1) of the Constitution has made an order transferring Mr. Justice M. M. Ismail, the then Chief Justice of the Madras High Court as Chief Justice, Kerala High Court. The question posed was whether the powers to transfer a Judge of a High Court conferred on the President under Article 222 can be used to defeat the right of puisne judges of the High Court to be considered for the post of Chief Justice of the High Court wherein a vacancy may have occurred. It was averred that on the elevation of Mr. V. Balakrishna Eradi, the then Chief Justice of Kerala High Court to the Bench of the Supreme Court of India, the office of Chief Justice, Kerala High Court has been rendered vacant and other considerations being equal, the next seniormost puisne judge who should legitimately occupy the same office is Mr. Justice Subramania Poti or any other judge of the Kerala High Court. It was contended that the expression 'judge' in Article 222 does not comprehend Chief Justice and, therefore, the transfer of Chief Justice M. M. Ismail as Chief Justice of Kerala High Court is *ex facie* illegal. It was also contended that this power to transfer

was to be exercised in public interest and the power has not been conferred for the purpose of providing the executive with a weapon to punish a judge who does not toe its line and that exercise of such power would be subversive of the independence of judiciary. An application for adding parties was made in which 9 other persons were sought to be impleaded as respondents, one of them being Shri K. B. N. Singh, Chief Justice of Patna High Court who was under an order of transfer as Chief Justice Madras High Court. There was also a prayer for urging additional grounds and the whole of the prayer clause was amended and by the amended clause a declaration was sought that Article 222 of the Constitution is illegal and unconstitutional. A further declaration was sought that the transfer of Chief Justice M. M. Ismail and Chief Justice K. B. N. Singh as Chief Justice of Madras and Kerala respectively being not in public interest and also because Article 222 does not confer any power to transfer a Chief Justice, is unconstitutional. By an order made by this court on February 4, 1981, from amongst those sought to be arrayed as respondents, the prayer to join Mr. M. M. Ismail and Mr. K. B. N. Singh alone was granted and in respect of others the application was rejected. Rule was issued after recording a statement that the petitioner will not press ground No. 5 challenging the constitutional validity of Article 222 of the Constitution.

781. One Shri D. N. Pandey, Advocate filed C. W. J. C. No. 2224/81 in the High Court of Patna impleading the Union of India, Chief Justice of India, Shri K. B. N. Singh, Chief Justice of Patna High Court, Registrar of Patna High Court as respondents, praying for an appropriate writ or order directing the respondents to forbear from giving effect to the order of the President dated January 19, 1981, transferring Shri K. B. N. Singh, Chief Justice of Patna High Court as Chief Justice, Madras High Court with effect from the date he assumed charge of his office. By an order made by a Bench of the Patna High Court, Shri Thakur Rampati Sinha, President, Bihar State Socialist Lawyers Association, was permitted to be added as petitioner No. 2. Various contentions have been raised in this petition and they will be dealt with at the

appropriate place. By an order made by this Court the petition stood transferred to this Court and numbered as Transferred Case No. 24/81. After the petition was transferred to this Court, Shri K. B. N. Singh applied for transposing him from the array of respondents as petitioner and the same having been granted, Shri K. B. N. Singh is now petitioner No. 3, in this case and he is represented by counsel Dr. L. M. Singhvi. In this petition Shri K. B. N. Singh has filed a short affidavit on September 7, 1981, followed by a detailed affidavit on September 16, 1981. Shri K. C. Kankan, Deputy Secretary, Department of Justice, Ministry of Law, Justice and Company Affairs, filed the counter-affidavit on September 24, 1981. Shri K. B. N. Singh filed a rejoinder affidavit on September 28, 1981. The Chief Justice of India filed his counter-affidavit on September 29, 1981, to which a rejoinder affidavit was filed by Shri K. B. N. Singh on October 16, 1981. A rejoinder affidavit was also filed by Thakur Rampati Sinha on behalf of petitioners 1 and 2 on October 16, 1981.

782. One P. Subramaniam filed Writ Petition No. 553 of 1981 in the Madras High Court challenging the constitutional validity of Notification dated January 19, 1981, by which Shri M. M. Ismail, Chief Justice, Madras High Court was transferred as Chief Justice, Kerala High Court. In this petition Union of India represented by the Secretary, Ministry of Law, Justice and Company Affairs was impleaded as the sole respondent. Union of India moved this Court under Article 139A (1) requesting the Court to withdraw to itself the aforementioned Writ Petition pending in the Madras High Court on the ground that petitions raising identical questions have already been transferred to this Court. This Court having granted the request, the writ petition stood transferred to this Court and numbered as Transferred Case No. 6/81.

783. One A. Rajappa, an Advocate of Madras, filed Writ Petition No. 390/81 in the Madras High Court questioning the constitutional validity of the Notification transferring Chief Justice Ismail to Kerala High Court, inter alia, contending that Article 222 does not comprehend power to transfer a Chief Justice. In this petition he impleaded the

Union of India, Registrar of the Madras High Court, Registrar of the Kerala High Court and Registrar of the Patna High Court as respondents. An application to transfer this petition to this Court under Article 139A was moved. This Court accepted the transfer application by its order dated February 3, 1981, and accordingly the case stood transferred to this Court and numbered as transferred Case No. 2/81.

784. One Ripudaman Prasad Sinha had filed C. W. J. C. No. 312/81 in the Patna High Court for a writ of quo warranto seeking information as to how after the Notification dated January 19, 1981, transferring Shri K. B. N. Singh, Chief Justice, Patna High Court as Chief Justice, Madras High Court, he continued to occupy the office of Chief Justice, Patna High Court. This petition came up for admission before a Bench of the Patna High Court. At the oral hearing a question was posed to the petitioner why he had not produced the presidential notification and on this short ground the writ petition was rejected. An oral prayer for a certificate to appeal to the Supreme Court was also rejected. Hence he filed Special Leave Petition (Civil) No. 1509 of 1981. He has impleaded Shri K. B. N. Singh, Union of India and the Chief Justice of India as respondents.

785. Mr. K. C. Kankan filed his counter affidavit in Transferred Case No. 24/81, inter alia, contending that the fact that the mother of Shri K. B. N. Singh is aged about 85 years and is ailing and bed-ridden for last two years was present to the mind of the Chief Justice of India. The Chief Justice of India can certainly be presumed to have knowledge not only about this fact but the other fact that Tamil language is freely used in Tamil Nadu and Shri K. B. N. Singh is not conversant with it. It is stated that Shri K. B. N. Singh had an effective opportunity to represent his case before the Chief Justice of India. Then it is further averred that Chief Justice of India had visited Patna as mentioned by Shri K. B. N. Singh himself. It is further stated that the Chief Justice of India while making recommendations for transfers pointed out that he had met several lawyers and judges of the concerned High Courts and expressed the view that on the basis

of data which he collected and which he had considered with greatest objectivity, Shri K. B. N. Singh should be transferred. It is not disputed that for misbehaviour as adumbrated in Article 124, transfer is not the remedy and that transfer can only be ordered in public interest without regard to any complaint of misbehaviour. Denying the averment of Shri K. B. N. Singh that transfer was based on considerations which are not genuine and germane, it was stated that Shri Singh has given no basis for his averment that the transfer order is likely to have been made because either the Hon'ble Chief Justice of India or the President of India or both of them have been misled by interested parties. It was asserted that considerations relevant to transfer were taken into account by the Chief Justice of India as also by the President of India. The request of Shri K. B. N. Singh for disclosure of documents bearing upon his transfer was resisted by Shri T. N. Chaturvedi, Secretary Department of Justice, Ministry of Law, Justice and Company Affairs, claiming privilege against disclosure of documents.

786. Transferred Case No. 24/81 arising from the writ petition filed by Shri D. N. Pandey in which Mr. K. B. N. Singh at his request was transposed as petitioner No. 3, was heard as the main case and other petitioners and their learned counsel were permitted to intervene at the hearing of this case.

787. Dr. L. M. Singhvi who led, ably supported by Shri H. M. Seervai and Shri Soli Sorabjee, put in the forefront the contention that the power to transfer a judge of the High Court is an extraordinary power vested in the President, the highest executive in the country, which has to be exercised according to the advice of the council of ministers, if not properly controlled and adequate safeguards provided, would render independence of judiciary a myth. Keeping aside, therefore, the facts of the case, it would be advantageous at this stage to find out the purpose for which such power is conferred on the President under Article 222, the circumstances in which the power can be exercised highlighting the constraint or limitations on the exercise of power which would be safeguards against arbitrary exercise of power,

788. To repeat, on the question of construction of Art. 222 we are not breaking a fresh ground. It was the subject-matter of a very intelligent and enlightened debate in the Gujarat High Court wherein Mr. S. H. Sheth, a judge of the Gujarat High Court challenged his transfer to Andhra Pradesh High Court. This debate continued unabated in the appeal against the decision of a special bench of the Gujarat High Court to this Court. Barring some additional submissions the arguments covered the familiar ground, I say familiar because I had the privilege of hearing arguments at the time of admission of the Special Civil Application filed by Mr. S. H. Sheth in the Gujarat High Court and also when the petition was finally heard. The appeal against the decision of the Gujarat High Court quashing the order of transfer of Mr. S. H. Sheth and issuing a mandamus to the Union of India directing it to forbear from giving effect to the transfer order was heard by a Constitution Bench of this Court presided over by Shri Y. V. Chandrachud, who, as the quirk of fate shows, in his capacity as Chief Justice now is one of the respondents in this group of cases. As we are to a considerable extent on a familiar ground, in order to avoid mere repeat performance, it would be conducive to proper adjudication of issues raised, to recall what has been the view of the Constitution Bench of this Court in Mr. Sheth's case (AIR 1977 SC 2328). After briefly referring to the position thus established, I would refer to additional contentions and also a fervent appeal for accepting the minority view in Mr. Sheth's case because very persuasively it was argued that this larger Bench must re-examine the issue in its entirety. The emotional appeal was founded on the submission that since the decision in Mr. Sheth's case disturbing trends have appeared in the Indian polity and even though once thwarted, a claim to naked and arbitrary exercise of power for transfer having been made on behalf of the Union of India and it being further shown that the safeguard which appealed to the majority view in Mr. Sheth's case having been found to be of slender strength, the Court should further insulate the judiciary from continuing threats emanating from powerful executive quarters.

789. In constitutional interpretation while value system may have a fair sprinkling, emotions, sentiments, unfounded suspicions, wild apprehensions and imaginary threats have no place. Equally, a possible chance or abuse of power would not permit denial of power if it is conferred. We will have to be all the more circumspect, imbued with wisdom and restraints because let it not be said by the posterity that the judges interpreting the judiciary provisions in the Constitution have rewritten the Constitution for their own total and absolute insulation from any quarter so that an otherwise irremovable elitist institution may become so entrenched as to be impervious to the realities of the situation. We wish to steer clear of what Professor Friedmann stated, between the scylla of subservience to Government and the charybdis of remoteness from constantly changing social pressures and economic needs (see *Law in a Changing Society* by W. Friedmann).

790. Let us then first recapitulate what has been the majority view in Mr. Sheth's case (AIR 1977 SC 2328).

791. Mr. S. H. Sheth, a judge of the Gujarat High Court was transferred as per the Presidential Notification dated May 7, 1976 as Judge of the High Court of Andhra Pradesh. Mr. Sheth challenged the order of transfer in a petition that he filed in Gujarat High Court on June 16, 1976, in which he impleaded Union of India and the then Chief Justice of India as respondents. This petition was heard by a special Bench of Gujarat High Court which by a unanimous order dated November 4, 1976, voided the order of transfer. An appeal by certificate was preferred by the Union of India to this Court which was heard by a Constitution Bench of this Court.

792. Let me recapitulate the contentions canvassed on behalf of Mr. S. H. Sheth in his petition questioning the validity of the order made under Article 222 (1) by which he was transferred from the office of the judge of the High Court of Gujarat to the office of the judge of High Court of Andhra Pradesh. The constitutional validity of the order of transfer was challenged on the following grounds :

(i) The order was passed without his consent. Such consent must be necessa-

rily implied in Article 222 (1) of the Constitution and, therefore, the transfer of a judge from one High Court to another High Court without his consent is unconstitutional.

(ii) The order was passed in breach of the assurance given on behalf of the Government of India by then Law Minister Shri A. K. Sen who, while moving the Constitution (Fifteenth Amendment) Act, 1963, said in the Lok Sabha that "so far as High Court Judges are concerned they should not be transferred except by consent." Mr. Sheth having accepted judgeship of Gujarat High Court on April 23, 1969, on the faith of the Law Minister's assurance, the Government of India was bound by that assurance on the doctrine of promissory estoppel.

(iii) The order of transfer militated against public interest. The power conferred by Article 222 (1) was conditioned by the exigencies and requirements of public interest and since his transfer was not shown to have been made in public interest it was ultra vires; and

(iv) The order was passed without effective consultation with the Chief Justice of India. 'Consultation' in Article 222 (1) means 'effective consultation' and since the pre-condition of Article 222 (1) that no transfer can be made without such consultation was not fulfilled, the order was bad and of no effect.

Though the Full Bench of the Gujarat High Court by a unanimous order struck down the order of transfer they arrived at this conclusion by different processes of reasoning. One judge took the view that in not consulting or informing Mr. Sheth of even the proposal of transfer, it being an administrative executive action in violation of the principles of natural justice and hence the order was bad. The second judge took the view that the order was unconstitutional because it was passed without Mr. Sheth's consent and secondly because it was passed for a collateral purpose. The third judge took the view that the mass transfers of 16 judges which were effected with one stroke though each judge may have had peculiar personal difficulties to contend with and considering that the Union of India had failed to disclose the nature and content of the consultation with the Chief Justice of

India, the consultation was not meaningful and that the pre-condition for exercise of power in Art. 222 (1) was not satisfied and, therefore, the order was void. All the three judges unanimously rejected the challenge to the order of transfer on the ground of promissory estoppel.

793. In the appeal preferred by the Union of India only two contentions were examined by the Constitution Bench of this Court. They were: (i) the independence of judiciary being the basic and fundamental feature of the Constitution, power of non-consensual transfer to be exercised by the executive, a litigant before the judge in large number of cases, would be subversive of the independence of judiciary and, therefore the Court must read in Art. 222 (1) that the power to transfer can only be exercised with consent of the judge proposed to be transferred; and (ii) that the power to transfer High Court judge having been conferred on the President it can only be exercised in public interest and that before exercise of such power there must be full, effective and meaningful consultation between the President and the Chief Justice of India. Under the second submission, the scope and content of the consultation necessary to satisfy the stringent requirements of Art. 222 have been fully thrashed out.

794. The leading judgment of majority view by Chandrachud, J. after referring to various articles of the Constitution held that the provisions set out in the judgment indisputably are aimed at insulating the High Court judiciary and even officers and servants of the Court from the influence of the executive. The observation of Krishna Iyer, J. in *Shamsher Singh's case* (AIR 1974 SC 2192) that fearless justice is a prominent creed of our Constitution and the independence of judiciary is the fighting faith of our founding document, was affirmed. It was also held that power to transfer the High Court Judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who for some reason or other has fallen from its grace. Thirdly, it was held that the two-fold limitation on the power of the President to transfer a High Court Judge, namely, that it

can be exercised in public interest and that it can only be exercised after full, effective and meaningful consultation with the Chief Justice of India would provide sufficient safeguards against arbitrary exercise of power and accordingly the contention that in order to insulate the judiciary from executive interference the Court should read into Art. 222 the words 'with his consent' was rejected. What constitutes meaningful, effective, full and substantial consultation has been succinctly set out in a paragraph at p. 453 (of 1978-1 SCR): (at p. 2347 of AIR 1977 SC) which has been extracted hereinbefore. Briefly to recapitulate in the present context, the President must make relevant data available to the Chief Justice of India on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice of India, he must ask for them because in casting on the President the obligation to consult the Chief Justice of India, the constitution at the same time must be taken to have imposed a duty on the Chief Justice of India to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President of his constitutional obligation to place full facts before the Chief Justice of India and the performance by the latter of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of Justice. Consultation within the meaning of Art. 222 (1), therefore, means full and effective, not formal or unproductive consultation. Concluding on this point, it was observed as under:—

"Article 222 (1) postulates fair play and contains built-in safeguards in the interests of reasonableness. In the first place, the power to transfer a High Court Judge can be exercised in public interest only. Secondly, the President is under an obligation to consult the Chief Justice of India which means and requires that all the relevant facts must be placed before the Chief Justice

Thirdly, the Chief Justice owes a corresponding duty, both to the President and to the Judge who is proposed to be transferred, that he shall consider every relevant fact before he tenders his opinion to the President. In the discharge of this constitutional obligation the Chief Justice would be within his rights, and indeed it is his duty whenever necessary, to elicit and ascertain further facts either directly from the Judge concerned or from other reliable sources. The Executive cannot and ought not to establish rapport with the Judges which is the function and privilege of the Chief Justice. In substance and effect, therefore, the Judge concerned cannot have reason to complain of arbitrariness or unfair play, if the due procedure is followed (at p. 456) (of 1978-1 SCR): (at p. 2349 of AIR 1977 SC).

795. Krishna Iyer, J. speaking for himself and S. Murtaza Fazal Ali, J., while concurring with this view, observed that the President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice in turn must collect necessary information through responsible channels or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the Justice system (at p. 496) (of 1978-1 SCR): (at p. 2380 of AIR 1977 SC). At another place it was observed as under:—

"Before giving his opinion the Chief Justice of India would naturally take into consideration all relevant factors and may informally ascertain from the Judge concerned if he has any real personal difficulty or any humanitarian ground on which his transfer may not be directed. Such grounds may be of a wide range including his health or extreme family factors. It is not necessary for the Chief Justice to issue formal notice to the Judge concerned but it is sufficient — although it is not obligatory — if he ascertains these facts either from the Chief Justice of the High Court or from his own colleagues or through any other means which the Chief Justice thinks safe, fair and reasonable. Where a pro-

posal of transfer of a Judge is made the Government must forward every possible material to the Chief Justice so that he is in a position to give an effective opinion. Secondly, although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power under Art. 222 cannot be exercised whimsically or arbitrarily." (at pp. 501, 502) (of SCR): (at p. 2384 of AIR).

796. The majority view is that it is not possible to read words 'with his consent' in Art. 222 and non-reading of these words would not jeopardise independence of judiciary otherwise guaranteed by the Constitution. It was held that a non-consensual transfer is within the purview of Article 222.

797. On the question of policy transfers which loomed large in the present case, Chandrachud, J. observed that whether it is necessary to transfer Judges from one High Court to another in the interest of national integration is a moot point, but that is a policy matter with which Courts are not concerned directly (see p. 450) (of SCR): (at p. 2344 of AIR 1977 SC). At another place he held that policy transfers on a wholesale basis which leaves no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution (p. 454) (of SCR): (at p. 2347 of AIR). Krishna Iyer, J. in this context expressed himself in a forceful way when he said that: 'to promote the community's concern for impeccable litigative Justice, policy oriented transfer of Judges after compliance with constitutionally spelt out protocols may not be ruled out' (see p. 501) (of SCR): (at p. 2383 of AIR). Untwalia, J. after attempting to spell out specific public interest to subserve which a transfer of a High Court Judge can be ordered, ultimately concluded that these are matters of policy decision entirely within the realm of the Governmental power' (p. 507) (of SCR): (at p. 2387 of AIR). The minority view of Bhagwati, J. and Untwalia, J. held that non-consensual transfer is outside the purview of Article 222 but both of them reached the conclusion by a different process of

reasoning. Bhagwati, J held that having examined various provisions of the Constitution unerringly pointing towards assuring independence of judiciary from executive pressure, to further fortify and insulate it, the Court should give to the expression 'transfer' in Art. 222 a limited meaning that it only comprehends consensual transfer and compulsive transfer is not within the purview of the Article. Untwalia J. held that 'there may be necessity and justification on the ground of public interest or policy for the transfer of Judges from one High Court to another, although it may be few and far between or even punitive in character, but to do so without the consent of the Judge concerned will bring about devastating results and cause damage to the tower of judiciary and erosion in its independence.' He was, therefore, of the view that an additional safeguard is necessary to insulate the judiciary and he found that safeguard by holding that a Judge cannot be transferred under Art. 222 without his consent. Bhawati, J. agreed with Krishna Iyer, J. on the scope and content of consultation and Untwalia, J. agreed with Chandrachud, J. on the scope and content of consultation under Art. 222. Scope and ambit of consultation under Art. 222 (1) has been dealt with in the earlier part of this judgment and it is unnecessary to repeat it here.

798. The obligation to consult may arise in different contexts and in different circumstances and situations and for different purposes. Duty or obligation to consult inheres full, effective and meaningful consultation. The situation and context and purpose of consultation would define parameters of consultation. Within the parameters all relevant considerations on which consultation to be effective must be focused, must be precisely laid down. It was admitted on all hands that transfer is likely to cause hardship and inflict injury both private and to some extent public. In Shamsher Singh's case (AIR 1974 SC 2192) it is in terms stated that sometimes transfer is more harmful than positive punishment. Before the Judge is made to suffer hardship or he is required to suffer injury, certain relevant questions have to be examined and answered so that even a remote chance of transfer by way of punishment may be scrupulously

avoided and a firm decision is reached that it is for achieving an avowed public interest. In the context of transfer of a Judge from one High Court to another High Court, the questions which must engage the attention of the concerned authorities may be briefly enumerated. They are: (i) why this particular Judge is selected for transfer; (ii) what would be the personal difficulties faced by him in the event transfer is ordered, such as whether his wife is gainfully employed, whether his children are taking education or are gainfully employed, whether the old parents dependent on him would be seriously inconvenienced, whether he is being pushed out from a station which is considered good to a station not so good, whether it is likely to attach any stigma, whether he would have to maintain two establishments, and finally; (iii) whether the public interest for which he is required to be transferred would far outweigh his inconveniences, difficulties and even a possible stigma. Selective transfers generally give rise to canards because ordinarily High Court Judges are not transferred and as late as 1963 the then Law Minister Mr. A. K. Sen assured the Parliament that a High Court Judge should not be transferred except by consent and this policy is departed from. Once one or the other Judge is specifically selected for transfer, even if it is proclaimed to be in public interest, such as a senior, experienced and competent Judge is required for other High Court this hardly satisfies anyone and the Judge really suffers character assassination. It is, therefore, absolutely necessary that all these aspects and many more that can be enumerated, must be specifically and individually examined, discussed, deliberated upon and finally a decision must be reached that the public interest for which transfer is proposed would be served by the transfer. Specific public interest must not be left to guess work but must be precisely stated and must be such that it would far outweigh the personal difficulties, inconvenience and the possible stigma.

799. Principal contention canvassed in the High Court and in this Court in Mr. Sheth's case (AIR 1977 SC 2328) was that non-consensual transfer is outside the purview of Art. 222. This contention would have stood concluded by

the majority decision of the Constitution Bench but as the matter is before a larger Bench, Mr. Seervai made a valliant effort to persuade us to hold that in view of the recent disturbing trends surfacing in the Indian polity, such as continuous denigration of judiciary and experience proving the safeguards spelt out in Mr. Sheth's case against the abuse of transfer power, broken reed, coupled with the claim for naked and arbitrary power, the time has come to consider the majority view in Mr. Sheth's case by further buttressing independence of judiciary and completely insulating it against compulsive transfers by accepting the minority view in Mr. Sheth's case, that a non-consensual transfer is beyond the purview of Art. 222. In support of this submission Mr. Seervai drew attention to some observations in the judgment of Chandrachud, J. and Iyer, J. which according to him are factually incorrect and a decision based on such incorrect assumption would render the majority view not sustainable. I remain unconvinced. In my detailed judgment in Mr. Sheth's case (1976) 17 Guj LR 1017 in the Gujarat High Court I have given long and elaborate reasons for rejecting the contention that non-consensual transfers are not within the purview of Article 222. I would not reiterate them because I unreservedly accept the majority view of this Court in Mr. Sheth's case (1978) 1 SCR 423: (AIR 1977 SC 2328) as correct. I would however, briefly deal with some of the submissions of Mr. Seervai in this behalf.

800. The first error in the majority judgment which, it was contended, would necessitate reconsideration of the majority view that it is not necessary to read the words 'with his consent' in Art. 222 (1), was that the majority view proceeds on the erroneous assumption that the Government of India Act, 1935, did not contain any provision for transfer of a High Court Judge. Chandrachud, J. has observed that the Government of India Act (1935) did not contain any provision for the transfer of a Judge. That is why it provided that the office of a Judge shall be vacated either on the Judge being appointed to be a Judge of the Federal Court or on being appointed as a Judge of another High Court (p. 448) (of SCR): (at p. 2342 of AIR). Krishna Iyer, J., who concurs

with the majority view has in this context observed that 'it has already been pointed out above that the Government of India Act did not contain any provision for transfer which was effectuated by appointing a Judge of one High Court to be a Judge of another High Court' (p. 493) (of SCR): (at p. 2377 of AIR). In this connection it may as well be pointed out that in the minority judgment, Bhagwati, J. who accepted the contention that Article 222 (1) comprehends only consensual transfer has also observed that '..... there was no specific provision in the Act (Government of India Act, 1935) conferring power to transfer a High Court Judge. The power to transfer a High Court Judge was expressly conferred for the first time under the Constitution' (p. 473) (of SCR): (at p. 2362 of AIR). Therefore, the assumption that the Government of India Act, 1935, did not contain a provision for transfer which on further examination turns out to be erroneous, did not materially affect the outcome because while accepting this position that there was no such provision, the majority reached the conclusion that Art. 222 (1) does not cater to only consensual, and that non-consensual transfer is within the purview of Art. 222 (1). The minority reached an exactly opposite conclusion relying on this very aspect. It would, therefore, appear that the assumption is not so material as to necessitate reconsideration of the majority view. Even otherwise let me see whether presence or absence of the provision to transfer a Judge in the Government of India Act, 1935, has any bearing on the question of construction of Art. 222 (1).

801. Sec. 220 of the Government of India Act, 1935, provided for constitution of High Courts. Sub-sec. (2) of Sec. 220 provided that 'every Judge of a High Court shall be appointed by his Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years'. There is a proviso to this sub-section, paragraph (c) of which states that the office of a Judge shall be vacated by his being appointed by His Majesty to be a Judge of the Federal Court or of another High Court. It was assumed during the course of arguments in Mr. Sheth's case before this Court that paragraph (c) of the proviso to Sec. 220 (2)

formed part of the Government of India Act, 1935, as originally enacted. On investigation that does not appear to be correct. It is now pointed out that paragraph (c) of the proviso to sub-section (2) of Sec. 220 was introduced by Sec. 2 of the India (Miscellaneous Provisions) Act, 1944. By Sec. 6 of the 1944 Act retrospective operation was given to the amendment introduced by Sec. 2 from the commencement of the Government of India Act, 1935. The marginal note to Sec. 2 of the 1944 Act reads: "Judges to vacate office on transfer." Referring to this provision it was urged that the word 'appointed' in paragraph (c) also comprehends transfer and it was spelt out that the office of a Judge of the High Court would be vacated not only on his appointment as a Judge of the Federal Court but also on his being transferred to another High Court. Earl of Munster during the debate on the provision pointed out that a Judge of a High Court on being appointed to the Federal Court or on being transferred to another High Court would not retain his office of the Judge of the High Court from which he was transferred. In this context he made reference to Sec. 10 of the Supreme Court of Judicature Act, 1925, which provided that the office of any Judge of a High Court shall be vacated on his being appointed as a Judge of the Court of Appeal. Mr. Pethick Lawrence explaining the provision pointed out that the transfer of a High Court to another High Court was implicit in the provision itself and that the proposal is merely intended to be beyond question what was certainly the intention in regard to it. In this context the provision contained in Sec. 103 of the Government of India Act, 1915-19 was recalled. In Sec. 103 provision was made for rank and precedence of the High Court Judges inter se according to the seniority of their appointment unless otherwise provided in the patents. This provision was omitted from the Government of India Act, 1935, but it was said that it makes no difference because a similar provision existed and continues to exist in the High Courts Act or the Charter Act of 1861. At this stage it would be worthwhile to recall that in the draft constitution there was no specific and positive provision for transfer of a

High Court Judge. Draft Art. 193 (1) proviso paragraph (c) had almost bodily incorporated paragraph (c) of sub-section (2) of Sec. 220, Government of India Act, 1935, in that it was provided that the office of a Judge shall be vacated on his being appointed by the President to be a Judge of the Supreme Court or of another High Court. And recalling the amendment made to Section 220, paragraph (c) of the proviso by the 1944 Act while retaining the word 'appointed' in the body of the paragraph, the marginal note set out the word 'transfer' meaning that the expression 'appointed' in the context of a Judge of a High Court from one High Court to another High Court obviously comprehends his transfer. However, when the drafting committee forwarded the revised draft constitution as passed by the Constituent Assembly at the second reading, it recommended certain amendments and changes. One such amendment was present Art. 222. The Drafting Committee while forwarding its report with a draft constitution as revised by it, stated that it has 'proposed the insertion of Art. 222 to enable the President to transfer a Judge of a High Court from one High Court to another. The proposed provision of the Constitution would not permit of any compensatory allowance being given to Judges on such transfer. Power has accordingly been reserved to Parliament to determine by law the compensatory allowance to be paid in case they are so transferred, and, until, Parliament so determines, to the President to fix by order the quantum of such allowance.' This insertion of Art. 222 was accepted by the Constituent Assembly and simultaneously clause (c) of the proviso to Art. 217 (1) was amended to read the word 'transfer' in place of the word 'appointed.' It thus transpires that there was a provision in the Government of India Act, 1935, since its commencement for transfer of High Court Judges from one High Court to another High Court and to that extent the assumption of absence of such a provision as stated in Mr. Sheth's case is erroneous. What is the sequester? If there was power to transfer a High Court Judge in 1935 Act, logically the argument that our Constitution has adopted the basic scheme of that Act must inevitably lead to the

conclusion that the Constitution makers wanted such power to be conferred and made an explicit provision in Art. 222. Whether on transfer a fresh appointment is made so as to necessitate the consent of the transferred Judge will be presently examined. But presence or absence of a power to transfer a Judge in the Government of India Act, 1935, would not be decisive of the matter because the Constituent Assembly demonstrably expressed its intention to confer power on the President to transfer a Judge as indicated in Art. 222 (1). The statement, therefore, in the judgments of Chandrachud, J., Bhagwati, J. and Krishna Iyer, J. in Mr. Sheth's case (AIR 1977 SC 2328) that the Government of India Act, 1935, did not contain any provision for transfer of a Judge would not in any manner detract from the binding character of the ratio of the majority judgment, nor on this account a re-examination becomes necessary.

802. It was urged that transfer of a Judge of one High Court to another High Court constitutes fresh appointment and, therefore, if initially a man cannot be appointed without his consent because if such a power was to be conferred on any one it would be a conscription or we may be thrown back to the days of slavery and, therefore, if transfer of a Judge of the High Court amounts to a fresh appointment, ipso facto it cannot be done without his consent. The majority view in Mr. Sheth's case has rejected this contention and in my opinion for very cogent and valid reasons. Briefly, the reasons for accepting the majority view may be stated.

803. Submission is that on transfer a High Court Judge ceases to be a Judge of the High Court where he was functioning and is appointed a Judge of the High Court to which he is transferred and, therefore, it is a fresh appointment and that it can only be with his consent. When it was pointed out that the framers of the Constitution used the words 'appointment' and 'transfer' in Art. 217 (1) proviso (c), in collocation, they must be aware that the connotation of the two words are different and the word 'transfer' in itself does not involve a fresh appointment, it was said that the words have been used inter-

changeably and recourse was taken to the definition of 'actual service' set out in clause (11) to Second Schedule which includes joining time on transfer from a High Court to the Supreme Court or from one High Court to another. It was submitted that the word 'transfer' if it does not include appointment is inappropriate when used in the context of a transfer from a High Court to the Supreme Court because that is unquestionably an appointment which cannot be made without consent of the person concerned. Proceeding further it was said that it is well recognised that use of different words does not necessarily produce a change in the meaning (see Maxwell's Interpretation of Statutes, 11th Edn., pp. 286-289). Reliance was placed on State of Bombay v. Heman Alreja AIR 1952 Bom 16 which decision was referred to with approval in Kesavananda Bharati's case (1973 Suppl SCR 1; AIR 1973 SC 1461) by Chandrachud J. (at p. 966). Attention was also invited to Edward Mills v. Ajmer, (1955) 1 SCR 735; (AIR 1955 SC 25) where this Court did not find any material difference between two expressions 'existing law' and 'Law in force'. While defining the expression 'actual service' the word 'transfer' is used in the context of physical movement, that is, leaving one place and going to another place and the time spent in the process. But the expression 'transfer' is used in Art. 222 to mean transfer from one High Court to another High Court, the person so transferred continuing to be a High Court Judge with continuity of service and there is no break. Undoubtedly the oath to which a Judge of the High Court must subscribe provided that he takes oath as Judge on being appointed to a designated High Court and, therefore, on transfer when he goes to another High Court he has to subscribe to a fresh oath as being appointed to that High Court. But in service jurisprudence appointment by transfer is a well recognised concept involving continuity of office without break. Thus fresh oath does not imply that his appointment as High Court Judge comes to an end. What comes to an end is his appointment as a Judge of a particular High Court and not the holder of the constitutional office of High Court Judge and Art. 217 (1) provides for appointment of a High Court Judge and not

Judge of a particular High Court. He continues to hold office even when transferred. But when he reaches the other High Court he subscribes to an oath to be a Judge of that High Court, not that he subscribes to an oath to be a Judge. The jurisdiction to function as a High Court Judge is not ambivalent but the Judge functions as a Judge of a particular High Court and enjoys the jurisdiction of a High Court judge in relation to the High Court to which he is thereby attached.

804. Same conclusion inevitably follows when viewed from another angle. Art. 217 (1) prescribes consultation with three constitutional functionaries before appointing a person as a High Court Judge while Art. 222 (1) obligates consultation only with Chief Justice of India while transferring a Judge from one High Court to another High Court. If transfer were to mean a fresh appointment and yet it can be carried out by mere recourse to Art. 222 (1), the only limitation on the power of the President while ordering transfer is to have consultation with the Chief Justice of India, while if the President is making an appointment of a High Court Judge within the contemplation of Article 217 (1) the President is under a constitutional obligation to consult not only the Chief Justice of India but the Chief Justice of High Court to which appointment is being made as also the Governor of the State in which the High Court is situated. Mr. Seervai in this context urged that the two articles must be harmoniously construed and to achieve the harmonious construction he submitted that even though in the case of a transfer under Art. 222 (1) the Chief Justice of India is not bound to consult the Chief Justice of the High Court but normally it is his duty to do so as a responsible person and that Article 222 (1) does not preclude such consultation. One cannot read into an article what is not prescribed because if consultation is obligatory it cannot be left to the discretion of the Chief Justice of India to consult someone as a responsible person. Maybe, that the field of consultation, i. e. the aspects to be taken into consideration in the process of consultation for Art. 217 (1) and Art. 222 (1) are different but the difference cannot be wished away by merely suggesting something as a matter of

prudence. This is inherent evidence suggesting that transfer of High Court Judge does not mean a fresh appointment.

805. But the most insurmountable impediment I find in the suggested construction is that the court is not merely called upon to construe the word 'transfer' but re-write the Article in the name of construction. Is it permissible? Should the Judges constitute themselves a Constituent Assembly? To answer it in the affirmative would be a dangerous proposition. In fact, in this context the caution administered by Mr. Seervai himself in his Constitutional Law of India, 2nd Edn., Vol. III, while commenting upon the decision of this Court in *Manohar v. Maruti Rao* AIR 1979 SC 1084 may be profitably referred to. He says at p. 1878 'that no doubt there is a limited sense in which in interpreting the law the Judge may make law in the sense of adopting one of two or more alternatives, if such alternatives are open, or evolving a new principle to meet a new or unusual situation. But it is not given to him to write his own theories, likes and dislikes into the Constitution and the law.' The further comment is that 'the personal views of a Judge are irrelevant in the matter of interpretation of a constitutional provision.' A further warning was administered that no scientific theory propounded in a book can form the basis of a judgment, for, it is opinion evidence, and such an evidence is admissible on condition that the scientific witness goes into the box and is cross-examined. The serious objection is to the Judge writing philosophical and social thesis. Now, interpretation of a constitutional provision is both an art and a science but while resorting to well-known canons of construction unwittingly the pet theory that the independence of judiciary is prized so high that in order to achieve it if it becomes a compelling necessity the provision of a constitution may be re-written, no canon of construction permits this to be done. We must always remember that we are called upon to construe the Constitution, the fundamental law of the land. No doubt a broad and liberal spirit should inspire those whose duty it is to interpret it, but I do not imply by this that they are free to stretch or pervert the language of the enactment in the in-

interest of any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors. In re: The Central Province and Berar Act, 1938, 1939 FCR 18 at p. 37; (AIR 1939 FC 1 at p. 4). The Constitution-makers clearly envisaged a power to transfer a High Court Judge and conferred it on the President and howsoever we may disapprove this power we cannot wish this power away by re-writing the Article. There is no power in the Court to re-write the Article. Dr. Ambedkar who piloted the Constitution in his speech on November 25, 1949, on the motion that the Constitution as settled by the Constituent Assembly be passed, adopted the following observation with approval:

"Courts may modify, they cannot replace. They can revise earlier interpretations as new arguments, new points of view are presented, they can shift the dividing line in marginal cases, but there are barriers they cannot pass, definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another."

(Underlining mine)

If we read the words 'with consent' not only the power of the President is totally taken away but the power is re-allocated to the Judge who is to be transferred, namely, he cannot be ordered to be transferred but he can be requested, a request which can be finally turned down.

806. The suggested construction is contrary to jurisprudential concept of power. It was never disputed that Article 222 (1) confers power on the President to transfer a Judge from one High Court to another High Court. The only limitation on the power is a prior consultation with the Chief Justice of India. Now, if the power to transfer vested in the President can only be exercised with the consent of the Judge who is to be transferred, does there remain any power in the President to discharge his constitutional function entrusted to him by Art. 222 (1)? When power is vested in a person or a constitutional functionary there ought to be the subject and object of power. Power is generally defined as 'ability conferred upon a person by the law to alter

by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons. Powers are classified either as public or private. Power is said to be public when it is vested in a person as an agent or instrument of the functions of the State. Amongst others, it contains executive authority.' The correlative of power is liability. This connotes the presence of power vested in someone else, as against the person under liability. It is the position of one whose legal rights may be altered by the exercise of a power. Hopefield describes power and disability as jural contradiction. Now, if the power is in the President, there is a liability as jural correlative in the Judge who can be transferred. And that power remains power if the liability can be imposed without consent. The moment the concept of consent is imported the power ceases to be power and becomes disability. It either becomes immunity or disability, more appropriately disability, in the sense of lack of power. (See for this discussion pages 229 and 230 of Salmond on Jurisprudence by Fitzgerald, 7th Edn.). Is it open to the Court by a process of interpretation to neutralise the power and thereby remove the disability which was constitutionally provided? I consider it impermissible and, therefore, also the contention that the Court should read the words 'with his consent' in Art. 222 (1) must be rejected.

807. What then is the check against arbitrary exercise of power conferred by Art. 222 (1) once the argument that it can only be exercised with the consent of the Judge to be transferred is rejected. This power to transfer a High Court Judge has rightly been described as an extra-ordinary power. The question then is, unless a positive check on its arbitrary exercise emanating from judiciary is found, this extra-ordinary power is likely to undermine independence of judiciary. It was said that the best check would be if this power can be hedged in with condition that it can only be exercised with the consent of the Judge, a submission which has not commended to me. Now, if this safeguard of reading consent in Art. 222 is rejected, is there any other safeguard against arbitrary exercise of power? We were repeatedly reminded that this

power was positively abused in 1976 when 16 Judges were transferred en masse and it is well recognised that what has been once done, if not restrained or checked, may be done again. In Mr. Sheth's case (AIR 1977 SC 2328) the first safeguard against arbitrary exercise of power was found in the obligation cast on the President to consult the Chief Justice of India and, therefore, the parameters of consultation were drawn very wide so that the power may not be exercised to the detriment of the Judge for a collateral purpose. The second safeguard was found in reading into Art. 222 that the power to transfer a High Court Judge can only be exercised in public interest. Chandrachud, J. held that the power to transfer a High Court Judge is conferred by the Constitution in public interest and not for purposes of providing the executive with a weapon to punish a Judge who does not toe its line or who for some reason or the other has fallen from its grace. At another place it was observed that if the power of the President who is to act on the advice of Council of Ministers to transfer a High Court Judge under Art. 222 (1) is strictly limited to cases in which the transfer becomes necessary in order to subserve public interest, in other words, if it be true that the President has no power to transfer a High Court Judge for reasons not being in public interest but arising out of whim, caprice or fancy of the executive, or its desire to bend a Judge to its own way of thinking, there is no possibility of any interference with the independence of judiciary if a Judge is transferred without his consent. The same view is shared by Krishna Iyer, J. in his concurring judgment. Therefore, the majority declined to read the words 'with his consent' in Art. 222 (1). The majority, therefore, concluded that non-consensual transfer is within the purview of Art. 222 (1). Even the minority does not question the view that the power to transfer a Judge can only be exercised in public interest.

808. The public interest like public policy is an unruly horse and is incapable of any precise definition and, therefore, it was urged that this safeguard is very vague and of doubtful utility. It was urged that these safeguards failed to checkmate the arbitrary exercise of power

in 1976. This approach overlooks the fact that the Lakshman Resha drawn by the safeguards when transgressed or crossed, the judicial review will set at naught the mischief. True it is that it is almost next to impossible for individual Judge of a High Court to knock at the doors of the Courts because access to justice is via the insurmountable mountain of costs and expenses. This need not detain us because we have seen that in time of crisis the Bar has risen to the occasion twice over in near past though it must be conceded that judicial review is increasingly becoming the preserve of the high, mighty and the affluent. But the three safeguards, namely, full and effective consultation with the Chief Justice of India, and that the power to transfer can be exercised in public interest, and judicial review, would certainly insulate independence of judiciary against an attempt by the executive to control it.

809. There was a lively debate as to whether transfer of a Judge who has to some extent become obnoxious in a High Court would be in public interest. Chandrachud, J. observed that "experience shows that there are cases, though fortunately they are few and far between, in which the exigencies of administration necessitate the transfer of a judge from one High Court to another. The factious local atmosphere sometimes demands the drafting of a Judge or Chief Justice from another High Court and on the rarest of rare occasions which can be counted on the fingers of a hand, it becomes necessary to withdraw a Judge from a circle of favourites and non-favourites. The voice of compassion is heard depending upon who articulates it. Though transfers in such cases are pre-eminently in public interest, it will be impossible to achieve that purpose if a Judge cannot be transferred without his consent. His personal interest may lie in continuing a Court where his private interest will be served best, whereas, public interest may require that his moorings ought to be served to act as a reminder that 'the place of justice is a hallowed place'". This approach mixes up two independent problems. While transfer in public interest is conducive to independence of judiciary, such power when exercised with a view to punishing a Judge becomes counter-productive. To punish a High Court Judge by an impermissible method is not in public interest. And if a judge

is uprooted from one place because he has made himself obnoxious, the transfer itself may inflict punishment. In the whole controversy in this case this is the grey area and it is difficult to give precise answer either way.

810. Public interest is an expression incapable of any precise definition nor what constitutes public interest is capable of specific enumeration. A negative definition was attempted by learned Attorney-General when he said that if a judge is guilty of misbehaviour or is suffering from incapacity he ought to be removed and not transferred but if the Judge is not guilty of any misbehaviour but because of activities of some others has become ineffective his transfer could be said to be in public interest. One can visualise a situation when a judge having an expertise in some specialised branch of law may be required to be transferred to another High Court where it becomes necessary to strengthen that department. Transfer in such a situation would indisputably be in public interest. Unquestionably such transfer may cause some inconvenience or hardship to the transferred Judge, but by no stretch of imagination it can be said to cast either a slur or that the order was passed with a view to punishing him. Such a situation in our vast country with number of High Courts can be easily envisaged. A transfer of this nature even if it involves to the Judge concerned some hardship, some inconvenience, some pecuniary loss, yet his outstanding merit which necessitated his transfer for strengthening another High Court would far outweigh the personal considerations. If it is recognition of merit, the judge would himself hardly make any grievance about it. To question such a transfer as not being in public interest by illustration that there are three Judges of same eminence in three High Courts, what basis can be adopted for the transfer of a Judge, is too hypothetical to need an answer. No rule can be framed to meet with such a situation. A threat of a resignation by such a judge is inconceivable. One can visualise a number of situations where a transfer can be in public interest and when a transfer is effected in public interest and when questioned, the authority exercising the power of transfer must make good the claim of public interest. To say that public interest is not a sufficient safeguard is to deny what is being done in and day out

done in Court, viz., that a certain action being in public interest is upheld.

811. But the serious and fairly difficult question is, whether a Judge can be transferred on account of complaints against him or on account of anything in his conduct or behaviour. Let us put the negative in the majority view in the forefront. Chandrachud, J. has in most unequivocal terms stated that 'the power to transfer a High Court judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a judge who does not toe its line or who, for some reason or the other, has fallen from its grace (at p. 444) (of 1978-1 SCR) : (at p. 2339 of AIR 1977 SC). At another place he said that he has taken the view that a High Court Judge cannot be transferred as a matter of punishment as for example the views which he bona fide holds and that his transfer, being conditioned by the requirements of public interest, cannot be effected for an extraneous purpose (at p. 446) : (of 1978-1 SCR) : (at p. 2341 of AIR 1977 SC). Bhagwati, J. observed that it would be gross abuse of power to displace him from his High Court and transfer him to another High Court by way of punishment because he has decided cases against the Government. It is a power conferred on the President to be exercised in furtherance of public interest and not by way of victimisation for inconvenient decisions given by a High Court Judge (at p. 460) (of SCR) : (at p. 2352 of AIR). Krishna Iyer, J. in this context has observed that 'the nature of judicial process is such that under coercive winds the flame of justice flickers, faints and fades. The still small voice is smothered by subjective tribulations and anxieties and, if coerced, trembles to objectify law and justice. The true Judge is one whose soul is beyond purchase by threat or temptation, popularity or prospects'. At another stage it is observed that 'environmental protection of the judicial echelons from executive influence, by transfer or other deterrent, is in public interest'. Coupled with this is the view expressed that 'considering the great inconvenience, hardship and possibly a slur which transfer from one High Court to another involves the better view would be to leave the judges untouched and take other measures to achieve the purpose pleaded, namely, national integration'. Transfer thus casts slur. If, therefore, a Judge is transferred because he is involv-

ed in local factious atmosphere or has a circle of favourites and disfavoureds. It would be obviously by way of punishment and would cast a slur and stigmatise the Judge. Mr. Seervai pointed out that while conceding in the majority view that transfer involves a slur, the illustrations given by Chandrachud, J., clearly show that transfer in such situations would be by way of punishment. Power conferred by Art. 222 (1), frankly, cannot be exercised with a view to punishing the Judge. It can only be exercised in public interest for achieving some larger public good. But it was urged that if a Judge is not guilty of high misdemeanour sufficient to impeach him but behaves in a manner which brings administration of justice into disrepute a transfer which with a view to uprooting him from an atmosphere in which he has become inconvenient, would be to the good of that judge and in the interest of purity of administration of justice and such a transfer cannot be said to cast a slur or stigma on the Judge concerned. On an earlier occasion this view appealed to me. In my judgment in Mr. Sheth's case (1976) 17 Guj LR 1017, I observed in this behalf as under:

"I specifically asked Mr. Seervai, taking cue from his Sir Chimanlal Setalvad Lecture titled 'Tipping the Scales' where he refers to 'reigning favourite' that there is a judge in the High Court. He is a very competent judge. But he has developed certain local angularities which have vitiated the Court's atmosphere. He is a good judge and the drawback is not so grave to call for his impeachment; what was required was to free him from local peculiar undesirable influence. Would not his transfer solve the problem to the satisfaction of all. He was asked whether he would not mind being transferred. He candidly said 'no'. How is the problem to be solved? Transfer of such a Judge is in public interest, cannot be gainsaid. He is not willing to be transferred and he would not give his consent. If the power to transfer is further limited by reading into Article 222 the words 'with his consent' by process of interpretation, Article 222 becomes a constitutional deadwood. He cannot be transferred. He cannot be continued at that place, and there is no tangible sufficient proof for impeachment. Law Commission in its Fourteenth Report, Vol. I, p. 99 rejected a transferable cadre of High Court Judges. But Mr. Seervai in his lecture ob-

served that the Commission did not consider separately whether the power to transfer a Judge would not in the last resort be used as a remedy for an admitted evil (p. 118). Then there must be power in some one to transfer the Judge albeit without his consent. And if we read down the Article as suggested there is no way out. Mr. Seervai said that the resultant situation is that there are two public interests in the field and they appear to be in conflict with each other, to wit (i) transfer of a Judge without his consent by a litigant, namely, executive would undermine judicial independence which is a cardinal feature of the Constitution; and (ii) image of due justice would be tarnished unless the Judge is transferred so as to save him from the undesirable environmental influence affecting his integrity. The answer is that the Court, in such a situation, must determine the dominant public interest and give precedence to it over the conflicting subservient interest which must give way. Said Mr. Seervai, tolerate the situation rather than undermine judicial independence by compulsory transfer by the Executive. It often happens that the principles when pushed to logical end lead to two irreconcilable positions. In such a conflict choice has to be made. Cardozo in his *Nature of Judicial Process* (pp. 40-41) vividly describes this conflict by saying that force of logic of one should prevail over the other and the choice is made by the judicial mind born of its conviction that the one to be selected would lead to justice. In the end, the principle which is thought to be most fundamental to represent the larger and deeper social interests must put its competitors to fight. Approaching from this angle, he said, if you cannot impeach the judge, tolerate but you cannot transfer him without his consent because that would impinge upon the higher public interest, namely, independence of judiciary and would nullify the cardinal feature of the Constitution."

But on deeper thinking I believe that selective transfer of individual Judge for something improper in his behaviour or conduct would certainly cast a slur or attach a stigma and would leave such indelible mark on the character of the Judge that even in the High Court to which he is transferred he would be shunned and the consumers of justice would have little or no faith in his judi-

cial integrity. This is an inevitable outcome of selective transfer on the ground of some improper streak in the conduct or behaviour of the Judge. It is true that the procedure for impeachment is rather very cumbersome and it ought to be so because the ultimate power to impeach rests with the Parliament. And in a Parliamentary democracy the executive which controls a majority in Parliament would be able to carry out the threat of impeachment. It may be, as was urged, that the Judge may behave in an impeccable manner but there are others functioning in the Court who would render judge's task of judicial justice impossible. I fail to see how transfer of such a weak and indecisive Judge unable to control his relations, friends or associates would be better off by transfer. Society would dub him a weak and imbecile Judge. One thing is, therefore, certain that the power conferred by Art. 222 (1) cannot be exercised with a view to punishing the Judge for anything improper in his behaviour or conduct. What a deep resentment and consequential character assassination a High Court Judge suffers by such selective transfer can be gauged from the reaction of Shri M. M. Ismail, former Chief Justice of Madras High Court who resigned only because according to him the transfer was by way of punishment and casts stigma on his judicial poise and bearing. Law Minister in his highly controversial circular dated March 18, 1981, has stated that 'to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations', some fresh steps are required to be taken. Transfer to achieve such objects may apparently be in public interest. Therefore, whenever the transfer answers to some objective norms even if it causes personal inconvenience and hardship, it can be said to be in public interest. But the transfer of a judge not answering to any objective norms but selectively made and founded upon complaints and grievances relatable to the conduct or behaviour of the judge would certainly cast stigma or slur and would be by way of punishment and that cannot be inflicted by exercise of power under Art. 222 (1). If transfer can be effected because there are complaints and grievances against a Judge of a High Court on account of his behaviour or conduct it would permit the executive after going through the process

of consultation to rotate inconvenient Judges and this rotation causes such character assassination on one hand and hardship and inconvenience on the other that it will be sufficient to drive out even a strong willed Judge. Therefore, a transfer on account of any complaint or grievance against a Judge referable to his conduct or behaviour is impermissible in exercise of powers under Art. 222 (1).

812. One more submission may be examined here. It was contended that upon a true construction of Art. 222 (1), a proposal for transfer cannot be initiated by the Chief Justice of India, it can only be initiated by the President because the Chief Justice of India is the 'consultee'. The power of transfer is conferred on the President and it can be exercised after consultation with the Chief Justice of India. Chief Justice of India is thus the constitutional functionary to be consulted. Would initiation of a proposal for transfer emanating from the Chief Justice of India, a constitutional functionary required to be consulted, by itself vitiate the proposal? In other words, can it be said that Art. 222 (1) envisages proposal for transfer to be initiated by the President alone and after due deliberation and consultation with the Chief Justice of India the proposal can be carried out if deemed proper or be dropped? Undoubtedly, the power is in the President to transfer and as a pre-condition the Chief Justice is required to be consulted. But on that account alone it cannot be said that the Chief Justice of India cannot initiate the proposal. Where power to do a thing is vested in a certain constitutional functionary it is immaterial who draws the attention of the constitutional functionary, the repository of power, for exercise of the same. If the power is exercised after fulfilling all the pre-conditions, the mere fact that somebody invited the repository of power to exercise power which may tantamount to saying that someone initiated the proposal for exercise of the power, such initiation of proposal would not be unconstitutional or contrary to the constitutional mandate. The only caution that must be required to be administered is and it has assumed importance in this case, that if Chief Justice of India who is the authority to be consulted in respect of a proposal for transfer himself becomes the initiator of the proposal, the whole process of consultation must move in such a manner as

to ensure that the President who is invited to exercise the power at the instance of the Chief Justice of India has to apprise himself of all relevant considerations and has to fully inform himself of all the aspects of the matter and then the power is to be exercised. When in Mr. Sheth's case (AIR 1977 SC 2328) it was said that while consulting the Chief Justice of India the President must make the relevant data available to him on the basis of which he can offer to the President the benefit of his considered opinion, the process would have to be reversed when the Chief Justice of India is the initiator of the proposal for transfer. It would be the constitutional obligation of the Chief Justice of India to place all relevant data and material having an impact on the final verdict before the President and the President in his turn must apprise himself of all the relevant considerations. If there are either grey or blurred areas, it would be the constitutional obligation of the President to call for necessary information from the Chief Justice of India who being the initiator of the proposal must have considered all of them and having brought to bear upon the subject his mature consideration must have initiated the proposal and after all the relevant data thus supplied, including the missing links, if any, as required by the President, the President may either exercise the power or on mature consideration may decline to exercise the power. Collection of relevant material, public interest involved, and the decision recommending transfer must precede the proposal and the same must accompany the proposal. A bald proposal unaccompanied by relevant material and the reasons for proposing transfer and total absence of public interest sought to be served by the proposal would certainly not satisfy the constitutional mandate of Art. 222 (1). The fulfilment of the constitutional obligation in this background would be on the Chief Justice of India and the performance by the President of his duty to elicit all facts which are necessary to arrive at an appropriate conclusion are parts of the same process and are complementary to each other. But with this precaution, who initiates the proposal is irrelevant. In this context, however, my attention was drawn to a passage in my judgment in Gujarat High Court in Mr. Sheth's case (1976-17, Guj. LR 1017) which gives an impression that the President alone can initiate the pro-

posal. In paragraph 140 it is stated that 'it is not for a moment suggested that the proposal for transfer must emanate from the Chief Justice. That is not expected and it is bound to emanate from the President. The process for inception of the proposal is not to be reversed. Such a thing may also be open to objection and the reason is apparent'. At first blush this passage gives an impression that upon its true construction Art. 222 (1) precludes anyone except the President of India to initiate the proposal for transfer and that in any case the Chief Justice of India cannot initiate the proposal. The observation was in the context of a submission that exercise of power of transfer by the executive would be subversive of independence of judiciary and that in order to eliminate arbitrary exercise of power conferred on the President the Court must so construe Art. 222 (1) that the proposal for transfer must originate with the Chief Justice of India. The submission presently examined is exactly the converse but answering the submission before the High Court it was observed that in order to ensure independence of judiciary it is not obligatory that a proposal for transfer must emanate from the Chief Justice of India. The passage, therefore, must be read in this light.

813. Summing up the discussion, following propositions emerge both on principle and authority. While testing the validity or otherwise of an order of transfer of a High Court Judge made by the President in exercise of the power conferred by Art. 222 (1), below mentioned tests will have to be applied:

(i) power to transfer a Judge of High Court is conferred on the President which as part of the executive function of the President he would, in view of Art. 74, discharge according to the aid and advice received by him from the Council of Ministers;

(ii) the power to transfer a High Court Judge thus is in the executive which is the litigant in a very large number of cases coming before a Judge of a High Court;

(iii) the power to transfer a High Court Judge is extraordinary power;

(iv) the limitation on the exercise of power is full, effective and meaningful consultation with the Chief Justice of India;

(v) the power to transfer can be exercised only in public interest and not ac-

cording to the whim, caprice or fancy of the executive or to remove an inconvenient judge not toeing its line]

(vi) the consultation to be effective must be focussed upon very personal factors as the family problems of the judge, which include the position of his wife and children and parents, the reasons for transfer whether the transfer is actuated on account of anything in the conduct or behaviour of the judge, whether the injury, inconvenience and difficulties experienced by the judge consequent upon his transfer are such as to be inconsequential in view of the larger public interest for which the transfer is being ordered;

(vii) would the transfer cast a slur or stigma on the judge proposed to be transferred;

(viii) the policy universally followed till 1976 of not transferring a judge of High Court without his consent is being shelved for achieving some larger public interest or the so-called public interest is a cloak or device to strike at an inconvenient judge;

(ix) is the transfer intended to inflict punishment for misbehaviour not of adequate magnitude to invoke proceedings analogous to impeachment as contemplated by Art. 124 (4) and (5) read with Art. 218 and Judges (Inquiry) Act, 1968.

814. The allegations made and countered in this group of petitions may be examined on the touchstone of aforementioned well settled propositions so as to reach an affirmative conclusion one way or the other, whether the order dated January 19, 1981, transferring Shri K. B. N. Singh, Chief Justice of Patna as Chief Justice, Madras, is constitutionally valid or otherwise.

815. Factual averments are set out in petitions as well as numerous affidavits filed in the course of hearing of these petitions. Two important affidavits are of Shri K. B. N. Singh, dated Sept., 16, 1981, and counter affidavit of the Chief Justice of India dated Sep. 29, 1981, Shri K. B. N. Singh filed on October 16, 1981, an affidavit in reply to the affidavit of the Chief Justice of India. It is rather unfortunate that there is divergence between the affidavits of Shri Singh and the affidavit of the Chief Justice of India but the painful and agonising task of searching where the truth lies is spared by the stand taken by Shri Singh's learned counsel, Dr. Singhvi, that he would not refer to any divergence between these affidavits

and base his submissions on the points on which they converge. The only difficulty we experienced is that in the course of discussion some queries emerged and had to be left at that stage because Mr. Parasaran, learned Solicitor-General to whom we addressed our queries, frankly confessed his inability to help because he did not appear for the Chief Justice of India. In Mr. Sheth's case (AIR 1977 SC 2328) the Chief Justice of India appeared through counsel but did not file his affidavit. In this case Chief Justice of India filed his affidavit but did not appear through counsel to assist the Court. We are, therefore, left to fend for ourselves. But let it be made distinctly clear that the affidavit of Chief of India would be looked upon as setting out the truth, and is entitled to undiluted respect befitting the dignity of his office.

816. Shri K. B. N. Singh has filed as many as four affidavits. It is not necessary to recapitulate the averments in these affidavits. The broad allegations which have a bearing on the issues under discussion may be briefly stated.

817. In his first affidavit dated September 7, 1981, the only averment worth referring to is that he had not at any time consented to his transfer to Madras and that no reasons, ground, questions or materials necessitating or justifying his transfer from Patna to Madras were ever disclosed to him or discussed with him by the President of India or the Government of India or by the Chief Justice of India. He also states that it was not possible for him to give consent to his transfer on account of a compelling personal problem, namely, that his mother of advanced age is staying with him and she is seriously ailing and bed-ridden for over two years and who is not in a position to be moved out of Patna without risk to her life and he is not in a position to leave her alone. Coupled with this affidavit there was a request that from the array of respondents he may be transposed as petitioner 3, which request was granted.

818. Consequent upon transposition of Shri K. B. N. Singh as petitioner 3, detailed amendments to the petition preferred by two advocates, would have been inevitable. With a view to avoiding the same, Shri K. B. N. Singh was given liberty to file a detailed affidavit setting out therein all his contentions. Pursuant to this liberty reserved in his favour he

has filed a detailed affidavit dated September 16, 1981, inter alia, contending that in February 1980, the Chief Justice of India visited Patna for inaugurating International Rotary Conference. The fact that such a conference was held on 23rd & 24th Feb., 1980 and that it was inaugurated by the Chief Justice of India is not disputed but what is controverted is that the visit was not specifically for the purpose of inaugurating the Conference but it was an official visit incidental to which the invitation to inaugurate the conference was accepted. Shri Singh then proceeds to state that during this visit the Chief Justice of India did not give him any inkling of a proposal to transfer him. This is admitted by the Chief Justice of India saying that at that time no proposal for transfer of Shri Singh was even mooted and, therefore, there was no question of giving him any inkling in this behalf. Shri Singh then proceeds to state that on January 5, 1981, for the first time he received a telephonic message from the Chief Justice of India that as Shri M. M. Ismail, the then Chief Justice of Madras was proposed to be transferred to Kerala, in the consequential vacancy in the office of Chief Justice, Madras, Shri Singh was proposed to be transferred. Shri Singh enquired why he was being transferred to Madras and the Chief Justice of India said that it was 'Government policy'. The fact that there was such a telephonic conversation between Shri Singh and the Chief Justice of India on January 5, 1981, is admitted and also that during this conversation there was reference to 'Government policy' bearing on the question of transfer was also referred to. What is disputed is that for the proposed transfer 'Government policy' was not the only reason given by Chief Justice of India and the Chief Justice of India in his counter-affidavit has stated that over and above referring to Government policy, Shri Singh was informed that it was proposed to transfer Chief Justice M. M. Ismail from Madras and it was necessary to appoint an experienced and senior Chief Justice in his place. Shri Singh then asserts that he informed the Chief Justice of India that his mother who lives with him was seriously ill and bed-ridden and was not in a position to be moved from Patna without risk to her life. This is admitted. The additional averment of Shri Singh that he also stated certain other compell-

ing and personal circumstances and difficulties was disputed and denied. Undoubtedly the further averment of Shri Singh that despite all these difficulties, if his transfer is insisted upon he might be compelled to resign and such a statement having been made by him in the telephonic conversation is admitted by the Chief Justice of India. Shri Singh was also informed that the Chief Justice of India has taken note of the difficulties mentioned by him and that it would be taken into consideration before a final decision was taken. The Chief Justice of India also requested Shri Singh during this conversation to come over to Delhi to discuss the question of his transfer. Shri Singh further avers that he reached Delhi three or four days after this telephonic conversation and according to Chief Justice of India Shri Singh came to Delhi on Jan., 8, 1981, and met him at his residence. There is some divergence on the question as to the duration of time for which Shri Singh was with the Chief Justice of India. According to Shri Singh he was with Chief Justice of India for 10 to 15 minutes while according to Chief Justice of India he was with him for a period much longer than 10 to 15 minutes. During this discussion according to Shri Singh the Chief Justice of India was non-committal in the matter of Shri Singh's transfer. Shri Singh proceeded to tell the Chief Justice of India during this conversation at the residence of the latter that it was possible that baseless complaints which are the bane of Bihar might have been made to him and if so, he would like to remove any wrong impression that might have been created. Even after this suggestion, according to Shri Singh, the Chief Justice of India did not put any question or material to him which necessitated or justified his transfer. The version given by the Chief Justice of India in his counter-affidavit is that the question of Shri Singh's mother's illness was discussed and the Chief Justice of India disclosed his inability to agree with Shri Singh that there were no other dependable persons in his family who could look after his mother and it was pointed out that Shri S. B. N. Singh, the brother of Shri Singh who was a practising advocate in the Patna High Court was quite capable of looking after the mother. The Chief Justice of India admits that during this discussion Shri Singh pointed out that if

was possible that some baseless complaints may have been made to him (Chief Justice of India) and that he (Shri Singh) would like to remove any wrong impression which those complaints may have created. On this reference being made by Shri Singh the Chief Justice of India told him that he did not go by baseless complaints, that he did not believe that his (Shri Singh's) conduct was blame-worthy, but that if he wanted to explain any matter, which according to him had created dissatisfaction about the working of the High Court he was free to do so. The Chief Justice of India further states that during this conversation Shri Singh told him how certain persons connected with the High Court were influenced by communal considerations and how he, on his own part, did not permit communal or any other extraneous considerations to influence him administratively or judicially. The Chief Justice of India further states that he (Chief Justice of India) assured Shri Singh that he did not hold that he (Shri Singh) himself was to blame but that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. Number of grounds have been stated by Shri Singh in this affidavit but those of which notice may be taken are that the transfer is without consent which according to him is impermissible, and that the consultation was not full, effective and meaningful in that the relevant considerations were not taken into account, no verification of facts was made and there was no relevant consideration for coming to a fair and considered conclusion that such a transfer would be in public interest. One additional ground is that the impugned order of transfer is punitive in character. Further, the transfer caused injury and the injury is inflicted without following the principles of natural justice, and the transfer is not shown to be in public interest.

819. Chief Justice of India filed his counter-affidavit dated Sept. 29, 1981. Shri Singh filed reply to the counter-affidavit on Oct., 16 1981. In between there are two affidavits, one of Shri K. C. Kankan, Deputy Secretary, Department of Justice, Ministry of Law, Justice and Company Affairs, being counter-affidavit on behalf of the Union of India, and the other by Shri T. N. Chaturvedi, Secretary, Department of

Justice, Government of India, specifically claiming privilege against disclosure of certain documents called for by Shri Singh.

820. By an order made by this Court, the Union of India was called upon to disclose all relevant documents, notings, etc. bearing on the question of transfer of Sri K. B. N. Singh. Pursuant to this order a file was submitted to this Court containing the correspondence between the Chief Justice of India and the Law Minister, Chief Justice of India and the Prime Minister, and a letter from Shri M. G. Ramchandran Chief Minister of Tamil Nadu to Law Minister.

821. The evidence furnished by the correspondence may have to be evaluated, appreciated, analysed and examined along with the averments made in various affidavits. The correspondence has to be read in juxtaposition with the averments in the affidavits so that the clear picture of fact situation may emerge which may assist in disposing of the contentions raised by Shri Singh.

822. The Chief Justice of India wrote to the Law Minister on December 7, 1980. This is a fairly long letter, part of which refers to filling in the vacancies in the Supreme Court which may be ignored as being wholly irrelevant for the present purpose. The next subject discussed is confirmation of Acting Chief Justices one of whom is Shri K. D. Sharma, then Acting Chief Justice of Rajasthan High Court and the recommendation is that he should be confirmed. There is a reference to Justice Mufti Bahauddin Farooqi, then Acting Chief Justice of Jammu and Kashmir. The recommendation bearing on the question of confirmation of Justice Farooqi as Chief Justice is not relevant but as we are dealing with the transfer and as the proposal has emanated from the Chief Justice of India, what were the relevant considerations present to the mind of the Chief Justice of India on the question of transfer have a vital bearing on the final outcome and, therefore, that part of the letter which recites a recommendation for transfer of Justice Farooqi can be taken into account. This is being referred to for a very limited purpose as to the overall view of the letter, the approach of the Chief Justice of India, the permeating flavour in the letter that the transfer is consequent upon some inquiries in respect of

complaints against various Chief Justices and this has a vital bearing on the topic of transfer. Viewed from this angle, the statement in this letter that several complaints have been received against Mr. Farooqi, some of which, on verification, seem well-founded, has a direct nexus to the recommendation that Mr. Justice Farooqi, then Acting Chief Justice of Jammu and Kashmir should be transferred as a puisne Judge of the Punjab and Haryana High Court. As would be pointed out later, indisputably the transfer was a direct consequence of complaints found well-founded on verification and, therefore, the transfer was directly and irrevocably related to the conduct of Justice Farooqi.

823. The Chief Justice of India then proceeds to state in unmistakable terms as under which is very relevant:

"Though I am firmly opposed to a wholesale transfer of the Chief Justices of the High Courts, I take the view, which I have expressed from time to time, that such transfers may be made in appropriate cases for strictly objective reasons. Personal considerations must, in the matter of such transfers, be wholly kept out. The transfer of some of the Chief Justices has been engaging my attention for the past few months. I have made personal inquiries in this behalf and have met several lawyers and many judges of the concerned High Courts. On the basis of the data which I have collected and which I have considered with the greatest objectivity, I am of the opinion that the following transfers may be made."

Proceeding further in the letter the Chief Justice of India recommends transfer of Shri K. D. Sharma, Acting Chief Justice of Rajasthan as Chief Justice of Kerala consequent upon the vacancy caused in the office of Chief Justice of Kerala by elevation of the then incumbent of office to the Supreme Court of India. In the vacancy caused by the transfer of Shri K. D. Sharma in the Rajasthan High Court, the recommendation was that Shri K. B. N. Singh, Chief Justice of Patna High Court be transferred and posted as Chief Justice of Rajasthan High Court and Shri Syed Sarwar Ali, senior-most puisne Judge of the Patna High Court should be appointed as Acting Chief Justice of Patna High Court. On the transfer of Shri Farooqi, Acting Chief Justice of Jammu and Kashmir High Court, Mr. Justice Mohammad Hamid

Hussain of the Allahabad High Court was to be promoted and posted as Chief Justice of Jammu and Kashmir High Court. Then follows a paragraph which must be extracted:

"That leaves for consideration the question of appointment of permanent Chief Justice of the Allahabad High Court. I am fairly satisfied that Chief Justice Satish Chandra should be transferred from the High Court of Allahabad, but I do not want to express any final opinion on this question until I ascertain for myself the state of affairs in Allahabad. For that purpose I will be going to Allahabad on December, 31. During my three days' stay at Allahabad, I will be meeting various members of the Allahabad Bar as also the Judges of that High Court. In case I advise the transfer of Justice Satish Chandra, he can be appointed as the Chief Justice of the Patna High Court. That will create a vacancy in the office of the Chief Justice of the Allahabad High Court for which a suitable recommendation can be made later. Justice Satish Chandra's transfer to Patna, in case it is necessary, may be made any time after January 15, 1981".

This letter thus involves the transfer of Acting Chief Justice Mr. Farooqi, Mr. Justice M. H. Hussain, Acting Chief Justice Mr. K. D. Sharma, Chief Justice Mr. K. B. N. Singh and a near certain transfer of Chief Justice Mr. Satish Chandra.

824. Leaving aside others, one incontrovertible fact may be noticed here that prior to December 7, 1980, when a firm proposal was made for transfer of Shri K. B. N. Singh from Patna to Rajasthan High Court, there was neither a whisper or discussion between Chief Justice of India and Shri Singh concerning his transfer. The proposal to transfer Shri Singh is a firm proposal not a tentative one because the tentative suggestion couched in a different language is in respect of Shri Satish Chandra, Chief Justice of Allahabad. As far as Shri K. D. Sharma, Acting Chief Justice of Rajasthan, Shri K. B. N. Singh, Chief Justice of Patna, Shri Farooqi, Acting Chief Justice of Jammu and Kashmir, and Shri M. H. Hussain, Judge of Allahabad High Court, are concerned, there was a firm proposal and it would mean that before making such a firm proposal the Chief Justice of India must have taken all aspects bearing on the question of transfer into consideration because transfer of

such high constitutional functionaries as Judge or a Chief Justice of a High Court is to be made after collecting relevant material, cool deliberation, mature consideration and as an absolute necessity. If the proposal to transfer Shri Singh was thus a firm proposal which if the President had accepted without further question as it was coming from the highest in the judiciary, the Chief Justice of India, and Shri Singh was transferred, *ex facie* the validity of the transfer would be open to serious question in view of the ratio in Mr. Sheth's case. Within 24 hours before the ink was dry on the first letter the Chief Justice of India, whose attention was drawn to a serious error in proposing transfer of Acting Chief Justice K. D. Sharma from Rajasthan to Kerala High Court by telephonic conversation, immediately went back on the proposal. It transpires from the correspondence that the Law Minister drew the attention of the Chief Justice of India that if Shri K. D. Sharma, Acting Chief Justice of Rajasthan was transferred as Chief Justice of Kerala High Court, he would become Chief Justice over six Judges of Kerala High Court who were senior to him by length. It was pointed out that Shri Sharma was inducted as a Judge of the Rajasthan High Court in 1973 while the seniormost puisne Judge in Kerala High Court Shri P. Subramonia Poti was inducted in the High Court in 1969 and that there were five other Judges along with Mr. Poti who were inducted into the High Court prior to 1973. If the proposal of the Chief Justice of India was implemented, a fairly junior Judge would become Chief Justice over his seniors, a thing which would be seriously resented as the imposition would be utterly unjustified, destroying ruthlessly the natural expectations of Judges who had accepted High Court judgeship between 1969 and 1973. It appears this very relevant aspect was completely overlooked while making the recommendation for the transfer of Shri K. D. Sharma to Kerala High Court. This faux pas on being brought to the notice of the Chief Justice of India was rightly accepted saying that the Chief Justice of India "did not realise that as many as six Judges of the Kerala High Court are senior to Justice K. D. Sharma and that makes it necessary to think about the matter afresh", and, therefore, by letter dated December 8, 1980, the proposal to transfer Shri K. D. Sharma as Chief

Justice of Kerala was cancelled and in supersession of that proposal a fresh proposal was submitted that Shri K. D. Sharma be transferred to Sikkim and Shri M. M. S. Gujral, the then Chief Justice of Sikkim be transferred as Chief Justice, Kerala. Even Mr. Gujral was inducted as a High Court Judge five months later than Mr. Poti. This fact was not considered important enough in making the proposal. The other proposals contained in the letter dated December 7, 1980, were reaffirmed which would imply that Shri K. B. N. Singh's proposed transfer from Patna to Rajasthan High Court was to be ordered.

825. The next letter dated December 18, 1980, by Chief Justice of India to Law Minister reveals one more fact that before the letter dated December 8, 1980, intimating the cancellation of proposal of transfer of Shri K. D. Sharma to Kerala High Court reached appropriate quarters, the proposal was already processed to the Prime Minister who appears to have approved the same and this becomes evident from a recital in the letter dated December 18, 1980, that having communicated one proposal to the Prime Minister in regard to the appointment of Kerala Chief Justice (Shri K. D. Sharma) consequent upon the impending elevation of the then Chief Justice to Supreme Court, it was somewhat awkward to withdraw that proposal especially since the Prime Minister was inclined to agree to that proposal.

826. Possibly with a view to apprising the Prime Minister as to the circumstances necessitating withdrawal of the proposal, on the same day a letter was addressed by the Chief Justice of India to the Prime Minister in which it was stated that while recommending transfer of Shri K. D. Sharma as Chief Justice of Kerala High Court he had overlooked that Justice K. D. Sharma is junior to as many as six Judges of the Kerala High Court and, therefore, his transfer to that High Court was bound to invite a great amount of public criticism and it would also create administrative problems in the way of Justice Sharma himself. One other aspect in this letter worth noticing is that the Chief Justice of India informed the Prime Minister that he was trying to explore the possibility of recommending the appointment of the seniormost puisne Judge of the Karnataka High

Court, Shri K. Bhimiah, as Chief Justice of Kerala High Court. In the penultimate paragraph of the letter the Chief Justice of India reiterates that the other proposals, for example, the proposal of transfer of Shri K. D. Sharma, Acting Chief Justice of Rajasthan High Court to Sikkim and the transfer of Shri K. B. N. Singh, Chief Justice of Patna High Court to Rajasthan High Court may await further consideration. The underlined portion of the letter extracted herein would show that the proposal to transfer Shri K. B. N. Singh to Rajasthan was likely to be reviewed and reconsidered and, therefore, the proposal itself may become tentative. But the next letter to which presently a reference would be made would show that the transfer of Shri K. B. N. Singh was certain, only the station may be reconsidered.

827. The Chief Justice of India wrote to the Law Minister on December 20, 1980, that is, two days after the letter to the Prime Minister that having given the matter his most anxious consideration, he proposed, in supersession of the previous proposals made by him, that Shri M. M. Ismail, Chief Justice of Madras High Court should be appointed as the Chief Justice of the Kerala High Court and in the consequential vacancy caused in the office of Chief Justice of Madras High Court Shri K. B. N. Singh, Chief Justice of Patna be transferred as Chief Justice of Madras. A further proposal was that Shri Syed Sarwar Ali, seniormost puisne Judge in the Patna High Court should be appointed as Acting Chief Justice of the Patna High Court. There ends the correspondence.

828. The correspondence bearing on the question of transfer of Shri K. B. N. Singh, commencing from Dec., 7, 1980 and ending with the letter dated December 20, 1980, has been disclosed. There is no contemporaneous written evidence bearing on this topic either in the form of memorandum or notings. This becomes explicit from the following paragraph in the statement made on behalf of Union of India by the learned Solicitor-General on Nov. 12, 1981. Relevant paragraph in the statement reads as under:—

"Except the material brought on record by the various affidavits filed on behalf of the Government of India in the

case, the correspondence already disclosed and the notings submitted to this Hon'ble Court with a claim of privilege, there are no minutes recorded as to any conversation between the Chief Justice of India and the Union of India. No other data is available except what is in the above records".

(Underlining mine)

829. Affidavits refer to telephonic conversation of Chief Justice of India with Mr. Singh on January 5, 1981, and the meeting between the two on January 8, 1981. File of noting was shown to the Court. Dr. Singhvi submitted that if there is any relevant material bearing on the question of transfer of Shri Singh it must be disclosed and consistent with our order for disclosure we would have been duty bound to disclose it. The fact that after perusing the file we did not direct disclosure permits the irresistible inference that the notings did not contain any relevant material. Therefore a fortiori it follows that except the correspondence disclosed there is no contemporaneous written record; nor notings of minutes of telephonic communication relevant to transfer of Shri Singh. And it would be imprudent to hold that such serious issue with forebodings of resignation is left to oral discussion between two high constitutional functionaries to be conjured up by tapping memory as to what transpired. Such an approach would expose high constitutional functionary like Chief Justice of a High Court without remedy, relieve and relief.

830. Disclosed correspondence thus being the only source of what happened during two weeks commencing from December 7, 1980, and ending with the letter dated December 20, 1980, has to be minutely albeit dispassionately and objectively scanned. During the fateful period five Chief Justices and one puisne Judge were proposed to be transferred. They include Chief Justices K. D. Sharma (Rajasthan), K. B. N. Singh (Patna), M. M. S. Gujral (Sikkim), Acting Chief Justice Farooqi (J. & K), Chief Justice M. M. Ismail (Madras) and Justice M. H. Hussain, a puisne Judge of the Allahabad High Court who was to be promoted, transferred and posted as Chief Justice, Jammu and Kashmir. And notice the rotational movement. Shri Sharma was first proposed to be moved

from Jodhpur to Ernakulam, i. e. Rajasthan to Kerala, from the Hindi speaking belt to an area where Hindi is hardly welcome. Shri Gujral moves from Sikkim to Ernakulam, that is, from Sikkimese to Malayalam and from extreme north to down South. Within 24 hours the wheel turned almost 180 degrees when Shri Sharma instead of going to extreme south, i. e. Ernakulam in Kerala, is pushed to extreme north, Sikkim in the foothills of Himalayas. Shri Singh is first proposed to be sent from Patna to Jodhpur, Rajasthan, both in Hindi speaking belt and then actually shifted to Madras, Hindi to Tamil, seriously objected to by Mr. M. G. Ramchandran, Chief Minister of Tamil Nadu. Shri Ismail moved from Madras to Kerala not very far away though from Tamil to Malayalam language area. Shri Farooqi who was first in Kashmir, then sent to Allahabad, brought back to Kashmir, is proposed to be demoted and sent to Chandigarh. Shri Mohammad Hamid Hussain moves from Allahabad to Jammu and Kashmir. The chequered history of this rotational movement spreading over hardly 13 days would hardly satisfy the rigorous test of a mature, objective, dispassionate consideration of the various factors involved in the transfer. This is all the more so because as it will be pointed out a little while later that the Government of India possibly out of deference to Chief Justice of India, which ought to be the right attitude, had simply abdicated itself and accepted the proposals not for the reasons for which they were made but for entirely contrary and opposite reasons.

831. Transfer of Shri Singh is sought to be sustained on the ground that it is not by way of punishment nor on account of misbehaviour or objectionable conduct on his part nor with a view to casting a stigma on him but in larger public interest, namely, that he being an experienced senior Chief Justice, such a person was required to man a premier High Court like the Madras High Court. Does the correspondence bear out this submission?

832. The letter dated December 7, 1980, read as a whole, piecemeal or line-wise hardly indicates that Shri Singh was proposed to be transferred because he was the senior experienced man and a premier High Court like the Madras High

Court would require a senior experienced person. All High Courts are of equal importance, save that some High Courts have a span of more than a century and others were formed after the independence. When the submission that transfer of Shri Singh was not in public interest is considered, it would be pointed out that when transfer was first mooted, there was not even a remote possibility of Madras High Court requiring a senior experienced Judge.

833. With this background, if the letter dated December 7, 1980, is read as a whole, an indelible impression is formed on the mind that the governing consideration for recommending transfers was that one or the other Chief Justice had made himself obnoxious on account of complaints against him. Mr. Justice Farooqi's case is an instance in point and it is incontrovertible that in his case it was proposed that he be demoted and transferred from Jammu and Kashmir to Chandigarh because several complaints had been received against him some of which on verification seem well founded. And this is the undertone of the whole letter because it is with reference to Justice Farooqui that the proposals for transfer commenced in the letter. And this is reinforced when one reads the case of Shri Satish Chandra, Chief Justice of Allahabad because it is suggested by the Chief Justice of India that he is fairly satisfied that Shri Satish Chandra should be transferred but that he will formulate the proposal by reaching a decision after a visit to Allahabad when he proposed to meet various members of the Allahabad Bar as also Judges of the High Court to ascertain the state of affairs in Allahabad. If Shri Satish Chandra is the senior experienced Chief Justice, that aspect is not to be collected by a visit to Allahabad. If some other public interest requires transfer of Shri Satish Chandra, a visit to Allahabad would hardly be enlightening. If the state of affairs at Allahabad is required to be ascertained a visit is inevitable. That such a visit was in contemplation is clearly stated and during this visit what was contemplated to be done was a meeting with various members of the Allahabad Bar as also Judges of the Allahabad High Court. And this meeting was for the avowed object of ascertaining the state of affairs in Allahabad which will have a bearing on the proposal to transfer Shri

Satish Chandra. Can it be said in all humility that the sequence of events herein set out would not unmistakably show that the complaints against Shri Satish Chandra have to be examined, the truth or otherwise of it has to be ascertained, the degree of his unacceptability at Allahabad has to be determined and upon all these considerations flowing invariably from complaints against Shri Satish Chandra, a transfer proposal would be submitted. Add to this the statement in the letter dated December 7, 1980, when the chapter on transfers opens that transfers be made in appropriate cases for strictly objective reasons. In this connection Chief Justice of India states that he has made personal enquiries in this behalf and has met several lawyers and many Judges of the concerned High Courts and on the basis of the data collected during such visit and enquiry which he has considered with greatest objectivity, he proposed transfers including that of Shri Singh. Therefore, the transfer is the outcome of enquiries from lawyers and Judges, about local atmosphere qua a Judge necessitating his transfer. The transfer in such a case would be clearly relatable to the alleged misbehaviour, if any, or conduct of the Judge.

834. Read the letter as a whole and the permeating flavour emerging from it is that the Chief Justice of India believed, truthfully and honestly, but impermissible according to the ratio in Mr. Sheth's case that the transfer in each case was to remove the Judge from a certain place because he had made himself obnoxious and that this cannot be for any other reason except punishment because it has already been pointed out that transfer is more harmful than even punishment. This conclusion is reinforced by a specific, unambiguous assertion extracted hereinabove that the Chief Justice of India was opposed to the wholesale transfer of Chief Justices of High Courts and that his approach was that : 'transfer may be made in appropriate cases for strictly objective reasons. Personal considerations must be wholly kept out in such cases'. Analysing this sentence it would mean that wholesale transfer of Chief Justices referable to an objective norm that the Chief Justices shall always be from outside is not acceptable to the Chief Justice of India. That is his view and he strictly

adheres to it. He is, therefore, certainly not proposing transfers as and by way of policy. It would be so because in his leading judgment in Mr. Sheth's case he has expressed in no uncertain terms that policy transfers on a wholesale basis which leave no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution. The Chief Justice of India is thus opposed to policy transfers. Therefore, he is not proposing these transfers by way of policy transfers. The Chief Justice of India is of the view that the transfer may be made in appropriate case, meaning thereby selective transfers. Then he says that it must be for objective reasons. These objective reasons may include complaints against the Judge concerned and the complaints, if found to be of substance, transfer may be ordered pursuant to the complaints. Transfers on such complaints can be made and would not be made punitive is also his view in the leading judgment in Mr. Sheth's case. To recall his observation that the 'factious local atmosphere sometimes demands the drafting of a Judge or Chief Justice from another High Court and on the rarest of rare occasions which can be counted on the fingers of a hand, it becomes necessary to withdraw a Judge from a circle of favourites and non-favourites'. Transfer for these reasons would, according to the view expressed by Chandrachud, J. in Mr. Sheth's case (AIR 1977 SC 2328), be in public interest. This itself is a moot point. Transfer in appropriate cases not answerable to any objective norms would be selective transfer. But in view of the majority decision in Mr. Sheth's case, the more objectionable part is that personal considerations in the matter of such transfers be wholly kept out. If by personal considerations it is meant the complaints against Judge then it becomes tautologous because objective reasons remain unexplained. If by personal considerations what is meant is personal difficulties, inconveniences and hardships of the Judge consequent upon the transfer and if these are to be kept out of consideration, the transfer order becomes bad in view of the ratio in Mr. Sheth's case. Therefore, summing up the whole approach underlying the letter by which transfers were first proposed show that all the relevant aspects were not taken

into consideration, to wit, proposal to transfer Shri K. D. Sharma to Kerala, that these were not policy transfers because the Chief Justice of India was wholly opposed to policy transfers; that these were selective transfers in appropriate cases meaning complaints against Mr. Justice Farooqi and the future investigation of complaints against Chief Justice Satish Chandra, and the data collected in course of enquiry with lawyers and Judges in respect of other Judges whose transfer was proposed, that the personal considerations, i. e. the personal inconveniences, hardships and difficulties were to be kept out of consideration, and that the transfers were to be for objective reasons, namely, complaints against the concerned Judges, were the governing considerations of the letter and this was operating on the mind of the Chief Justice of India while proposing the transfers. It may also be recalled here that while deciding the transfers the station to which the man is sent has a relevant consideration because as has been pointed out that some stations are good and some are not so good. And while deciding the station it is necessary that the personal considerations of the Judge may have an important bearing, to wit, education of his children, environmental considerations, availability of medical facility, health of his parents, if any, etc. and all these have to be kept in view in deciding the station to which the Judge is proposed to be transferred. Now, here this aspect seems to have been taken for granted because on December 7, 1980, Shri Sharma was proposed to be sent to Kerala and on the next day he was shifted to Sikkim. Is there anything comparable between Ernakulam and Sikkim save and except that they form part of India? Shri Singh was proposed to be transferred first to Jodhpur and then he was shifted to Madras. Now, nothing transpires from the record as to what relevant considerations about selecting the station qua a Judge have weighed with the Chief Justice of India while making proposal for transfer.

835. One additional fact which I only propose to mention and not comment upon is that all the relevant considerations were not thoroughly examined and analysed before making the proposal and this becomes apparent from the fact that a very vital consideration that a junior may not be imposed over a senior was

wholly overlooked when Mr. K. D. Sharma was proposed to be sent to Kerala because there were six Judges senior to Mr. Sharma who would be Puisne Judges and over whom he would be the Chief Justice. And this is admitted when it is stated that that aspect while making the proposal was overlooked. This is such a vital consideration that if the proposal had been carried out, it would have admittedly invited a great amount of public criticism and would have resulted in administrative problems in the way of Mr. Justice Sharma himself.

836. It may be fairly assumed here that at one stage the Chief Justice of India considered it necessary in public interest to transfer Mr. Justice Gujral from Sikkim but that proposal was eventually dropped.

837. The most serious contention raised by Dr. Singhvi may now be examined. Urged Dr. Singhvi, that before a transfer of a Judge is contemplated it is necessary to keep in view his personal problems and it must be weighed in relation to the reasons for his transfer. When a high constitutional functionary like the Chief Justice of India makes a proposal it is not conceivable that the proposal would be made first and the relevant facts bearing on the subject may be collected afterwards and examined and evaluated later on, on a proposition that if it becomes so necessary the proposal may be withdrawn. This is not how high constitutional functionaries discharge their constitutional obligations. Art. 222 provides for a minimum safeguard of a consultation with the Chief Justice of India. What constitutes meaningful, purposive and substantial consultation has been set out earlier. It includes within its fold an inquiry into the personal factors of the Judge such as the position of his wife, children, parents, other inconveniences and difficulties that he might experience on transfer. This can be gathered either from the Judge concerned or from other reliable sources. But personal inconveniences at best can be gathered from the person himself.

838. There is not a tittle of evidence that before proposing the transfer of Shri K. B. N. Singh from Bihar to Rajasthan on December 7, 1980, he had been given even a glimpse of his proposed transfer. That is an admitted position. Nothing was whispered to him, neither in February 1980 when

the Chief Justice of India paid an official visit to Patna, nor at any time till December 7, 1980, when a firm proposal emanated from the Chief Justice of India and was handed in to the Government of India for being implemented. In this connection it is stated in the affidavit of the Chief Justice of India that the mother of Shri K. B. N. Singh is old and is not keeping good health was a fact known to him since Feb., 1980. The age and health of the mother, an objective fact if known would by itself hardly be relevant. The real question would be, what is the position of the mother qua the son and how much is she in her old age dependent on the son, and what would be the result of bringing about an estrangement between the two. That is a vital consideration not the fact of her age and present health. Till January 5, 1981, during which period two independent proposals emanated from the Chief Justice of India for transfer of Shri K. B. N. Singh, first to Rajasthan and next to Madras, not a whisper was made to Shri Singh about the proposed transfer. After- all, when a high constitutional functionary like the Chief Justice of India makes a proposal how speedily it is processed at the highest level becomes discernible from the fact that the proposal dated December 7, 1980, passed through the Law Minister to the Prime Minister by December 9, 1980, and was approved by the Prime Minister and embarrassment was felt as disclosed by the letter of the Chief Justice of India dated December 18, 1980, while withdrawing the proposal. The incontrovertible fact situation that emerges from reading the correspondence is that the Chief Justice of India made the proposal for transfer of Shri K. B. N. Singh in the letter dated December 7, 1980, re-affirmed it in the letter dated December 8, 1980, described it as tentative by saying that the proposal concerning Shri K. B. N. Singh may wait further consideration by the letter dated December 18, 1980, and affirmed it to be a firm proposal by letter dated December 20, 1980, without whispering a word to Shri K. B. N. Singh. The proposal is unaccompanied by necessary relevant facts evidencing the relevant public interest, and it is inevitable that it must be so. Public interest which necessitates transfer is not stated. There is not the slightest reference to the problem of mother of Shri Singh. May be, Chief Justice of India may consider it irrelevant from his stand-

point. But President is entitled to know every relevant fact. And barring making proposal till that day no relevant fact is collected and even if Chief Justice of India had the facts, none were stated in the proposal. Would the Chief Justice of India accept this proposal emanating in this form from President without further inquiry? He would send for all relevant material which must be the source and foundation for transfer. Should the President be denied the same considerations? And President says he had no discussion with the Chief Justice of India. It was for the first time in a telephonic talk in the evening of January 5, 1981, the Chief Justice of India conveyed the proposal for transfer to Shri K. B. N. Singh. By that time two firm proposals, one a tentative and another final were pending with the Government of India. It would be stretching one's credibility to limit to hold that Chief Justice of India postponed talking to Shri Singh to a date later than the proposals. Chief Justice of India is an authority to be consulted but instead of being consulted he initiated the proposal. The minimum that is excepted of him is that he collects all relevant facts, also collects the relevant personal problems of the Judge to be transferred, examines, appraises and evaluates them from all objective standards keeping in view the possible inconvenience and hardship likely to be caused to the Judge and comparable public interest which necessitates transfer and thereafter puts forward the proposal. While discharging such a high constitutional function of either initiating the proposal for transfer or for being consulted for transfer it would be a failure to perform the constitutional duty if the proposal is made first, processed right up to the Prime Minister in one case and collecting of the data is postponed to a later date. This is contrary to what Chandrachud, J. has stated in his judgment in *Mr. Sheth's case* (AIR 1977 SC 2328). To recall, he said that there can be no purposeful consideration of a matter in the absence of facts and circumstances on the basis of which alone the nature of the problem involved can be appreciated and a right decision taken. The decision to be a right decision must follow the collection of material and be based on the material and that collection of evidence is not an empty formality for the record only.

839. It was, however, said that before the proposal was finally implemented by

the Presidential notification transferring Shri K. B. N. Singh there was a full and effective consultation between the Chief Justice of India and the President and that by that time the Chief Justice of India was in possession of all the relevant and material facts. Attention in this context was invited to a statement in the affidavit of the Chief Justice of India that 'there was a full and effective consultation between me and the President of India on the question of Shri K. B. N. Singh's transfer from Patna to Madras as Chief Justice of Madras High Court. Every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer'. What reference to the statement in affidavit a question was put to Mr. Parasaran, learned Solicitor-General as to whether the discussion involved in consultation was personally with the President of India or the expression 'President of India' means the Government of India and the consultation was through proper channel as laid down in the rules of business. A statement was read over to the Court by Mr. Parasaran, possibly as instructed by the President of India, that at no time the Chief Justice of India had any personal discussion with the President. Therefore, one has to fall back on the discussion, if any, Chief Justice of India may have either with the Law Minister who as Minister of Justice according to the rules of business would be the proper person to deal with the problem of transfer. It appears more or less the discussion has been by correspondence. Even a perfunctory knowledge about official correspondence would convince anyone that if there is a continuous correspondence on the subject, every letter would have a reference to the prior letter bearing on the subject. Turning to the first letter dated December 7, 1980, in which a proposal is made for transfer of Shri K. B. N. Singh from Patna to Rajasthan, there is not the slightest reference to any earlier discussion oral or in writing between the Law Minister and the Chief Justice of India on the question of transfer of Shri K. B. N. Singh. It may be that there was some public debate about the transfer of all Chief Justices of High Courts pursuant to a policy which was sought to be evolved that the Chief Justices of all High Courts must be from outside the State. This evolving proposal was

not acceptable to the Chief Justice of India when he said in the first letter that he is firmly opposed to a wholesale transfer of Chief Justices of High Courts. Then he proceeded to point out transfers may be effected in appropriate cases for strictly objective reasons. Having settled what ought to be the governing form for transfer, the Chief Justice proposed transfer of Acting Chief Justice K. D. Sharma, Chief Justice K. B. N. Singh, Acting Chief Justice M. B. Farooqi and Justice M. H. Hussain. Recalling the statement in the affidavit that there was full and effective consultation with the President of India prior to transfer, it has to be evaluated in the light of the contemporaneous written evidence in the form of the letter of the Chief Justice of India dated December 7, 1980. And in the statement on behalf of Union of India dated November 12, 1981, it is specifically made clear that except the disclosed correspondence and notings for which privilege is claimed there are no minutes or notes of discussion. I have shown above that there is no other contemporaneous written record except the correspondence. The first proposal to transfer Shri K. B. N. Singh finds its place in letter dated December 7, 1980. It is an admitted position that prior to that there was no discussion between the Chief Justice of India and the Law Minister. Equally it is an admitted position that Shri K. B. N. Singh was not even whispered that it was proposed to transfer him. It is also an admitted position that it was on January 5, 1981, that the Chief Justice of India talked with Shri K. B. N. Singh for the first time in which he broached the subject of transfer of Shri Singh. The inescapable conclusion is that a firm proposal for transfer was submitted to Government as late as December 20, 1980, and about 15 days thereafter Shri Singh was told for the first time about his proposed transfer and was invited to inform the Chief Justice of India about his personal difficulties and inconveniences. Now, the order of transfer is dated January 19, 1981. In between Shri Singh met the Chief Justice of India on January 8, 1981, and till the order of transfer was notified there is nothing in the correspondence which shows that there was any further discussion. The firm decision was reached on January 8, 1981 itself because it was stated to the court that the Prime Minister approved the proposal of transfer of Shri Singh on January 9, 1981.

It is reasonable to believe that Law Minister must have processed the proposal on January 8, 1981. The meeting between Chief Justice of India and Shri Singh took place in the evening on January 8, 1981. This would establish that a firm proposal for transfer was made, processed and approved before collecting all the relevant material which would considerably detract from the validity and efficacy of the proposal. Even if subsequently gathered facts were communicated to the President, one could have overlooked this apparent defect but the written record does not bear out that the President was informed of all the relevant facts.

840. One would have expected in this connection that while making the proposal for transfer, the very letter would, in respect of each Judge proposed to be transferred, set out therein as to what were the personal difficulties, what necessitates the transfer, which public interest was likely to be served by the transfer and all these should find their relevant place in the proposal itself. Oral or telephonic conversation while discharging important constitutional function affecting character and dignity of such high constitutional functionary as Chief Justice of a High Court is entirely out of place. The only reference to the transfer of Shri K. B. N. Singh in the first letter is as under:

"The transfer of Justice K. D. Sharma will create a vacancy in the office of the Chief Justice of the Rajasthan High Court. I recommend that Justice K. B. N. Singh, who is the Chief Justice of the Patna High Court, should be transferred as the Chief Justice of the Rajasthan High Court."

We struggled hard to find out from this long letter as to what public interest prompted the Chief Justice of India to propose transfer of Shri K. B. N. Singh to Rajasthan. The later suggestion that Shri Singh's transfer was proposed to subserve the public interest, namely, that he is a "senior, experienced Chief Justice needed to preside over a premier High Court will not help because there was no question of sending a senior, experienced Chief Justice to Rajasthan High Court and at the relevant time there was no proposal for transfer of Shri M. M. Ismail, Chief Justice of Madras High Court. Therefore, some other public interest must have informed the Chief Justice

of India to propose transfer of Shri Singh to Rajasthan. What inevitably transpires is that the transfer of Shri Singh from Patna is certain, reasons and place and public interest may fill in the gap as situation demands. This is neither consultation nor appreciation of relevant facts to satisfy the rigorous test laid down in Mr. Sheth's case.

841. There is a further lacuna in the process of consultation and it may be briefly mentioned here. While laying down the parameters of the scope of consultation under Art. 222 (1), Chandrachud, J. in his leading judgment of the majority view in Mr. Sheth's case (AIR 1977 SC 2328) approved and affirmed the passage in Chandramouleshwar Prasad (1970-2 SCR 666 : AIR 1970 SC 370) extracted earlier. Approving the statement of law contained in the extracted passage, it was said in Mr. Sheth's case that in order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer, the direction to give effect to the counter proposal without anything more cannot be said to have been issued after consultation (pp. 674-675) (of SCR): (at p. 375 of AIR). The question is, whether this test is satisfied.

842. Chief Justice of India unmistakably asserts that he is opposed to policy transfers or wholesale transfers of Chief Justices of the High Courts. He is of the view that transfers may be made in appropriate cases for strictly objective reasons. In other words, selective transfers. Pursuant to this view held by him he proposed amongst others the transfer of Shri K. B. N. Singh. This proposal was to be processed by the executive. It was incumbent upon the executive to have requested the Chief Justice of India to put all the materials and relevant facts collected by him for consideration of the President. Obviously, pursuant to a caution voiced by Chandrachud, J. in Mr. Sheth's case that as a high constitutional functionary like the Chief Justice of High Court was involved all the necessary relevant facts bearing on the question of transfer must be collected by the

Chief Justice of India as this is founded on the principle that in a matter which concerns the judiciary vitally, no decision ought to be taken by the executive without obtaining the views of the Chief Justice of India who, by training and experience, is in the best position to consider the situation fairly, competently and objectively. In order to consider every relevant fact in the discharge of this constitutional obligation the Chief Justice of India would be within his right and indeed it is his duty wherever necessary to elicit and ascertain further facts either directly from the judge concerned or from reliable sources, but thereafter he has voiced a caution that 'the executive cannot and ought not to establish rapport with the judges which is the function and privilege of the Chief Justice'. Consistently with this weighty judicial pronouncement the Chief Justice of India alone will have to gather all material and the executive would be well advised to keep hands off the judiciary. Therefore, whatever material the Chief Justice of India will have, has to be placed before the President. The correspondence manifests a woeful lack of any such material being placed before the President. That apart, the Chief Justice of India proposed selective transfers in appropriate cases strictly for objective reasons. Now, look at the performance of the executive. The executive appears to have accepted the proposal not on merits but out of reverence for the Chief Justice of India which constitutes a complete abdication of its function. This becomes discernible when in the course of hearing in response to a query made by the Court, the learned Solicitor-General made a statement on November 12, 1981, which is material for the decision on this point and, therefore, may be extracted hereunder:

"Throughout the Government had been of the view that as a policy the Chief Justices of the various High Courts should be from outside their States. It is this policy view that was put across to the Chief Justice of India. The Chief Justice of India expressed that he was opposed to all the Chief Justices of the High Courts being from outside and was keen on transfers to be made in appropriate cases strictly for objective reasons. It is in pursuance of the view propounded by the Chief Justice of India that he suggested the transfers covered by the letters which

in his view were desirable. Government acceded to the transfers proposed by the Chief Justice of India as (1) it was felt that not agreeing to these transfers may be construed as though the Government is departing from the view of having Chief Justices from outside; (2) the policy aspect could still be pressed into service later." (Emphasis supplied)

At a later stage of the hearing to a further query by the Court Mr. Parasaran in terms stated that the Government accepted the proposal for transfer not for the reasons which prompted the Chief Justice of India to propose transfers but for its own reasons. Recalling the test of consultation at this stage set out just hereinabove that 'if one party makes a proposal to other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation', the proposal was for a selective transfer definitely not in consonance with any policy Government of India may have in contemplation which was firmly opposed and the counter proposal was for policy transfer and giving effect to the counter proposal without anything more cannot be said to be after consultation. The test of consultation certainly is not satisfied because not only two minds have not been able to confer and produce a mutual effect but each did not have full and identical facts and, therefore, the final decision cannot be said to be the product of consultation and deliberation.

843. A very emotional and passionate appeal was made by Mr. Parasaran to consider these transfers as policy transfers. In the light of the statements hereinabove quoted, the appeal must fall on deaf ears. For, the Government of India had a policy in embryonic stage and the Chief Justice of India was firmly opposed to any such policy because he is firmly committed to the view as laid down in his majority judgment in Mr. Sheth's case that policy transfers on a wholesale basis which have no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution. He re-asserts this in his letter

dated December 7, 1981. Apart from this, it is impossible to uphold this transfer as a policy transfer. It is no doubt true that laying down of a policy is the function of the executive. If that policy relates to judiciary, ordinarily the executive would be well advised to have full and effective consultation with the Chief Justice of India, the highest constitutional functionary in the judiciary. The policy has to be evolved and firmly laid. Views expressed do not constitute policy. Now the question is, was there any policy to which these transfers can be related? The view of the Government as expressed by the Law Minister is that Chief Justice of every High Court shall be from outside his jurisdiction. Maybe, the Government may lay down such a policy and as and when laid down its constitutional validity may have to be examined. But one cannot accord the status of policy to a view expressed by the Law Minister, may be the official spokesman for the Department of Legal Affairs and Justice of the Government of India. We were not told how a policy is framed and firmly laid down. But a view occasionally expressed does not have the trappings of a firmly laid down policy. And it is not in dispute in this case. In the statement extracted hereinabove made on behalf of the Government of India, the policy question was to be examined at a later stage. A reference to the statement of the Law Minister in the Lok Sabha on July 24, 1980, upon a calling attention motion on the resolution of the Bar Council of India disapproving Government proposal to appoint seniormost judge of a High Court as Chief Justice of another High Court in the country, may be made. The Law Minister stated as under:

"The Government has, however, received representations from various quarters urging that as a matter of policy the Chief Justice of a High Court should be appointed from outside the jurisdiction of that High Court. This matter is actively engaging the attention of the Government. Even though Government's thinking has not taken a final shape in the matter, the Government is prima facie of the view that the proposal by and large merits favourable consideration in the interest of sound judicial administration and also the independence of the judiciary."

(Emphasis supplied)

This statement would at once reveal that till July 24, 1980, the matter was under consideration of the Government and that the Government's thinking had till then not taken a final shape in the matter. Then as late as September 3, 1981, the Law Minister informed the Consultative Committee of the Ministry of Law, Justice and Company Affairs that he had sought views of the Chief Justice of India on the policy of having Chief Justices from outside as that by itself would considerably improve the functioning of the High Courts. The Law Minister further apprised the members of the approach of the Chief Justice in the matter of transfers and appointments of outsiders. He proceeded to state that a final decision in the matter of a policy of transfers was still to be taken. (underlining mine). At any rate, this unmistakable, unambiguous statement of the Law Minister on September 3, 1981, much after the commencement of hearing in this case in the Court, would remove any vestige of doubt that a decision on policy transfers was yet to be taken. There was a view expressed but no policy in July 1980, there was no such policy in January 1981 when Shri K. B. N. Singh was transferred, there was no policy as late as September 3, 1981, when the case was being heard and the statement made to this Court on November 12, 1981, that the policy aspect could still be pressed into service later on, leave no room for doubt that the impugned transfer was not a policy transfer. Therefore, the transfer of Shri Singh cannot be upheld as a policy transfer. It is rather in this context surprising that the Chief Justice of India while firmly opposing policy transfers in letter dated December 7, 1980, should tell Shri Singh on January 5, 1981 that it was Government policy to transfer judges. And there is nothing to show that between December 7, 1980, and January 5, 1980, Chief Justice of India has veered round to the view of Law Minister because if he had, he could have proposed transfer of a large number of Chief Justices and not confined himself to two only.

844. It may be mentioned in passing that there was a very lively debate about the power of the executive to lay down policy. It is a well recognised epithet of constitutional wisdom that in constitutional matters the Courts

do not decide what is not brought before it nor would it prefer advice except in a reference under Art. 143, on the wisdom or validity of a future action. If there is no policy till today it would be unwise to pronounce upon a future policy without knowing what form and shape it would take. No carte blanche can be given in this behalf. How dangerous it would be can be illustrated by observing that if the policy were to be laid down by the executive that a judge of the High Court who decides the matter against the Government will be transferred it would be an objective norm because it can be easily ascertained whether a judge has decided a matter against the Government. Such a policy, if at all laid down, would be complete antithesis of the independence of judiciary. Therefore, I refrain from saying anything on the wisdom or validity of what is being proposed as a policy that every Chief Justice must be from outside the State because there is no such policy and as and when it is laid down, if questioned, its validity will have to be examined.

845. One more infirmity urged and likely to invalidate the order of transfer may now be examined. The power to transfer a High Court judge can be exercised only in public interest. In the proposal forwarded to the Government by the letter dated December 7, 1980, and the letter dated December 20, 1980, for transferring Shri K. B. N. Singh first to Rajasthan and then to Madras, it is nowhere stated what public interest is sought to be served by this transfer. This assumes importance because both the constitutional functionaries involved in the process of consultation are operating on different wave lengths, to wit, Chief Justice of India for selective transfers, President to buttress the position to evolve a policy in future. In the affidavit it is stated that consequent upon the transfer of Shri M. M. Ismail from Madras to Kerala it was necessary to appoint a senior, experienced Chief Justice in the Madras High Court. Permanent and senior, experienced Chief Justice from outside to man a High Court seems to be a phenomenon of recent origin. Ordinarily the seniormost puisne judge is appointed as Chief Justice. There were, of course, some cases in which the Chief Justice was brought from outside and the

cases pointed out were of Mr. Justice Das sent to Karnataka, Mr. Justice Sar-
foo Prasad going to Rajasthan, and our esteemed colleague Mr. Justice R. S. Pathak going to Himachal Pradesh. But these cases are few and far between. The normal rule of succession has been the seniormost puisne judge becoming the Chief Justice unless he was otherwise found to be unsuitable. And the Chief Justice of India accepts unreservedly just and rightful expectations of the seniormost puisne judge to be promoted as Chief Justice when he suggests that Mr. Poti, seniormost puisne judge in Kerala High Court will be deprived of his just and rightful expectation to become Chief Justice on the transfer of Sri K. D. Sharma, and therefore, further suggested that Mr. Poti be appointed in a suitable vacancy as Chief Justice but outside Kerala, thereby, of course, denying rightful expectation of the seniormost puisne judge in that High Court. Now, Mr. P. R. Gokulakrishnan is the seniormost puisne judge of the Madras High Court. Nothing is pointed out why he would be considered unsuitable for being promoted as Chief Justice if it becomes necessary to transfer Mr. Ismail. Mr. M. M. Ismail who was seniormost puisne judge was promoted as Chief Justice, Madras, on retirement of Mr. Ramaprasada Rao in the year 1979 who had by that time to his credit experience of 12 years of High Court judgeship. How it became a compelling necessity not to promote Mr. Gokulakrishnan even if Shri M. M. Ismail was to be transferred, left us guessing. Mr. Gokulakrishnan was appointed as permanent judge of Madras High Court on July 7, 1969. Mr. Poti was appointed as Additional Judge of Kerala High Court on March 20, 1969. If a judge of a High Court after twelve years of High Court judgeship is not suitable for being promoted as Chief Justice, he would ordinarily never become suitable for that post. But Mr. Poti is good enough to be appointed Chief Justice but unsuitable for Kerala, for which Mr. Sharma an inductee of 1973 was considered good enough to be permanent Chief Justice. Again, Mr. S. Sarwar Ali inducted as High Court Judge on July 6, 1970, was recommended to be posted as Acting Chief Justice of Patna High Court on the transfer of Mr. Singh. If Madras High Court has a life span over a century, so also Patna High Court has a life

span over a century. But Mr. Ismail, a senior experienced Chief Justice is transferred to Kerala High Court, a High Court which came into existence as late as 1956 and just celebrated its Silver Jubilee, Delhi High Court has a permanent Chief Justice who is an inductee of January 1969. Every attempt to find an objective norm or yardstick related to proclaimed public interest by which these transfers can be measured or judged and for which they were ordered has led me to a blind alley. For over 30 years with some few exceptions the seniormost puisne judge was always promoted as the Chief Justice except in the case of Himachal Pradesh when on setting up the High Court for the first time Mr. M. H. Beg was transferred from Allahabad and promoted as Chief Justice and posted at Simla. And also again when someone had not put in five years of High Court judgeship before his turn to be elevated as Chief Justice arrived. It is quite well-known that next in line of succession to the Chief Justice is always being trained by being normally associated with administration so that when the elevation as Chief Justice becomes due he has already his grip over the administration. In most of the High Courts seniormost puisne judge is always entrusted with a large chunk of administrative work and, therefore, he is probably well acquainted and trained to take over the responsibilities of a Chief Justice. There is no material on record which would show that Mr. Gokulakrishnan would not compare favourably with Mr. Singh for being appointed as Chief Justice of Madras High Court. Mr. P. S. Poti the seniormost puisne judge of Kerala High Court and who is functioning as Acting Chief Justice since the elevation of the then Chief Justice of Kerala High Court to Supreme Court has been a judge of the High Court since 1969. If 12 years of High Court judgeship does not make the incumbent mature for Chief Justice one would be left guessing when he would become one. And yet Mr. M. M. Ismail was transferred to Kerala reverting Mr. Poti as puisne judge. It thus appears that the transfer of Shri Singh on the ground that he is the seniormost experienced Chief Justice which would be in public interest, fails to carry conviction.

846. Dr. Singhvi, learned counsel for Shri Singh also contended that the trans-

fer of Shri Singh is punitive in character. The Chief Justice of India specifically denies this charge. And further it is stated that when Mr. K. B. N. Singh brought up the question of some baseless complaints against him, the Chief Justice of India assured him that he did not go by baseless complaints and he did not believe that his (Mr. Singh's) conduct was blameworthy. And the Chief Justice of India further assured him that he did not hold Mr. Singh was to blame but that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. Thus the answer of the Chief Justice would certainly show that the complaints against Mr. Singh did not provoke the transfer. Shri Singhvi however, tried to persuade us by putting in juxtaposition certain events which would permit an inference that the complaints against Shri Singh formed the foundation for the order of transfer. It was pointed out that when in February 1980 the Chief Justice of India visited Patna he met lawyers and Judges which may permit an inference that the complaints against Shri Singh must have been voiced by those lawyers. This feeling was uppermost in the mind of Shri Singh because he himself broached the subject at a meeting with the Chief Justice of India on January 8, 1981, and even though the Chief Justice of India assured Shri Singh that he did not go by baseless complaints and that he did not believe that his conduct was blameworthy but yet pointed out that certain persons were exploiting their proximity with him which had created needless misunderstanding and dissatisfaction. Drawing sustenance from this statement it was contended that inferentially speaking the situation has come at Patna to such an impasse that Shri Singh was required to be uprooted from that atmosphere and, therefore, the transfer and this being a selective transfer it would attach stigma or slur. While accepting what the Chief Justice of India says that the complaints did not form the foundation for transfer and that the Chief Justice was actuated by the sole desire to subserve the public interest in proposing the transfer of Shri Singh, selective transfers always give rise to canards and the transferred Judge suffers character assassination. From this limited point of view one cannot escape the conclusion that such transfer in the

background stated would cast a slur and, therefore, punitive in character and that would also vitiate the order of transfer.

847. Having examined all the relevant considerations, regrettable as it may appear, the conclusion is inevitable that the order of transfer of Shri K. B. N. Singh is vitiated for want of effective consultation and the selective transfer would cast a slur or stigma. Add to this that the public interest pleaded fails to carry conviction in the facts and circumstances of this case and, therefore, the transfer does not appear to be in public interest. For all these reasons the order of transfer is vitiated and must be declared void.

848. In the course of hearing petitioners requested the Court that the correspondence that passed between the Chief Justice of India, the Chief Justice of Delhi High Court and the Law Minister in regard to the non-appointment of Shri S. N. Kumar as additional Judge be disclosed. The Union of India through the affidavit initially of Shri S. M. H. Burney, Secretary, Ministry of Justice and subsequently by the affidavit of Shri T. N. Chaturvedi, holding the same post, claimed privilege on the ground that doctrine of candour demands that the correspondence bearing on the question of appointment or non-appointment of high constitutional functionaries should not be disclosed. There was a similar request for disclosure of correspondence that passed between the Chief Justice of India and the Law Minister with reference to the transfer of Shri K. B. N. Singh, Chief Justice of Patna High Court to Madras High Court. After hearing both sides at considerable length and first perusing the documents ourselves to ascertain whether disclosure of it would or would not be in public interest, we directed disclosure and deferred giving our reasons for the same. I would, however, briefly say what I feel to be the fairly antiquated notion about the secrecy in administration. Privilege was claimed under S. 123 of the Indian Evidence Act, 1872. S. 123 was enacted in the hey-day of the colonial regime. And more than a century after when the Raj has disappeared and a republican form of Government under a liberal Constitution is ushered in, we are told that the principle enunciated in S. 123 holds good. What is impermissible under S. 123 is

giving evidence derived from unpublished official records relating to affairs of the State. It was said that appointment to high offices is such a sensitive subject that the expression 'affairs of the State' would be wide enough to comprehend the same and, therefore, correspondence, notes notings connected therewith forming part of unpublished official record cannot be disclosed to the Court except at the cost of injury to public interest. Add to this the prohibition enacted in Article 74 that the court cannot inquire whether, if any, and if so what, advice was tendered by the minister to the President. Privilege was claimed and disclosure was opposed on the above mentioned ground. It was very passionately urged that no public interest would be served by washing the linen, dirty if it appears to be, in open and who is going to be benefited by disclosure of such documents. In the State of Punjab v. Sodhi Sukhdev Singh (1961) 2 SCR 371: (AIR 1961 SC 493), Gajendra-gadkar, J. speaking for Sinha, C. J. and Wanchoo, J., referred to *Duncan v. Cammell Laird & Co. Ltd.*, 1942 AC 624, wherein Viscount Simonds L. C. deduced the principle which has to be applied in such cases in the following words:

"Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest must as a class be withheld from production."

The question was whether the objection to production taken was valid one or not. The House of Lords in the aforementioned case held that an objection validly taken to production on the ground that this would be injurious to public interest is conclusive. Having referred to this observation, the majority decision further proceeded to state that the decision in the case before it wherein privilege was claimed against disclosure must ultimately rest on the relevant statutory provisions contained in Indian Evidence Act. The Court then referred to Ss. 123 and 162 of the Indian Evi. Act. Referring to the expression "affairs of the State" in Sec. 123, the majority judgment observed that in the latter half

of the Nineteenth Century affairs of State may have had a comparatively narrow content, but with the State in pursuit of its welfare activities which were formerly treated as purely commercial and documents in relation to such commercial activities undertaken by the State in pursuit of public policies of social welfare are also apt to claim the privilege of being documents relating to the affairs of State. It is in the latter class of documents the Court proceeded to determine the claim for privilege in such borderline cases. The Court ultimately upheld the claim for privilege. Duncan's case appears to be hovering over the entire discussion. Then came Conway v. Rimmer, 1968 AC 910. This decision moved a step further because it was held therein that the Court can inspect the document to find out whether the claim to privilege is well merited. The view in Sodhi's case was to some extent diluted by reference to Conway. Two subsequent cases, one in Science Research Council v. Nasse, 1980 AC 1028 and *Burmah Oil Co. Ltd. v. Governor & Company of the Bank of England* 1980 AC 1090, were also referred to. The discussion as to what is laid down by the House of Lords in aforementioned cases was so elaborate in the Court that at one time I suspected that these decisions will have to be explained away, otherwise they are binding on us. A specific question was put, should we mould our approach dovetailing it to the changes in the view in the United Kingdom because it is an undeniable fact that on the question of privilege and disclosure commencing with Duncan and ending with the last mentioned case, the view in this country has more or less changed shades with the view expressed by the House of Lords. In my opinion, Section 123 must be construed on its own terms. Undoubtedly, a century old provision enacted to some extent keeping in view the needs of Empire builders must change in the context of the Republican Government and the open society which we have set up. Undoubtedly there must be such affairs of the State involving security of the nation and foreign affairs where public interest requires that the disclosure should not be ordered. It is, however, equally well recognised that fair administration of justice is itself a matter of vital public interest. Therefore, if the two public interests conflict, the Court will have to decide whether

the public interest which formed the foundation for claiming privilege would be jeopardised if disclosure is ordered and on the other hand whether fair administration of justice would suffer by non-disclosure and decide which way the balance tilts. Viewed from this angle, it was stated in Conway that the Court should balance public interest involved where a clash of public interest is brought to its notice. In the ultimate analysis the approach of the Court while deciding the question of privilege would be that it has to balance public interest in just justice and just administration of justice and state affairs at high level in respect of appointment to high constitutional offices and then decide which way the balance tilts. Having formulated this test the answer was that a disclosure in the interest of justice far outweighs the possible embarrassment felt by disclosing certain aspects. I do not propose to deal with the matter further. Justice Bhagwati by a very elaborate discussion has given reasons why the disclosure was necessary and I find myself so entirely in agreement with what has been stated by him that I do not think I can usefully add anything to it.

849 The only point that now remains is whether the petitioners Iqbal M. Chagla and three others in the petition filed in the Bombay High Court, Mr. V. M. Tarkunde, petitioner in the petition filed in the Delhi High Court and other advocates who have filed petitions in Patna and Madras High Courts have a locus standi to maintain the petitions. Learned Attorney General did not raise this question but Mr. P. R. Mridul learned counsel who appeared for the Law Minister in the first set of petitions seriously contended that the petitioners have no locus standi. In fact the matter has assumed academic importance because in the 1st batch of petitions Shri S. N. Kumar, the learned Judge of the Delhi High Court who was given short term extension and was ultimately not appointed, has questioned the validity and legality both of the circular issued by the Law Minister and the power claimed by the executive not to appoint an additional Judge after the expiry of his initial term. His locus standi is beyond question. Similarly, in the other batch of petitions Shri K. B. N. Singh, the Chief Justice transferred is transposed as petitioner No. 3 in the

petition filed by Shri D. N. Pandey and another advocate of the Patna High Court and he has challenged the validity and legality of the order of his transfer. His locus standi is beyond question. Therefore, the contention about locus standi is now of academic interest and I do not propose to deal with it. However, I am in full agreement with my learned brother Bhagwati, J. who has discussed this aspect in meticulous details.

850. That is the end of the journey. To sum up:

(1) An additional Judge can only be appointed in the High Court if the President is satisfied that there is a temporary increase in the work of the High Court or there are arrears and for this purpose it is necessary to increase the number of Judges in the High Court for the time being.

(2) An additional Judge appointed initially for a certain tenure has a right to be considered for fresh appointment on the expiry of the tenure and the consultation must proceed along the same lines as prescribed under Article 217.

(3) Consultation under Article 217 must be full, effective and meaningful and in the case of an additional Judge, if there is any defect, drawback or deficiency in the consultation the decision arrived at is open to judicial review.

(4) Power to transfer a High Court Judge conferred by Article 222 on the President can be exercised after full, effective and meaningful consultation with the Chief Justice of India and this necessitates all the facts in possession of one or the other constitutional functionary being fully exchanged and deliberated upon.

(5) Power to transfer a High Court Judge cannot be exercised with a view to punishing a Judge or for anything in his conduct or behaviour which may cast a slur or stigma on him.

(6) The circular of the Law Minister dated March 18, 1981, does not suffer from any infirmity and is not constitutionally invalid.

851. Accordingly, Transferred Case No. 19/81 arising from the writ petition filed by Shri S. P. Gupta in Allahabad High Court, Transferred Case No. 21/81 arising from the petition filed by Shri J. L. Kalra and others in the Delhi High Court, Transferred Case No. 22-81 arising from the petition filed by Shri Iqbal M. Chaglia and

three others in the Bombay High Court and Transferred Case No. 20/81 arising from the writ petition filed by Shri V. M. Tarkunde in the Delhi High Court are dismissed. There will be no order as to costs in all the matters.

852. Transferred Case No. 24/81 in which Shri K. B. N. Singh, Chief Justice of Patna High Court is transposed as petitioner No. 3 is allowed and the order dated January 19, 1981, transferring him as Chief Justice of Madras High Court is quashed and set aside and a mandamus is issued to the Union of India directing it to forbear from giving effect to the said order. There would be no order as to costs.

853. In view of this decision no specific order is required to be made in Writ Petition No. 274/81 filed by Miss Lily Thomas. Transferred Case No. 6/81 arising from a writ petition filed by Shri P. Subramaniam in Madras High Court and Transferred Case No. 2/81 arising from a writ petition filed by Shri A. Rajappa in the Madras High Court and they accordingly stand disposed of. There would be no order as to costs.

854. In view of the order quashing and setting aside the order directing transfer of Shri K. B. N. Singh as Chief Justice of Madras High Court, the Special Leave Petition No. 312/81 filed by Shri Ripudaman Prasad Singh has become infructuous and would stand disposed of accordingly with no order as to costs throughout.

PATHAK, J.— 855. Transferred Case No. 19 of 1981, filed by Shri S. P. Gupta, an Advocate of the High Court at Allahabad, as a writ petition challenges the validity of a Circular letter dated March 18, 1981 issued by Shri P. Shivshankar, Minister for Law, Justice and Company Affairs in the Union Government and addressed to the Governor of Punjab and the Chief Ministers of all the States, except the north-eastern States, requesting them to obtain the consent of additional Judges serving in the High Courts to their appointment as permanent Judges of other High Courts. Such consent was also required from persons who had already been proposed or may in the future be proposed, for initial appointment. He contends also that the President has failed to appoint the necessary number of permanent and additional Judges of the High Court of Allahabad in accordance

with Art. 216 and clause (1) of Art. 224 of the Constitution, and he assails the appointments of some Additional Judges of the High Court for short terms of six months only when, according to him, the additional Judges should have been appointed as permanent Judges. In particular, he has prayed for a declaration that three additional Judges, Mr. Justice Murli Dhar, Mr. Justice A. N. Verma and Mr. Justice N. N. Mithal be deemed to have been appointed as permanent Judges and that the Circular letter of the Law Minister is void.

856. Transferred Case No. 20 of 1981 filed by Shri V. M. Tarkunde, a senior advocate of the Supreme Court as a writ petition in the High Court of Delhi, also assails the Circular letter and the appointments of three additional Judges, Shri O. N. Vohra, Shri S. N. Kumar and Shri S. B. Wad for a further period of three months only. The petitioner prays that the Circular letter be declared void and the posts of additional Judges in the several High Courts be converted into permanent posts. Of the three additional Judges specifically named, Shri S. N. Kumar has entered appearance and has supported the case pleaded by the petitioner.

857. Shri J. L. Kalra and a few other advocates filed Transferred Case No. 21 of 1981 as a writ petition in the High Court of Delhi and, inter alia, they have prayed for mandamus to the Union Government to create an adequate number of posts of permanent and additional Judges and to make appointments to those posts.

858. Four advocates practising in the High Court of Bombay, Shri Iqbal M. Chagla, Shri C. R. Dalvi, Shri M. A. Rana and Shri Sorab K. J. Modi filed Transferred Case No. 22 of 1981 as a writ petition in the High Court of Bombay questioning the validity of the aforesaid Circular letter dated March 18, 1981 and have prayed inter alia for a declaration that the Circular letter is ultra vires and void and that the Union Government should be directed not to act on the consent conveyed by the additional Judges.

859. These four cases constitute a group raising substantially common points for consideration.

860. There is a second group, also consisting of four cases, led by Writ Petition No. 274 of 1981 filed by Miss Lily Thomas, an advocate practising in the Supreme Court of India, under Art. 32 of the Con-

stitution. She challenges the transfer of Shri M. M. Ismail, Chief Justice of the Kerala High Court. Shri M. M. Ismail has filed an affidavit stating that he has decided not to proceed to Kerala, nor to challenge the validity of the order of the President transferring him, but to proceed on leave preparatory to retirement by resignation of his office. Shri M. M. Ismail has resigned since.

861. An advocate, Shri A. Rajappa, practising in the High Court of Madras, filed Transferred Case No. 2 of 1981. He prays for a declaration that the order of the President transferring Shri M. M. Ismail from the High Court of Madras to the High Court of Kerala and Shri K. B. N. Singh, Chief Justice of the High Court of Patna, to the High Court of Madras is void.

862. Transferred Case No. 6 of 1981 was filed in the High Court of Madras by Shri P. Subramaniam, praying for the same reliefs as Shri Rajappa in Transferred Case No. 2 of 1981.

863. Two advocates, Shri D. N. Pandey and Shri Thakur Ramapati Sinha, filed Transferred Case No. 24 of 1981 in the High Court at Patna challenging the order of transfer of Shri M. M. Ismail from the High Court of Madras to the High Court of Kerala and of Shri K. B. N. Singh from the High Court of Patna to the High Court of Madras. During the pendency of this writ petition, Shri K. B. N. Singh, who had been impleaded as a respondent, was transposed as a petitioner.

864. These cases raise constitutional questions of considerable significance to the judicial system in India. They involve grave issues of fundamental importance respecting the High Courts and the Judges constituting them. They deeply affect the Rule of Law and the administration of justice.

The Rule of Law and the administration of justice:

865. India is a sovereign socialist secular democratic republic governed by a written Constitution designed to secure to all its citizens justice, liberty, equality and fraternity in their various facets. A constitutional democracy so portrayed has its institutions and values rooted in the Rule of Law, and that is plainly demonstrated by the provisions of our constitutional structure and the constitutional philosophy inspiring it. The vitality of the Rule of Law flows from those roots to the several branches of the con-

stitutional structure, sustaining and nurturing them and giving them life and their intended significance.

The Rule of Law is the Primary Principle of our Constitution, and in its universality and omnipotence it postulates that no one, neither State nor individual, shall act contrary to the law, and nobody shall be denied right and justice. The principal organs of the State, the Executive, the Legislature and the Judiciary are governed by it and operate through it. In its daily task of adjudicating disputes, the judiciary maintains the Rule of Law and enforces it. It does so by interpreting the law and applying it and, in appropriate cases, decreeing its observance. And in adjudging the constitutional validity of legislation and executive acts, it protects the Rule of Law embodied in the Constitution.

866. In securing and promoting the resolution of disputes in a legal forum in accordance with established legal procedure, the administration of justice ensures a peaceful and orderly progress by a people through constitutional methods towards the realisation of their aspirations. And if it is to rule their minds and hearts, the administration of justice must enjoy their confidence. Public confidence in the administration of justice is imperative to its effectiveness, because ultimately the ready acceptance of a judicial verdict alone gives relevance to the judicial system. While the administration of justice draws its legal sanction from the Constitution, its credibility rests in the faith of the people. Indispensable to that faith is the independence of the judiciary. An independent and impartial judiciary supplies the reason for the judicial institution, it also gives character and content to the constitutional milieu.

867. India's statesmen, political leaders, eminent jurists and representatives of a broad cross-section of our national life were engaged for about three years in forging a Constitution worthy of India's greatness. In the fashioning of the provisions relating to the judiciary, the greatest importance was attached to securing the independence of the Judges, and throughout the Constituent Assembly debates the most vigorous emphasis was laid on that principle. The judiciary in British India had by and large, for a century of British rule, enjoyed the respect and confidence of the people for its high reputation of independence and impartiality. Nonethe-

less the framers of the Constitution took great pains to ensure that an even better and more effective judicial structure was incorporated in the Constitution, one which would meet the highest expectations of judicial independence. In a land and among a people whose ancient values stemmed from truth as a reality, culminating in the adoption of a national emblem confirming that creed, they could have done no less.

868. It is pertinent to observe that the High Courts under our Constitution have been conferred far wider jurisdiction and powers than the High Courts under the Government of India Act, 1935. They enjoy not only the jurisdiction and powers existing before the commencement of the Constitution but by virtue of Article 226 they have been vested with power to issue directions, orders or writs to any person or authority, including any Government within their territorial jurisdiction, and that power is not limited, as it is in the case of the Supreme Court of India, to the enforcement of the rights conferred by Part III but extends to any other purpose. Moreover, by Article 227 of the Constitution the High Courts have been granted the superintendence not merely over all courts subject to their appellate jurisdiction but indeed over all courts and tribunals throughout their territorial jurisdiction. Further, unlike the Government of India Act the Constitution has not prohibited the High Courts from enjoying original jurisdiction in matters concerning the revenue or concerning any act ordered or done in the collection thereof. The framers of the Constitution evidently intended that the widest amplitude of remedial action should be available to every person throughout the territorial jurisdiction of the High Courts. So great was the anxiety to ensure that the Rule of Law reigned supreme in each State throughout India.

869. It is in this context that the questions raised before us may be considered.

The constitutional scheme concerning the High Courts:

870. The judiciary in India consists broadly of the Union judiciary, the High Courts in the States and the Subordinate Courts in those States. Chapter V of the Constitution deals with the High Courts and its present provisions may be briefly surveyed. Article 214 requires that there shall be a High Court for each State, and Art. 216 deals with the constitution

of every High Court. Article 217 lays down the procedure for appointment of a Judge of the High Court, the circumstances in which the office of Judge is vacated, the qualifications for appointment, and how the age of a Judge shall be determined. Art. 218 provides for the removal of a Judge from his office. Art. 219 requires a Judge to make or subscribe an oath or affirmation before he enters upon his office. Art. 220 places a restriction on practice after a person has been appointed permanent Judge. Art. 221 provides for payment to the Judge of his salary and entitles him to certain allowances and rights, and the proviso declares that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment. Art. 222 empowers the President to transfer a Judge from one High Court to another in consultation with the Chief Justice of India. Arts. 223, 224 and 224A enable the appointment of an acting Chief Justice, additional Judges, acting Judges and provide for former Judges to sit and act as Judges. Art. 225 defines the jurisdiction of existing High Courts and Art. 226 extends the jurisdiction to the issue of directions, orders and writs. Art. 227 vests in the High Court the power of superintendence over all courts and tribunals within its territorial jurisdiction. Art. 228 empowers the High Court to transfer to itself cases pending in a subordinate court involving a substantial question of law as to the interpretation of the Constitution. Art. 229 provides for the appointment of officers and servants of the High Court, and Article 230 for the extension of jurisdiction of the High Court to Union territories. Finally, there is provision by Art. 231 for establishing a common High Court for two or more States or for two or more States and a Union Territory.

871. An important point to note is that Chapter V relating to the High Courts embodies a single organic scheme. The provisions of that scheme are inter-related and often inter-dependent, and in order to appreciate the true purpose, scope and content of any provision it is necessary to examine it in the context of the entire constitutional scheme. This is so, whether the question relates to the appointment of an additional Judge, or to the transfer of a Judge from one High Court to another.

The constitution of the High Courts and the appointment of the Judges:

872. In a modern democracy the supreme power of the State is shared between the three principal organs, the Executive, the Legislature and the Judiciary. Each holds a distinct position in the overall constitutional scheme, and has broadly separate functions and responsibilities from those vested in the other organs. A Constitution deems the simultaneous co-existence and effective functioning of all three organs imperative to the proper working of the constitutional system. It envisages that all three organs should function continuously according to their true nature and responsibilities, so that in the totality the constitutional system is held in constant balance. The constitutional document itself has made full and detailed provisions for the constitution of each of these primary organs of the State, so that at all times the constitutional system as a whole is in full operation.

873. Article 216 provides that every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. Plainly, while the President is vested with the power to appoint Judges, he is also under a constitutional obligation to ensure that the High Court is fully constituted. It is fully constituted when it consists of Judges sufficient in number to regularly cope with and dispose of the work falling within its jurisdiction. From the terms of Art. 216 it is also plain that the constitutional obligation imposed on the President extends to ensuring from time to time that the High Court consists of a sufficient number of Judges. The expression "from time to time" is significant. The responsibility imposed by Art. 216 requires the making of a periodic review of the annual institution of cases and the pending strength of arrears resulting in a reasonable assessment of the number of Judges needed in each High Court. It may be observed that serious injury is possible to a constitutional democracy where this is not done, and the judiciary remains insufficiently manned and pending cases continue to accumulate for long periods. A continuing imbalance in the proper operation of the constitutional system ranging over a long period of time by reason of one of its primary organs remaining ill-equipped to discharge its essential responsibilities cannot but be viewed with grave concern.

874. Article 216 speaks of Judges generally. A study of the constitutional scheme embodied in Chapter V indicates that as a general rule the appointment of permanent Judges is contemplated. They are Judges who are entitled to continue in office until they attain the age of 62 years, and whose tenure is fixed by the Constitution itself. They are appointed with reference to the normal workload of the court. A fixed tenure unaffected by the discretion of the executive safeguards the principle of judicial independence. In special circumstances, however, and in special circumstances only, the appointment of additional Judges or acting Judges is contemplated under Article 224. An additional Judge is appointed under clause (1) of Art. 224 where it appears to the President that by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein the number of the Judges of that court should be for the time being increased. The number of Judges is increased only for the time being, and the appointment of an additional Judge is, therefore, envisaged for a limited period which, by clause (1) of Art. 224 must not exceed two years. An acting Judge is appointed under clause (2) of Art. 224 by the President when any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, a person so appointed can act as a Judge only until the permanent Judge has resumed his duties. Both additional Judges and acting Judges must be appointed from among duly qualified persons, that is to say, the qualifications prescribed in Article 217, and they cannot be appointed to hold office after attaining the age of 62 years. It will be seen therefore that Art. 216 contemplates Judges who are permanent Judges, additional Judges or acting Judges, permanent Judges as a rule and additional Judges or acting Judges in exceptional or special circumstances. A separate and distinct category is that of former Judges of a High Court who under Article 224-A may be requested by the Chief Justice of a High Court, with the previous consent of the President, to sit and act as a Judge of the High Court. Such a person does not fall within Art. 216, for he is not a Judge of the High Court when so sitting and acting. The President does not appoint him, but only gives his consent to the Chief Justice to request the former

Judge to sit and act as a Judge of the High Court. The process of appointment embodied in clause (1) of Art. 217 does not apply to him. It is for that reason that express provision has been made in Art. 224-A itself that while sitting and acting as a Judge of the High Court the former Judge will be entitled to such allowances as the President may, by order, determine and he shall have all the jurisdiction, powers and privileges, but will not otherwise be deemed to be a Judge of that High Court.

875. It may be pointed out that the Constituent Assembly was not in favour of appointing additional or acting Judges, and although in the Draft Constitution prepared by the Drafting Committee provision was made by Art. 198 for the appointment of temporary Judges and by Art. 199 for the appointment of additional Judges, there was strong opposition to their inclusion and those provisions were omitted when the Constitution was finally enacted.

The Draft Constitution provided by Art. 200 that the Chief Justice of a High Court could request a former Judge of that court to sit and act as a Judge of the Court. The provision was retained in the enacted Constitution as Article 224, with this difference that before making such request the Chief Justice had to obtain the previous consent of the President and further his choice extended not only to a former Judge of that High Court but also to that of any other High Court. Apparently, it was felt that by enacting Art. 224 there was no need to provide for the appointment of temporary or additional Judges. It was subsequently found that the arrangement was not adequate, and for that reason the Constitution (Seventh Amendment) Act, 1956 brought in the present Article 224 providing for additional Judges and acting Judges and simultaneously deleted the original provisions respecting former Judges. However, the need for former Judges continued to be felt, and the provision was reintroduced by the Constitution (Fifteenth Amendment) Act, 1963 and was numbered as Article 224-A.

876. The procedure for appointing a Judge of a High Court is set forth in clause (1) of Art. 217. A Judge of a High Court is appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other

than the Chief Justice, the Chief Justice of the High Court. The appointment of a Judge is an executive act. The power to appoint is vested in the President, who by virtue of clause (1) of Art. 74 is required to act in accordance with the advice of the Council of Ministers. The President may require the Council of Ministers to reconsider such advice, either generally or otherwise, but he must act in accordance with the advice tendered after such reconsideration. The nature of the power exercised by the President under clause (1) of Art. 217 being executive in character, it cannot be identified with the power exercised under clause (3) of Art. 217 in regard to the determination of the age of a Judge of a High Court. The power exercised under clause (3) of Article 217 has been held by this Court in *Union of India v. Jyoti Prakash Mitter*, (1971) 3 SCR 483: (AIR 1971 SC 1093) to involve a judicial function and which therefore does not fall within the scope of clause (1) of Art. 74.

877. While there can be no doubt that the appointment of a Judge of a High Court lies in the executive power of the President, it is not an absolute and unfettered power. It is conditioned by the obligation imposed on the President to consult the Chief Justice of India, the Governor of the State, and in the case of an appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. The consultation is a constitutional imperative and the process of consultation must precede the appointment. Three constitutional functionaries are required to be consulted, the Chief Justice of India and the Chief Justice of the High Court, who are judicial functionaries, and the Governor of the State who is the executive head of the State in respect of which the High Court has jurisdiction. In this, clause (1) of Art. 217 makes a marked departure from S. 220, Government of India Act, 1935. Under S. 220, a permanent Judge of a High Court was appointed in the absolute discretion of the Crown, and the additional Judges appointed in the absolute discretion of the Governor General. In practice, of course, the Chief Justice of the High Court was usually consulted, as well as sometimes a few eminent leaders of the Bar who would not be interested in the appointment. But when the Constitution was being drafted there was general agreement that the appointment of a

Judge of a High Court should not be left to the unfettered discretion of the Executive Government. The Constitution itself now imposed the obligation to consult. Judicial independence under the Government of India Act, 1935 had been assured by prescribing a fixed tenure under sub-sec. (2) of S. 220, and a Judge could not be removed from his office except on the ground of misbehaviour or of infirmity of mind or body and on a report by the Judicial Committee of the Privy Council that the Judge ought to be removed. There was the further stipulation by the proviso to S. 221 that neither the salary of a Judge nor his rights in respect of leave of absence or pension could be varied to his disadvantage after his appointment. Now, the independence of the judiciary can be fully safeguarded not by merely conferring security on the Judges during their term of office but by ensuring in addition that persons who are independent, upright and of the highest character are appointed as Judges. Moreover, there is always the fear that appointments left to the absolute discretion of the appointing executive could be influenced by party considerations. The framers of the Constitution apparently had this in mind when they decided to incorporate the prescription of consultation in the terms set forth in clause (1) of Art. 217. As Sardar Vallabhbhai Patel explained in the Constituent Assembly on June 21, 1947 when presenting the Report on the Principles of a Model Provincial Constitution:

"With so many checks and counter-checks these appointments place the High Court Judges beyond any influence of the parties or any other influences and beyond any suspicion or doubt of such a nature. There is thus enough guarantee provided for the independence of the Judiciary." (Constituent Assembly Debates Vol. IV p. 694).

878. As has been observed, clause (1) of Art. 217 prescribes that besides the Governor of the State, the Chief Justice of India and the Chief Justice of the High Court must be consulted in the appointment of a Judge of a High Court. Three distinct constitutional functionaries are involved in the consultative process, and each plays a distinct role, and the nature and scope of the role are indicated by the character and status of their respective offices. The Chief Justice of the High Court is the head of the institution to which the Judge will be ap-

pointed. He is, therefore, particularly qualified to know the needs of the court in the context of its present constitution and the work which is pending. Generally, an appointment is made either from the High Court Bar or from the District Judiciary. In both cases, the Chief Justice can be expected to possess an intimate knowledge of the legal ability of the person under consideration and to have a sufficiently accurate estimate of his character, antecedents and reputation, including his integrity, in the context of the legal profession or the judicial service, as the case may be, as well as his potential capacity as a Judge. It is also conveniently possible for him to obtain a fair measure of information in respect of a member of a District Bar, should such a member be under consideration. In regard to persons practising in other courts or members of judicial tribunals it is not difficult for him to secure adequate information. It is apparently for this reason that the practice which has prevailed for several years in this country postulates that it is the Chief Justice of the High Court who should initiate the process of appointment by suggesting a person for the office of a Judge. But by virtue of his position in the High Court and the State, the Chief Justice is also exposed to local influences, and to prejudice or bias in relation to lawyers appearing before him or judicial officers who meet him. His assessment can be subjectively effected. The Chief Justice of India has been brought in, and it is apparent that, in virtue of the exalted office held by him and the circumstances that he is far removed from the local pull of influences and the temptations of partisanship, he can be trusted to apply a strictly objective approach to the recommendation proceeding from the High Court. Besides, the Chief Justice of India possesses the advantage of viewing the matter from the superior plane of a national perspective. He is seized with knowledge of prevailing standards and trends in the different High Courts, and as the head of the highest court in India exercising appellate jurisdiction over the High Courts by way of the widest power under Article 136 he would be cognisant of the need to ensure that the highest quality was maintained in the appointment of Judges of the High Courts. Indeed, he is expected by the Constitution to keep himself adequately informed of the affairs of each High Court. For it is not merely for the purpose of appointing

a Judge to the High Court under cl. (1) of Art. 217 that he is to be consulted. The President is also obliged to consult him before he can transfer a Judge under clause (1) of Art. 222 from one High Court to another High Court, a matter in which the Constitution does not expressly stipulate consultation even with the Chief Justices of the two High Courts concerned, the High Court from which the Judge is to be transferred and the High Court to which his transfer is contemplated. It must also be remembered that in the determination of the age of a Judge of a High Court under clause (3) of Art. 217 it is the Chief Justice of India alone whom the President is required to consult.

879. The part played by the Governor of the State must, it seems, be limited. The State Government possesses the advantage of being able to secure information which may not be within the knowledge of the Chief Justice in regard to the character and integrity of the person recommended and his local position and affiliations. Besides, as the High Court is the highest court of the State and the funds for it flow from the State Exchequer, it is only logical that the State Government should be allowed a voice in assessing the suitability of the person recommended for appointment (Law Commission of India, Fourteenth Report Vol. 1, p. 74). The State Government, however, can have no role in commenting on his legal ability, knowledge of law and judicial potential.

880. The President is obliged to consider the advice tendered by the three constitutional functionaries under cl. (1) of Art. 217, and in the evaluation of the advice from each he must bear in mind that the appointment under consideration is the appointment of a Judge of a High Court, that is to say, a judicial appointment. Once that is kept in the forefront and it is apparent that the person recommended is of desirable personal character and reputation, the greatest value should be attached to the advice tendered by the Chief Justice of the High Court and the Chief Justice of India. The advice tendered by the two judicial functionaries possesses a quality peculiarly pertinent to the appointment of an able and efficient Judge. It is, in a sense, "expert" advice, and where the Chief Justice of the High Court and the Chief Justice of India agree on the recommendation it is within reason to hold that the President will ordi-

narly accept the recommendation, unless there is strong and cogent reason for not doing so, which must be a reason directly relevant to the purpose of the appointment. It may be reiterated that the departure made by clause (1) of Art. 217 of our Constitution from S. 220 of the Government of India Act, 1935 clearly establishes that the advice tendered by the judicial functionaries was considered to be a safeguard against arbitrary appointments and therefore entitled to the greatest weight. It may be pointed out that appointments in England to the Court of Appeal, to the Judicial Committee of the House of Lords and to the offices of Lord Chief Justice, and President of the Family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor, and the likelihood that the Prime Minister may depart from the recommendations of the Lord Chancellor can be contemplated "only in the most exceptional case," (J. A. G. Griffith; *The Politics of the Judiciary*, pp. 17, 18).

881. At the same time I am unable to accept the contention that as the Constitution stands today the President is obliged in all cases to agree with a recommendation in which the Chief Justice of the High Court and the Chief Justice of India have concurred. During the Constituent Assembly Debates a proposal was made by a member that the appointment of Judges should require the concurrence of the Chief Justice of India (although that suggestion was made in connection with the appointment of Judges of the Supreme Court), but that proposal was not accepted. The Law Commission of India (Ibid p. 75) surveyed the machinery for appointing a Judge of a High Court and considered it desirable that the provision in clause (1) of Art. 217 should be altered to provide for "not merely consultation with the Chief Justice of India but his concurrence in the proposed appointment". That recommendation has not borne fruit and we are concerned with the position which prevailed then and continues today.

Does the advice given by the Chief Justice of India have primacy over that rendered by the Chief Justice of the High Court?

882. A point has been raised whether on a difference of opinion between them the advice of the Chief Justice of India can be said to enjoy primacy over that

tendered by the Chief Justice of the High Court. Nothing is laid down on the matter in express terms in clause (1) of Article 217. If by "primacy" is meant that the opinion of the Chief Justice of India supersedes that of the Chief Justice of the High Court and can alone be considered, it is clearly against the provisions of clause (1) of Art. 217, for the clause intends that the President should consult both judicial functionaries, besides the Governor. The advice of each, the Chief Justice of India and the Chief Justice of the High Court, has to be considered by the President. The Chief Justice of India does not sit in appellate judgment over the advice of the Chief Justice of the High Court, and the fact that the former has given his advice cannot imply that the advice of the latter must be ignored. But it must be remembered that the advice by the Chief Justice of India takes into account not only the primary material before him but also the assessment made by the Chief Justice of the High Court, and therefore when he renders advice the assessment by the Chief Justice of the High Court has also been considered by him. In other words, in forming his opinion and giving his advice, the Chief Justice of India will take all the facts and circumstances into consideration, including the material circumstance that the advice of the Chief Justice of the High Court is the advice of an authority possessing the advantage of direct and intimate knowledge of the requirements of the Court and generally also of the person recommended, and thereafter he will advise whether he endorses the recommendation. In that sense, it can be said that the recommendation of the Chief Justice of the High Court is screened through the assessment made by the Chief Justice of India. The screening is a logical result of the Chief Justice of India being brought in to express his opinion in the recommendation. In passing, it may be observed that if any material comes into the possession of the Chief Justice of India which was not before the Chief Justice of the High Court it should be communicated to the Chief Justice of the High Court for his comments. When the advice of the Chief Justice of the High Court and of the Chief Justice of India is placed before the President, the President will consider both and assess them in the light of the positions held, and the advantages possessed, by the respective functionaries in relation to the recom-

commendation, and also bear in mind that while the Chief Justice of the High Court has the advantage of proximity in relation to the High Court and generally in assessing the ability and efficiency of the person recommended, the Chief Justice of India enjoys the advantageous position of being able to apply a more objective judgment and also of taking into account a national perspective and present standards and trends in other High Courts. In the ultimate analysis, it would be unrealistic to suppose that the advice rendered by the Chief Justice of India enjoys mere parity with that of the Chief Justice of the High Court. If the Chief Justice of India was intended to enjoy equal status merely with the Chief Justice of the High Court in this regard, it is difficult to appreciate why the Chief Justice of India was brought in at all especially when the advice expected of a judicial functionary for appointing a Judge of a High Court could be obtained from the Chief Justice of the High Court alone. The constitutional scheme appears to indicate that in matters concerning the High Courts there is a close consultative relationship between the President and the Chief Justice of India. In matters so serious as transfer of Judges and the determination of the age of judges, the Constitution has appointed the Chief Justice of India as the sole functionary to be consulted by the President. In that capacity, the Chief Justice of India functions under the Constitution as a constitutional check on the exercise of arbitrary power and protects the independence of the judiciary.

The position relating to Additional Judges specifically:

883. It has been observed earlier that a High Court is intended under Article 216 to consist of permanent Judges as a rule. That would accord with the principle of judicial independence because thereby security of tenure is provided. The permanent Judges must be in sufficient number to cope with the usual work of the High Court. There may, however, be exceptional circumstance, prevailing over a brief period, which may call for a temporary accretion to the number of Judges. Provision is found in Art. 224 for meeting the exigency. The President has power to appoint additional Judges and acting Judges depending on the nature of the exigency. Cl. (1) of Article 224 deals with the appointment of additional Judges, and it is this provision

with which we are immediately concerned. An additional Judge may be appointed where by reason of the temporary increase in the business of a High Court or by reason of arrears of work therein it appears to the President that the number of Judges should for the time being be increased. The two conditions control the exercise of the power, and if neither is satisfied there can be no case for appointing an additional Judge. The increase in the business of the High Court must be temporary and should be capable of being disposed of within a short period. Likewise, the arrears of work should be such that they cannot be expected to endure long. Inasmuch as the period of appointment of additional Judges is prescribed as a maximum of two years, it is only where the disposal of the temporary increase in the business of the High Court or the pending arrears of work is expected to take about two years at the most that a case for appointing additional Judges arises. If the increase in the business of the High Court or the volume of arrears of work is of a magnitude which cannot ordinarily be disposed of within two years, it is a case where the business or work must be regarded as an accretion to the regular business or work of the High Court, calling for an increase in the strength of permanent Judges. A person appointed an additional Judge under clause (1) must be a "duly qualified" person. He must be duly qualified for appointment as a Judge, the qualifications being those prescribed in Art. 217. The appointment of an additional Judge, like the appointment of a permanent Judge, must be made in the manner prescribed in clause (1) of Article 217. The appointment of the additional Judge like the appointment of the permanent Judge, must be made in the manner prescribed in clause (1) of Art. 217. The process of consultation contemplated by that clause comes into play, and it is only after his suitability has been determined in accordance with that clause that the additional Judge is appointed. An additional Judge discharges functions of the same character as a permanent Judge. There is no difference whatever between the two in status and the other incidents of office, except that an additional Judge can hold office only for the period specified in the warrant of his appointment. There is nothing in clause (1) of Art. 224 to suggest that the temporary increase in the business of the High Court or the pending arrears of work can alone be

entrusted to additional Judges. All that the clause provides is that either or both conditions can constitute a reason for temporarily increasing the number of Judges of the High Court. Which work should be assigned to permanent Judges and which to additional Judges is a matter normally falling within the discretion of the Chief Justice of the High Court. It was observed by this Court in *Krishan Gopal v. Prakash Chandra*, (1974) 2 SCR 206: (AIR 1974 SC 209) that "election petitions should ordinarily, if possible, be entrusted for trial to a permanent Judge of the High Court". But that was a mere expression of policy for the court affirmed that they "are legally competent to hear these matters". It may be that despite the appointment of a reasonable number of additional Judges, the temporary increase in the business of the High Court or the pending arrears of work may not be disposed of within a period of two years and may continue for a few more months. There is reason to expect that the person found fit for appointment as additional Judge and who has already gained proficiency and experience will be appointed as a Judge for a further period in order that the work may be disposed of and not allowed to remain pending.

884. In passing, it may be observed that the period prescribed by clause (1) of Art. 224 for the appointment of an additional Judge is put at a maximum of two years, but that does not mean that in every case the appointment must be for two years. The appointment of an additional Judge may be for a period less than two years, and the period will be determined with reference to the time estimated for disposing of the temporary increase in the business or the pending arrears of work which occasioned the appointment. The period of appointment cannot be fixed on the basis of any other factor. Where, as observed earlier, the work or business is not completed within two years and calls for a further appointment of additional Judges, the duration of the further appointment will be conditioned again by the time assessed for disposing of the remaining business or work. But it is to be distinctly borne in mind that additional Judges can be appointed only where the temporary increase in the business of the High Court or the arrears of work can be expected to be disposed of within a period of two years and not very much more. If additional Judges are appointed for successive

periods of two years or more it is clearly a case where the increase in the business of the High Court or the volume of the arrears of work does not call for the appointment of additional Judges but for a review of the number of permanent Judges. Appointments of additional Judges for successive periods of two years or more constitute a violation of the safeguard afforded by the appointment of permanent Judges for the protection of the principle of judicial independence.

885. It appears that for several years now a practice has grown, to which both the Executive and the Judiciary have unwittingly subscribed, of maintaining a regular strength of additional Judges and generally appointing a person as an additional Judge of the High Court instead of appointing him directly as a permanent Judge of the High Court. The additional Judge so appointed continues as an additional Judge, until a vacancy in the office of permanent Judge arises, whereupon such person is appointed as a permanent Judge. If no vacancy arises before the expiry of the term of the additional Judge he is appointed an additional Judge for a further term. A regular strength of additional Judges is maintained in almost every High Court which is burdened by a continuing backlog of pending cases. These arrears have assumed enormous proportions and cannot possibly be disposed of for quite some years, let alone a period of two years. A distortion of the constitutional scheme has resulted, and the aberration has persisted by reason of the failure to realise that additional Judges can be appointed only where the temporary increase in the business or the arrears of work can be disposed of ordinarily within two years, and that otherwise it is a case for increasing the number of permanent Judges. The omission has led to a serious state of affairs, which has affected the careers and future of a large number of persons appointed as additional Judges in the High Courts. Having decided to maintain a regular strength of additional Judges on a permanent basis, the practice also grew of invariably appointing these additional Judges as permanent Judges as and when vacancies arose. That was principally prompted by the disinclination to permit additional Judges on the expiry of their terms as such, to revert to the Bar. It must be remembered that

Article 199 providing for additional Judges was submitted for consideration there was strong opposition to the inclusion of that provision. Several legal luminaries, including Sir Tej Bahadur Sapru objected to it on the ground that such reversion to legal practice gave them an unfair advantage over their colleagues and was embarrassing to the administration of Justice. Therefore, the Constitution as originally enacted did not contain any provision for the appointment of additional Judges. Subsequently, however, because of persisting arrears of cases in most High Courts, the need was felt for making such provision and it was inserted as clause (1) of Art. 224 by the Constitution (Seventh Amendment) Act, 1956. It was thought that the evil of additional Judges reverting to the Bar could be prevented by absorbing them as permanent Judges, and in some High Courts this was sought to be secured by obtaining from persons appointed as additional Judges an undertaking at the time of such appointment that they would not refuse appointment as permanent Judge if it was offered to them. In a few High Courts a further undertaking was secured to the effect that; in the event of the additional Judge refusing appointment as permanent Judge or resigning before the offer was made he would not practice in that High Court or in any Court or tribunal subordinate to it. It was intended that this practice should be extended to all High Courts, for a suggestion was made on June 29, 1967 by the then Chief Justice of India, Shri K. N. Wanchoo, when a member of the Bar is appointed Additional Judge, it must be with a view to making him permanent in due course. If that is not possible, additional Judgeship should not be offered to a member of the Bar, I agree, therefore, that an undertaking should be taken from the members of the Bar that they will accept a permanent judgeship when offered to them in due course....." The practice of additional Judges being appointed permanent Judges, the seniormost additional Judge being invariably appointed first, has been followed in India almost without exception. Where no present vacancy of permanent Judge was available, the additional Judge was, on the expiry of his term, always appointed for a further term as additional Judge. We are informed that of 400 such appointments of additional Judges as permanent Judges the practice has been breached in the obser-

This practice has been uniformly and consistently followed and has crystallised into a positive rule of conduct. It is a rule of conduct followed by the Government regularly and without interruption, almost entirely without exception, and has operated consistently for twenty five years on the basis of precisely defined norms in respect of a general class. And it flows from the power of the State. It prescribes a channel of appointing Judges and is not inconsistent with cl. (1) of Art. 217. So long as it is not varied or superseded, it will operate as a binding rule of conduct on the President. On that edifice rests the definite expectation of a large number of additional Judges. It may be added that during this period direct appointments from the Bar as permanent Judges have numbered 100 only. In the circumstances, the question which arises is: Are the additional Judges entitled to claim appointment as permanent Judges?

886. It is contended that as the volume of arrears of cases pending in the High Courts is so great that they cannot be disposed of within a period of two years, the position is that when the additional Judges were appointed the appointment should have been instead to the office of permanent Judges. Alternatively, it is urged that a direction should be issued to the President to appoint the additional Judges as permanent Judges. Now the warrant of appointment issued by the President recites that the appointment is of an additional Judge for the limited period specified therein. The intention was to appoint an additional Judge and for the period specified. It is not open to the Court to alter the terms of the warrant. Although it may be generally possible to say that the circumstances require an increase in the number of permanent Judges and not the appointment of additional Judges, it is for the President under Article 216 to determine what should be the number of permanent Judges. The Court cannot by judicial verdict decide how many permanent Judges are required for the High Court. And if it is not competent to do so, it can neither regard the appointment of additional judges as an appointment of permanent judges nor can it issue a direction to the Government that the additional judges should be appointed now as permanent judges.

887. But while an additional judge may not have a right to be deemed to be a permanent judge or be entitled to a

direction that he be so appointed, nonetheless he has, in my view, a right to be considered for such appointment. His case must be distinguished from the case of a person considered for direct appointment as a permanent Judge. The latter has no right to be considered for appointment. The additional judge, however, has accepted office within the framework of a definite and consistent practice practically always followed and leading him to believe that he would be considered for appointment in accordance with that practice. The requirement of an undertaking that he would not refuse an offer of appointment as permanent judge may, it is true, be a feature presently in some High Courts only, but it clearly demonstrates how the appointment of additional judges has been regarded by the President. It cannot be said that because the undertaking was required in some High Courts only, these High Courts are to be considered to be distinct from the others where no such undertaking has been required. The undertaking merely confirms the practice on the basis of which the appointments of additional judges have been made in all the High Courts and which has been followed all along. The additional judges are persons who were found to possess the same high order of character, integrity and legal ability as is required in the case of permanent Judge. The standards for making appointment as additional Judge or as permanent Judge are not different. All the additional Judges accepted judicial office on the assumption that the practice clothed with all the status of constitutional reality would operate in their cases and that they would in their turn be considered for appointment as permanent Judges. All of them certainly believed that inspired by that trust, they abandoned their positions at the Bar and law practices assiduously built up over many years. As observed already, there is nothing in the power of appointment vested in the President under clause (1) of Article 217 to prohibit the appointment of permanent Judges from persons holding office as additional Judges, and in the order of seniority based on the date of such appointment. It has been stated by the learned Attorney General that the Government places great value on the experience already acquired by the additional Judges and would be reluctant to allow them to revert to the Bar if on consideration they were found suitable

for appointment as permanent Judges. In my view, having regard to all the circumstances the additional Judges must be held entitled to consideration for appointment as permanent Judges, or to consideration for further appointment as additional Judges in the terms already set forth. That will be so in the case of all additional Judges appointed to that office in the framework of the circumstances to which I have adverted.

888. The next question to be considered is whether the consideration of persons serving as additional Judges for appointment to the office of permanent Judges envisages a fresh application of the process envisaged under clause (1) of Art. 217 in respect of all the matters to which consideration has already been given at the time of their appointment as additional Judges. On behalf of the petitioners it is contended that the process of consultation must be confined to the question whether a vacancy in the office of permanent Judge has arisen, or, if no such vacancy has arisen, whether the High Court continues to suffer from a temporary increase in its business or by continuing arrears of work inasmuch as suitability for holding the office of Judges was already been determined when they were appointed additional Judges. It is pointed out, and that is conceded by the learned Attorney General, that the additional Judges cannot be considered to be Judges on probation for the purpose of appointment as permanent Judges. Alternatively, it is urged that whatever else may be open to consideration it is not competent for the appointing authority to consider the manner and quality of their work as additional Judges. To my mind, there is no doubt whatever that the provisions of clause (1) of Article 217 come into play when an additional Judge is to be considered for appointment as permanent Judge or even for further appointment as additional Judge. The process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge, but it may be clearly stated that no account can be taken of the merits of judgments, decrees and orders rendered by him or administrative orders or directions made in the bona fide exercise of his functions as an additional Judge. In the consideration of matters under

cl. (1) of Art. 217 there will be a somewhat varied approach. The difference, and inevitably there will be a difference because the process has already been applied earlier in the case of that person, will lie in the reduced emphasis with which the consideration will be exercised. Ordinarily, the presumption will be that a person found suitable for appointment as an additional Judge continues to be suitable for appointment as a permanent Judge. But circumstances may arise and events may take place meanwhile which bear adversely on the mental and physical capacity, character and integrity or other matters rendering it unwise to appoint him as a permanent Judge. There must, however, be relevant and pertinent material before it can be said that such a person has forfeited the badge of suitability for appointment as a permanent Judge. There must be material which sufficiently convinces the reasonable mind that the person is no longer suitable to fill the high office of a Judge. It is difficult to define precisely the nature and quality of such material. If the reputation of the person is in doubt, the doubt must be rooted in reasonable foundation. It must not be forgotten that it is a case of a person who has a right to be considered for appointment. It is a right to be considered fairly. The exercise of arbitrary judgment is clearly ruled out. While I find it difficult to accept the plea that such a person is entitled as of right to be heard in regard to material discovered against him, I have no doubt that for the purpose of discharging responsibilities involved in the process of consultation the Chief Justice of the High Court and the Chief Justice of India will find it desirable in their discretion to ascertain from him whether there is any substance in what has been conveyed to them. In doing so, the two judicial functionaries will not be conceding a right of hearing to such a person. For a right to be heard involves an enquiry of certain dimensions well known to the law. In doing so, the two judicial functionaries will be acting within the scope of their legitimate duty of giving advice to the President if for that purpose they acquaint themselves fully and truly, so far as they reasonably conceive it necessary, to collect all available relevant information. Surely if it is open to them to gather information from other sources there is no valid reason why they should exclude the one person who would be in personal possession of material concern-

ing information operating to his detriment. But much will depend on the circumstances of each case. What needs to be considered is that the constitutional duty to tender advice necessarily involves the obligation of ensuring that the advice, in the judgment of the functionary tendering it, is accurate and proceeds on the basis of reliable material. Whatever verification is possible, there is no doubt that recourse should be had to it. There can be no half measures, and in the discharge of that constitutional duty the response must be equal to the responsibility.

889. There is the contention that if the consultative process under clause (1) of Art. 217 applied again in all its comprehensiveness in the case of a person who has already been found suitable for appointment as additional Judge, it must be regarded that while serving as additional Judge he was in fact put on probation. The submission appears to be misconceived. A person is on probation when he is appointed to an office on the understanding that he will be confirmed in that same office if found suitable. No such question arises here. Then, the service of a person on probation can be terminated at will even before the expiry of the period of probation. An additional Judge, however, is entitled to serve for the full period specified in his appointment, and can be removed only under Article 218 read with cl. (4) and cl. (5) of Article 124.

The case of Shri S. N. Kumar :

890. I shall now consider the validity of the decision of the Union Government not to appoint Shri S. N. Kumar as an additional Judge for a further term. It is the admitted position that the volume of work in arrears in the High Court of Delhi continues to be sufficiently large and would have otherwise justified his appointment. It has been observed already that when, on the expiry of his term, an Additional Judge is considered for a further term in that office his case attracts the provisions of clause (1) of Article 217, and the President must consult the functionaries mentioned in that clause. In the case of the High Court of Delhi, consultation is called for with the Chief Justice of India and the Chief Justice of the High Court only. The consultative process, it may be reiterated, requires that all the material in the possession of the Chief Justice of the High

Court must be placed before the Chief Justice of India as well as the President. Likewise, all the material in the possession of the Chief Justice of India must be placed before the President and the Chief Justice of the High Court. So also, all the material in the possession of the President must be placed before the Chief Justice of India and the Chief Justice of the High Court. A continuous process of consultation between all three authorities is mandated, resulting ultimately in advice tendered to the President by the Chief Justice of the High Court and the Chief Justice of India. It is not necessary for me to enter into the other questions raised in the challenge directed against the decision of the Union Government not to appoint Shri S. N. Kumar as an additional Judge for a further term. It seems to us sufficient to say, on a review of the material before me, that there was no effective and full consultation between the President and the Chief Justice of the High Court on the one hand, and the Chief Justice of India on the other. The facts may be recounted briefly.

891. Shri S. N. Kumar was appointed an additional Judge of the High Court of Delhi for a period of two years by a notification dated March 6, 1979, and he assumed charge of his office the next day. Shortly before the expiry of that period, the Chief Justice of the High Court of Delhi addressed a letter dated February 19, 1981 to the Minister of Law, Justice and Company Affairs stating that while the pendency of cases in the High Court justified the appointment of additional Judges and normally the extension of the tenure of an additional Judge was recommended in the circumstances, he did not recommend the extension of Shri S. N. Kumar because, he said, serious complaints had been received, both oral and in writing, against him directly by the Minister as well as himself, that he had examined those complaints and found that some of them were not without basis, that responsible members of the Bar and some other colleagues had also complained about Shri S. N. Kumar and that although he had no investigating agency to enquire conclusively into the genuineness of the complaints, the complaints had been persistent. It was also pointed out that Shri S. N. Kumar had also not been helpful in disposing of cases. Finally, it was said, some responsible members of the Bar as well as some colleagues expressed some doubts in regard to Shri S. N. Kumar's integrity. A copy

of the letter was sent to the Chief Justice of India. On March 3, 1981, the Chief Justice of India expressed a desire to look carefully into the charges against Shri S. N. Kumar and pointed out that the letter of the Chief Justice of the High Court appeared to be too vague to persuade one that Shri Kumar lacked integrity. The Chief Justice of India recommended that Shri Kumar be appointed for a further period to enable him to make an enquiry into the matter meanwhile. Shri Kumar was reappointed as an additional Judge with effect from March 7, 1981 for a period of three months. On March 19, 1981, the Law Minister wrote to the Chief Justice of the High Court drawing his attention to the observations of the Chief Justice of India that the letter dated February 19, 1981 sent by the Chief Justice of the High Court appeared to suffer from vagueness and it was therefore difficult to accept that Shri Kumar lacked integrity. It appears that the Chief Justice of the High Court met the Chief Justice of India and discussed the case of Shri Kumar with him. On March 28, 1981 he wrote to him confirming that "with regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us." On the same day the Chief Justice of the High Court wrote to the Law Minister enclosing a copy of his letter to the Chief Justice of India and he informed the Law Minister that he had had "an opportunity to discuss the entire matter in detail with the Chief Justice of India." He added:

"Perhaps you will consider this to be sufficient 'comments' on my part as desired by you in your letter under reply about the observations of the Chief Justice of India which you have quoted in your letter."

In reply, the Law Minister wrote back on April 15, 1981 to the Chief Justice of the High Court pointing out that "you must have had some material which provided the basis on which you concluded that Justice Kumar's reputation for integrity was not above board and recommended that he may not be continued. In view of the observations of the Chief Justice of India asking for concrete material, it would be necessary for us to have it with your comments." Quite evidently, the Law Minister intended that the material should be available to the Chief Justice of India also, so that all the material should be considered by both of

them. Thereafter, the Chief Justice of the High Court wrote a letter D.O. No. 296-HCJ/PPS dated May 7, 1981, bearing the caption "SECRET (For Personal Attention Only)" and reading as follows:

"Dear Mr. Minister,

I am in receipt of your D.O. No. 50/2/81-Jus. dated 15th April, 1981.

Hon'ble the Chief Justice of India had made certain observations with regard to my recommendation about Mr. Justice S. N. Kumar and the same were communicated to me by you for my comments in your D.O. No. 50/2/81-Jus., dated 19th March, 1981. The Chief Justice had also written to me a letter dated 14th March, 1981, asking for "details and concrete facts in regard to the allegations against Justice Kumar. As I wrote to you in my D.O. No. 293-HCJ/PPS, dated 28th March, 1981, I discussed the matter with Hon'ble the Chief Justice and as desired by him, in reply to his letter, wrote my D.O. No. 292-HCJ/PPS, dated March 28, 1981 a copy of which was forwarded to you. Accordingly, it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis for me to conclude that Justice Kumar's integrity was not above board, I give below some facts,

In the first half of 1980, Justice Kumar was sitting singly and was doing mostly Original Side matters but also some Appellate Side matters. Chance remarks came to my knowledge about his conduct in Court as well as about his integrity. Somewhere early in May, 1980 one of my colleagues met me and said that he was rather perturbed about information with him to the effect that if a substantial amount was paid to Justice Kumar, suits brought by a particular party against an insurance company would be decided in favour of that party. I had not paid much attention to the earlier reports but when this was brought to my notice, and I was at that time not the Chief Justice, I thought to myself that after the summer vacations, to save Justice Kumar from any embarrassment, he should be put on a jurisdiction other than original jurisdiction. Therefore, when as Acting Chief Justice I constituted the Benches for the second half of 1980 I put Justice Kumar in a Division Bench to sit on the Appellate Side and Writ Jurisdiction. In my view this was a safe way to finish the rumours if the same were incorrect and thus safeguard the reputation of a Judge.

Surprisingly enough, Justice Kumar did not release the original suits, regarding which allegations had been made, from his board and continued to deal with these suits even in the second half of 1980. These suits were Suit No. 1409 of 1979, Suit No. 1417 of 1978 and Suit No. 1408 of 1979 filed by Jain Sudh Vanaspati Ltd. and Jain Export Pvt. Ltd., against the New India Assurance Co. Ltd. In August, 1980, the same colleague of mine who talked to me earlier and another colleague mentioned that doubts were being expressed about the integrity of Justice Kumar vis-a-vis the aforesaid cases and some others. Since I was only acting as Chief Justice at that time, I did not want to take any precipitate action. I, however, made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations. This made me look into the matter more carefully when to my astonishment I found that it was not only the three suits mentioned above but that there were other Single Bench matters also which had been retained by Justice Kumar on his board despite being put in the Division Bench. There is fairly a long list of these cases. In some of these the parties involved were rich and influential including some former princes. After I was appointed Chief Justice early in January, 1981, I looked into this matter a little more deeply and made further inquiries. Some of the lawyers were non-committal and understandably so. Others, however, asserted with some force that Justice Kumar's reputation was not above board. I talked to some of my other colleagues besides the two who had earlier spoken to me. They also said that unconfirmed reports have been circulating in the Bar which were not very complimentary to Justice Kumar. This made me conclude that the reputation for integrity of Justice Kumar was not what should be for a Judge of the High Court. To my mind, reputation of a integrity is just as important as person actually being above-board."

Then followed reference to a complaint made by one Mr. Sabir Hussain, advocate and some data concerning the disposal of cases by Shri S. N. Kumar as well as allegations about some incidents in his Court concerning his conduct towards counsel.

892. Some days after receiving this letter of May 7, 1981 from the Chief Justice of the High Court, the Law Minister recorded a note on May 19, 1981 mentioning

ing therein that before issuing the letter the Chief Justice had requested him to treat it as a secret document confined to his personal attention, and that he had given certain reasons for wanting it treated so. The Law Minister sought advice from his Secretariat whether the communication of the letter to the Chief Justice of India was unavoidable. This indicates that the Law Minister was not decided, when he received the letter, whether he should withhold it from the Chief Justice of India. It is not apparent what advice he received from his Secretariat, but it seems that he ultimately decided to honour the request of the Chief Justice of the High Court to keep the document secret. It appears that neither the Law Minister nor the Chief Justice of the High Court did ever inform the Chief Justice of India of this letter of May 7, 1981 and of its contents. A perusal of the subsequent correspondence confirms that to be so, and indeed that was affirmed by the Law Minister in his letter of May 29, 1981 addressed to the Chief Justice of the High Court.

893. On May 27, 1981 the Law Minister recorded a note in which *inter alia* he said:

"I presume that when C.J., Delhi and the C.J. of the Supreme Court met, the former must have informed the latter about the details that he had mentioned to me in his letter dated 7-5-81. This presumption is raised on the basis of the letters from the Chief Justice, Delhi." He went on to observe that on the question of the integrity of Mr. Justice Kumar, the views of the Chief Justice of the High Court be preferred because he had the advantage of watching the work and conduct of the Judge.

894. The first point to consider here is whether the information contained in the letter dated May 7, 1981 of the Chief Justice of the High Court was ever made known to the Chief Justice of India. There is no dispute that the Law Minister, in deference to the wishes of the Chief Justice of the High Court, did not communicate that information to the Chief Justice of India. The dispute centres on whether the Chief Justice of the High Court had ever conveyed the particular information to the Chief Justice of India. In my view, he never did so. There were no doubt meetings between the Chief Justice of India and the Chief Justice of the High Court when the question relating to the integrity

of Shri S. N. Kumar was discussed. Originally, the Chief Justice of the High Court had spoken in the most general terms of complaint against the Judge. It seems that subsequently on March 26, 1981 the Chief Justice of the High Court told the Chief Justice of India that he doubted the integrity of Shri S. N. Kumar because "even after Justice Kumar's allocation was changed from the original side to the appellate side, he still continued to hear the part-heard cases on the original side." This was mentioned in the letter dated May 22, 1981 written by the Chief Justice of India to the Law Minister. The Chief Justice of India understood the allegation in its limited scope, that is to say that Shri S. N. Kumar was committing an irregularity in retaining original jurisdiction part heard cases before him when he was now sitting on the appellate side. In the same letter he said:

"As regards the complaint of the Chief Justice that Justice Kumar's integrity was doubtful since he continued to take old part-heard matters even after the allocation of his work was changed, I have made enquiries....."

and observed that it appears to be common practice in the Delhi High Court that even after the Judge was moved from the original side to the appellate side he continued to take up part-heard cases on which a substantial amount of time had already been spent. The Chief Justice of India concluded that in the circumstances Shri Kumar could not be said to have done anything out of the way in taking up part-heard cases even after the allocation of work was changed. The affidavit of Shri S. N. Kumar discloses that an enquiry was made of him by the Chief Justice of India on why he continued to deal with original work while sitting on the appellate side, and in this connection he specifically refers to the three suits clearly mentioned in the letter dated May 7, 1981 of the Chief Justice of the High Court. There is nothing to suggest that the Chief Justice of India was ever apprised of the much more serious allegations contained in the letter of May 7, 1981 insinuating that the parties in these suits and in certain other cases, which as part-heard cases were said to have been retained by Shri Kumar for hearing, were rich and influential persons and that the Chief Justice of the High Court had "made discreet enquiries from some of the leading counsel and they in strict confidence supported the allegations" and

that this was the material which led^o to doubt on the integrity of the Judge. This material was certainly very grave, much more than the mere allegation that the Judge was continuing to hear part-heard suits which, without anything more, could have been regarded at the worst as a mere irregularity. It took on a different complexion when considered in the light of the more damaging allegations made in the letter of May 7, 1981. I do not find anything on the record from which it can be presumed that this material was ever conveyed by the Chief Justice of the High Court to the Chief Justice of India. When all the correspondence and the affidavits on the record before us are considered together, that appears to be the only conclusion. It is strengthened by the insistent request of the Chief Justice of the High Court to the Law Minister that the letter of May 7, 1981 should not be disclosed to the Chief Justice of India.

895. What is the effect of that omission? It is clear that the Chief Justice of India had, for the purpose of rendering his advice in the process of consultation, decided to make enquiry from Shri S. N. Kumar concerning the allegations against him. He had enquired, and Shri Kumar had explained, about the Judge continuing to hear part-heard cases even after he had been moved to the appellate jurisdiction of the court. Had the allegations contained in the letter of May 7, 1981 been communicated to the Chief Justice of India, he would have been in a position to determine for himself by necessary enquiries, either from Shri Kumar or from other sources, whether there was any substance at all in those allegations. Such an enquiry was material to enable the Chief Justice to decide whether there was any substance in the allegations now made against Shri Kumar, and in case on enquiry he was of opinion that the allegations were baseless he would have, while maintaining his recommendation for a further term as additional Judge to be given to Shri Kumar, communicated his views to the Law Minister in respect of this further material. It must be remembered that the Government was deciding against a further term to Shri Kumar solely on the ground of doubtful integrity, and clearly the allegations contained in the letter of May 7, 1981 were strongly influencing that decision. That is apparent from the note drawn up by the Law Minister on May 27, 1981 where he says: "The Chief Jus-

tice of India in his advice proceeds from the premises that taking up part-heard cases after the allocation of work is changed does not amount to lacking in integrity. If it were that simple I would not have joined issue, but the details furnished by the Chief Justice of Delhi High Court in his letter dated 7-5-81 go farther". It is an open question whether the Law Minister would have continued to prefer the views held by the Chief Justice of the High Court if the Chief Justice of India had been informed of the allegations contained in the letter and on subsequent enquiries had found that there was no substance whatever in them. So long as the possibility remains, the conclusion must be that the process of consultation with the Chief Justice of India was not full and effective and the withholding of important and relevant material from the Chief Justice of India has vitiated the process. In my view, there was a violation of the constitutional requirement mandated by clause (1) of Art. 217. It follows that the question whether Shri S. N. Kumar should be given a further term as additional Judge has to be reconsidered, and a decision taken only after full and effective consultation as envisaged by the constitutional mandate.

The power to transfer a High Court Judge under clause (1) of Art. 222:

896. The most strenuous debate before us has been raised over the scope and content of the power to transfer a Judge from one High Court to another under clause (1) of Art. 222. The issues raised are of great importance to the administration of justice and undeniably can produce far-reaching consequences.

897. The matter has already received the attention of this Court in *Union of India v. Sankalchand Himatlal Sheth*, (1978) 1 SCR 423: (AIR 1977 SC 2328) and the majority opinion expressed therein is that the consent of the Judge is not essential to his transfer. It is urged that the view requires reconsideration and that we, as a larger Bench, are competent to do so.

898. It is desirable in the first place to trace the history of the provision. Almost from the inception of the High Courts in India, Judges appointed to one High Court were thereafter appointed to another High Court. The practice continued under the Government of India Act, 1935. The Government of India Act did not contain any provision corresponding

to Art. 222 of our Constitution. But by Section 2 and sub-sec. (1) of S. 6 of the India (Miscellaneous Provision) Act, 1944 statutory recognition was given to the practice by enacting with retrospective effect clause (c) in the proviso to sub-sec. (2) of S. 220, which said:

"(c) The office of a Judge shall be vacated by his being appointed by His Majesty to be Judge of the Federal Court or of another High Court."

That was the only provision in the Act which could be said to constitute evidence of the practice of moving a Judge from one High Court to another court. The clause was included as clause (c) of the proviso to clause (1) of Art. 193 of the Draft Constitution, and there was a suggestion that another clause be added as follows:—

"(d) Every Judge shall be liable to be transferred to other High Courts." (B. Shiva Rao: *The Framing of India's Constitution*, Select Documents Vol. IV, p. 165).

The peremptory nature of the suggested clause may be noted. The Drafting Committee considered the amendment unnecessary and pointed out that there was no bar under Article 193 to a Judge of one High Court being appointed a Judge of another High Court, and drew attention to the existing clause (c) providing that the office of the Judge would be vacated on the Judge being appointed to any other Court. In regard to another suggestion that a convention should be established whereby a proportion of Judges in every High Court could be recruited from outside the Province, the Drafting Committee observed that there was no bar to such recruitment or to the transfer of a Judge of a High Court to another High Court. It seems, however, that subsequently the Drafting Committee changed its mind and on reconsideration decided to incorporate an express provision for the transfer of High Court Judges. The provision empowered the President to transfer a Judge from one High Court to any other High Court. This provision was amended subsequently by including therein an obligation to consult the Chief Justice of India in the matter. Consequently, clause (c) of the proviso to clause (1) of Art. 217 was altered so that in place of the word "appointed" the word "transferred" would be read in conjunction with the words "to any other High Court". The reasons given by Dr. B. R. Ambedkar in the

Constituent Assembly for proposing this provision may be mentioned:

"The Drafting Committee felt that since all the High Courts so far as the appointment of Judges is concerned form now a central subject, it was desirable to treat all the Judges of the High Courts throughout India as forming one single cadre like the I.C.S. and that they should be liable to be transferred from one High Court to another. If such power was not reserved to the Centre the administration of justice might become a very difficult matter. It might be necessary that one Judge may be transferred from one High Court to another in order to strengthen the High Court elsewhere by importing better talent which may not be locally available. Secondly, it might be desirable to import a new Chief Justice to a High Court because it might be desirable to have a man who is unaffected by local politics and local jealousies. We thought therefore that the power to transfer should be placed in the hands of the Central Government.

We also took into account the fact that this power of transfer of Judges from one High Court to another may be abused. A Provincial Government might like to transfer a particular Judge from its High Court because that Judge had become very inconvenient to the Provincial Government by the particular attitude that he had taken with regard to certain judicial matters, or that he had made a nuisance of himself by giving decisions which the Provincial Government did not like. We have taken care that in effecting these transfers no such considerations ought to prevail. Transfers ought to take place only on the ground of convenience of the general administration. Consequently, we have introduced a provision that such transfers shall take place in consultation with the Chief Justice of India who can be trusted to advise the Government in a manner which is not affected by local or personal prejudices.

The only question, therefore, that remained was whether such transfer should be made so obligatory as not to involve any provision for compensation for loss incurred. We felt that that would be a severe hardship..... The Drafting Committee felt therefore justified in making provisions that where such transfer is made it would be permissible for Parliament to allow a personal allowance to be given to a Judge so transferred."

The statement gave reasons for making the express provision conferring power

to transfer and proceeded on the basis that the transfer could be made obligatory on the Judge concerned, and that he should be relieved to some degree against the hardship occasioned thereby provision was made for payment of compensation. Incidentally, the statement also shows that the Drafting Committee was under the impression that the Judges of the High Courts throughout India should be treated as constituting a single cadre like the Indian Civil Service. The statement can be regarded as of historical relevance only. In so far as it records the impression that the Judges of the High Courts form a single cadre it proceeds on an impression which, as I shall presently show, is totally erroneous. But it does mention the reasons which prompted the Drafting Committee to include the provision for transfer and compensation. The clause providing for the payment of compensatory allowance to a transferred Judge during the period he served as a Judge of the other High Court was omitted by the Constitution (Seventh Amendment) Act, 1956 but thereafter was reinstated in appropriate language by the Constitution (Fifteenth Amendment) Act, 1963.

899. The present Art. 222 reads:

"222 (1). The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court,

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined, by Parliament by law and, until so determined such compensatory allowance as the President may by order fix."

I think it is necessary to remove the impression that the Judges of the High Courts constitute a single All-India cadre. The constitutional scheme embodied in Chapter V envisages each High Court as a distinct entity from every other High Court. It is a complete, self-contained and self-sufficient institution, independent of the others and not related to them in any manner. Every High Court draws its own powers and jurisdiction from the provisions of the Constitution, and in no way does it share them with the other High Courts. When a Judge is appointed to a High Court, he

is appointed to that High Court only. It is for that reason clause (c) of the proviso to clause (1) of Art. 217 enacts that the office of a Judge shall be vacated by his being transferred to any other High Court. He is the holder of a distinct office, that of a Judge of the High Court to which he is appointed. It will be noticed that the consultative process envisaged in clause (1) of Art. 217 involved in his appointment requires the President to consult the Chief Justice of the High Court to which his appointment is proposed and the Governor of the State concerned, besides the Chief Justice of India. The Chief Justice of the High Court is consulted because, as has been observed earlier, he is intimately concerned with the appointment of a competent Judge to meet the particular requirements of his Court. The Governor of the State likewise is consulted because he is concerned about the quality of the administration of justice at its highest level in the State. In the case of both functionaries, they are involved with the appointment in order to ensure that the Judge appointed is most suitable in relation to that High Court. The interests and needs of that High Court alone occupy the mind of these two functionaries. A person may be found unsuitable, by reason of association or other links, for being a Judge of the particular High Court, while he may be free from that embarrassment in respect of the other High Courts. It may be observed that the Presidential warrant appointing the Judge specifically mentions that the appointment is as a Judge of the High Court named therein. Moreover, the prescribed Form itself of the oath, which the Judge must make and subscribe before entering upon his office shows clearly that the appointment is confined to that High Court. We have been referred to *Hira Singh v. Jai Singh*, (AIR 1937 All 588), where a Full Bench of the Allahabad High Court held that an additional Judge of that court who had already taken oath on such appointment was not obliged to take oath again on his appointment as a permanent Judge. The case is clearly distinguishable, for it was one where the Judge continued to be a Judge of that Court. He had not been transferred to another High Court. Under our Constitution, the Form reads:

"I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of)..... do swear in the name of God solemnly affirm that I will bear true faith and allegiance to the Constitu-

tion of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws," (Form No. VIII in the Third Schedule of the Constitution).

There is no All India Service of High Court Judges. Art. 215 speaks of a High Court for each State, and Art. 216 plainly declares that the High Court shall consist of a Chief Justice and other Judges. The Chief Justice is a Chief Justice of that High Court only and so are the other Judges. The Judges of a High Court owe their responsibilities and discharge their functions in relation to that High Court only. They have no constitutional connection and no legal relationship with the body of Judges of any other High Court. This position, in my view, cannot admit of any doubt.

900. That being the position how then can the transfer of a Judge from one High Court to another High Court be viewed in law? A Judge appointed to a High Court is entitled to continue as a Judge of that High Court until he attains the age of 62 years, unless of course he resigns his office or is removed from it. His transfer to another High Court involves the vacation of his office in that High Court, that is to say, his appointment as a Judge of that High Court stands terminated. This is confirmed by clause (c) of the proviso to clause (1) of Art. 217. Simultaneously, without anything more the transfer affects his appointment to the other High Court to which he is being sent. An order of transfer under clause (1) of Art. 222 therefore, is a transaction in two parts, the termination of the appointment as a Judge of the original High Court and the simultaneous appointment as a Judge of the other High Court. That view is supported by the circumstance that the power of transfer is vested in the President. It is significant in this connection that the President is also the appointing authority in the case of appointments made under clause (1) of Art. 217 and is also vested with the power of removal in cases falling under Art. 218 read with clause (4) of Art. 124. Therefore, it was necessary that the authority who has been otherwise vested with the power to appoint a Judge and to terminate his

appointment should also be the authority to transfer him. It may be added that inasmuch as the transfer constitutes an appointment of the Judge to the other High Court, Art. 219 comes into play and, therefore, the transferred Judge must, before he enters upon his office in that High Court, make or subscribe an oath or affirmation according to the prescribed Form.

901. It is necessary to observe that the appointment to the other High Court involved in the order of transfer is an appointment attributable to the power under clause (1) of Art. 222, and cannot be regarded as an appointment under clause (1) of Art. 217. Whereas in the latter the Constitution requires consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, in the case of an appointment by transfer the Chief Justice of India alone is involved in the consultation. The framers of the Constitution evidently considered it unnecessary to include other functionaries. If they had to be included, they would have consisted of the Governor of the State and the Chief Justice of the High Court to which the Judge was originally appointed as well as the Governor of the State and the Chief Justice of the High Court to which the Judge was being transferred. It was apparently considered that the consultation with the Chief Justice of India would suffice to take into account the relative interests of the two High Courts and the President would take into account the interests of the two States concerned. In this regard, while there is no constitutional requirement expressly mentioned in clause (1) of Art. 222, it is always open to the President and the Chief Justice of India to make necessary enquiries of the two States and the two High Courts affected by the transfer. The merit of involving the Chief Justice of India alone in the consultative process under clause (1) of Art. 222 lies in this that the process of consultation can be more expeditiously completed and is to be preferred to the inevitably protracted process called for by a constitutional requirement involving two States and two High Courts. Whereas the Chief Justice of India can informally ascertain the views of the Chief Justices of the High Courts and satisfy himself whether he should advise in favour of the transfer, the President can similarly ascertain the views of the two States. The need for a formal presentation before the President

of advice from the Chief Justices of the two High Courts, from the Governors of the two States and from the Chief Justice of India is thus eliminated.

902. I shall now examine whether the power to transfer under clause (1) of Art. 222 can be exercised only after securing the consent of the Judge concerned or even without his consent. As I have observed, the power to transfer was not expressly conferred by any provision under the Government of India Act, 1935. What was done was to clarify that when a Judge appointed to one High Court was thereafter appointed to another High Court, he must be deemed to have vacated his office in the original High Court. In other words, it was made clear that on his subsequent appointment he could not be regarded as a Judge of two High Courts. That, it seems to me, was the intent of the speeches made by the Earl of Munster in the House of Lords and the Secretary of State for India, Mr. L. S. Amery, and Mr. Pethick Lawrence in the House of Commons when the India (Miscellaneous Provisions) Bill was introduced in the two Houses. Although they spoke of "the transfer" of High Court Judges, it is apparent that the word was used in the popular sense. It was not used in the particular sense of an obligatory transfer. There was no provision then in the Government of India Act for the appointment to another High Court of a sitting Judge without his consent. Indeed, the word used in clause (c) of the proviso to sub-sec. (2) of S. 220 of the Act was "appointed". That was also the word used in the original clause (c) of the proviso to clause (1) of Art. 217 of our Draft Constitution. It was only when Art. 222 was added that the word "appointed" was substituted by the word "transferred". The difference between the two words 'appointment' & 'transferred' in our Constitution is borne out by the different terms used in clause (c) of the proviso to clause (1) of Art. 217, where it is declared that the office of a Judge shall be vacated by his being "appointed" by the President to be a Judge of the Supreme Court or on his being "transferred" by the President to any other High Court. It is true that sub-clause (iii) of clause (b) of paragraph 11 of the Second Schedule to the Constitution, which defines "actual service", speaks of "joining time on transfer from a High Court to the Supreme Court or one High Court to another". To my mind that plainly is an error in the drafting of the provision,

It would seem that some of the provisions in the Schedules have not been framed with the care they deserved, because in another part, Form IV in the Third Schedule, the Form of Oath or Affirmation to be taken by the Chief Justice of India before entering upon his office refers to him as the Chief Justice of the Supreme Court of India. In clause (1) of Art. 124, and throughout the other provisions in the body of the Constitution, he is described as the Chief Justice of India.

903. It seems to me that clause (1) of Art. 222 was specifically enacted in our Constitution for the purpose of empowering the President to transfer a Judge without necessarily securing his consent. The power was intended to be in the widest terms and subject only to the obligation to consult the Chief Justice of India. If transfer was conditioned further by the imperative of securing the consent of the Judge concerned, then having regard to past practice there was in fact no need to enact Art. 222. A Judge can always be removed from one High Court to another with his consent. That had not in frequently been done during the ninety years of the High Courts in British India, and there was no reason why it could not have continued in the High Courts under our Constitution. But the framers of the Constitution intended a departure from that position. By clause (1) of Art. 222 in the terms enacted, they did not include the condition that the Judge concerned must consent to his transfer.

904. It was contended before us that clause (1) of Art. 222 was incorporated in the Constitution so that the Chief Justice of India could be brought in for the purpose of ensuring that the transfer was effected in the public interest only and not for the personal benefit of a Judge. The argument is without substance. Public power of this nature can be employed only in the public interest. It may be that incidentally the transfer may advantage the Judge, but in every case the primary ground for transfer must be public interest. It seems to me clear that unless clause (1) of Art. 222 had been enacted, it was not possible for the President to transfer a Judge from one High Court to another without his consent. If a transfer only with the consent was contemplated, it would have been sufficient to rely on the power of the President under clause (1) of Art. 217 to appoint the Judge to another High Court, and

clause (c) of the proviso to clause (1) of Art. 217 would remove any doubt that by such appointment the Judge vacated his office in the original High Court. There is no need to confer power in express terms to do a specific act which can be done with the consent of the parties under the umbrella of a general power.

905. It is worthy of note that where the element of consent was considered necessary, it was expressly mentioned in the Constitution. The proviso to Art. 224A imposes that condition when a former Judge of a High Court is requested by the Chief Justice of a High Court to sit and act as a Judge of the High Court. So also is the provision in Art. 128 in respect of former Judges of the Supreme Court, the Federal Court or of a High Court requested to sit and act as a Judge of the Supreme Court. In contrast, when under clause (1) of Art. 127 a Judge of a High Court is requested to sit as an ad hoc Judge of the Supreme Court when a quorum of the Judges of the Supreme Court is not available, the Judge of the High Court is bound to accept the request and his consent is not necessary. Reference may also be made to the position in England where under S. 4 of the Supreme Court of Judicature (Consolidation) Act, 1925 the High Court is divided into three divisions, the Chancery Division, the King's Bench Division and the Probate, Divorce and Admiralty Division. The puisne Judges of the High Court are attached to the several divisions by a direction of the Lord Chancellor. Sub-sec. (2) of S. 4 of the Act provides that any such Judge may with his consent be transferred by a like direction from one of the Divisions to another. It will be noticed that although the three Divisions are part of the same High Court, nonetheless the statute expressly insists that on a Judge being attached to one of the Divisions he can be transferred to another Division only with his consent. The provision was reiterated in sub-sec. (4) of S. 1 of the Supreme Court of Judicature (Amendment) Act, 1944.

906. It is contended that the element of consent must be imported in cl. (1) of Art. 222 because a fresh oath or affirmation is necessary when a Judge enters upon his office in the other High Court, and whether he will make and subscribe such oath or affirmation rests necessarily within his volition. To my mind that consideration does not necessarily lead to the conclusion sought to be inferred. If a

transferred Judge refuses to make and subscribe such oath or affirmation he could be regarded, it seems as guilty of misbehaviour warranting his removal.

907. But the principal ground in support of the submission that a transfer of a Judge of a High Court can only be with his consent lies in the argument that such a transfer amounts to a punishment of the Judge without trial and therefore the principle of judicial independence is gravely prejudiced. That submission, to my mind, must be tested by an examination of the grounds on which a transfer is permissible. Clause (1) of Art. 222 does not mention the grounds on which the Judge may be transferred. Plainly, inasmuch as it is in the nature of a public power vested in a functionary of the State, it can be exercised only in the public interest. Public interest is the touchstone on which every transfer must be tested. That is the necessary limitation implicitly circumscribing the exercise of power under clause (1) of Article 222. All grounds which can be said to fall within that rubric may be entertained. But no ground which falls within the scope of Art. 218 read with clauses (4) and (5) of Art. 124 can be brought within that scope. The grounds envisaged by those provisions are "proved misbehaviour or incapacity". In relation to them express provision has been made by the Constitution, the grounds being so grave that if established they can result in one penalty only, that of removal of the Judge.

908. The removal of a Judge is a matter of the greatest seriousness. It affects not only the Judge personally but also, in a larger sense, affects the general reputation of the judiciary. Consequently, the Constitution, by cls. (4) and (5) of Art. 124 and by the Judges (Inquiry) Act, 1968 has made the removal subject to a constitutional and statutory process consisting of several stages at each of which the action for removal is screened. The Judges (Inquiry) Act, 1968 requires a notice of motion for presenting an address to the President praying for the removal of a Judge. The notice must be signed by a hundred members of the House of the People, where notice is given in that House and by fifty members of the Council of State where the notice is given in the Council. The Speaker or the Chairman, as the case may be, may consult such person as he thinks fit and after considering such material, if any as may be

available to him, he may either admit the motion or refuse to admit the same. If the motion is admitted, the Speaker or the Chairman, will then constitute a Committee for the purpose of making an investigation into the grounds on which the removal is sought. The Committee consist of three members, one chosen from among the Chief Justice and other Judges of the Supreme Court, the other being a Chief Justice of a High Court and the third being a distinguished jurist. The Committee is required to frame definite charges against the Judge, and such charges together with the statement of the grounds must be communicated to the Judge, who will be given a reasonable opportunity of presenting a written statement of defence. Where it is alleged that the Judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Committee may arrange for the medical examination of the Judge by a Medical Board appointed by the Speaker or, as the case may be, the Chairman. The Medical Board undertakes the medical examination of the Judge and submits a report to the Committee. During the investigation, the Committee is obliged to give reasonable opportunity to the Judge of cross-examining witnesses, adducing evidence and of being heard in his defence. At the conclusion of the investigation, the Committee is required to submit its report to the Speaker or the Chairman, as the case may be. If the report of the Committee finds that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity no further steps can be taken in either House of Parliament and the motion pending in the House cannot be proceeded with. If the report finds that the Judge is guilty, then the motion together with the report of the Committee, is taken up for consideration by the House or the Houses in which it is pending. If the motion is adopted by each House of Parliament in accordance with clause (4) of Art. 124 read with Art. 218, then the misbehaviour or incapacity of the Judge is deemed to have been proved and an address praying for the removal of the Judge must be presented to the President by each House of Parliament in the same session in which the motion has been adopted. It is clear that where an allegation of misbehaviour or incapacity is levelled against a Judge, he has the opportunity to defend himself includ-

ing the right to lead evidence as well as to cross-examine witnesses produced against him. At every stage of the process the statute provides for careful consideration whether the motion for removal should be continued. Allegations which are so grave as to attract such detailed procedure and which afford full opportunity to the Judge to defend himself cannot possibly be made a ground for transfer of the Judge. In my view, the grounds of misbehaviour or incapacity are clearly ruled out from the scope of clause (1) of Art. 222. I am convinced that the transfer of a Judge under that provision cannot be made for the purpose of punishing him. It was never intended that the power should be exercised to impose a penalty by way of punishment. To permit that would be to permit a violation of the principle of judicial independence, for the only grounds envisaged by the Constitution for punishment are grounds constituting misbehaviour and the penalty for which is removal from office.

909. In the transfer of a Judge from one High Court to another the principle of judicial independence and the rights of the Judge are protected by two safeguards. The first is that incorporated in clause (1) of Art. 222, that is to say, the obligations of the President to consult the Chief Justice of India. The Constitution expects the Chief Justice of India to ensure in the process of consultation that the power to transfer is not used arbitrarily against a Judge of a High Court, that it is not employed as a disguise for punishing him, and that, even if the ground for the proposed transfer is made out, it will be in the public interest to affect the transfer. In this regard, the consultation with the Chief Justice of India must, in my opinion, extend to the entire gamut of the grounds on which the transfer is proposed, even where the grounds are incorporated in a policy. The protection afforded to the Judge by the obligation of consultation with the Chief Justice of India is intended to be a complete protection. It must be borne in mind that the Judge concerned is entitled to continue in the High Court to which he has been appointed for the full period of his tenure. It has already been observed that the transfer can be affected without the consent of the Judge. It is, therefore, necessary to construe the scope of the safeguard of consultation in its fullest comprehension. To properly

discharge his responsibility in the matter, the Chief Justice of India must consider himself obliged to entertain not only the material furnished by the President to him but he must also make as full an enquiry as he conveniently can for the purpose of determining whether a transfer should be advised. In that process, he must determine not only whether the grounds on which the transfer proposed are made out but he must also consider as relevant the personal circumstances of the Judge concerned. It is ultimately in the public interest that the personal circumstances of the Judge should be taken into consideration, for there may be a case where they may hinder the proper discharge of his duties in the High Court to which he is transferred. In that connection it is only right that the Chief Justice of India should satisfy himself by enquiring from the Judge himself about what he has to say in the matter of his transfer, both in regard to the grounds for the transfer as well as in regard to any hardship or inconvenience which may be suffered by him by such transfer. As a sitting Judge he is entitled to be informed of the proposed transfer and of the grounds therefor because his right to continue as a Judge of the High Court is placed in jeopardy. It is a very different case from the transfer of an officer who is a member of a service and is ordinarily transferable. As has been observed earlier, a Judge of a High Court is not a member of any All India Service of Judges. It may be made clear at this stage that the Judge does not have a right of hearing in the sense in which that right is generally understood in law. The scope and degree of inquiry by the Chief Justice of India must rest in his discretion. All that is necessary is that the Judge should know why his transfer is proposed and he should be able to acquaint the Chief Justice of India of any reason why he should not be transferred. It may also be added that the process of consultation envisaged under clause (1) of Art. 222 requires that all the material in the possession of the President must be placed before the Chief Justice of India, as well as such other information which he may need and may call for in order to render his advice.

910. The advice tendered by the Chief Justice of India should ordinarily be accepted by the President and in this regard the observations made in *Union of India v. Sankalchand Himatlal (AIR*

1977 SC 2328) (supra) will be fully attracted. Chandrachud, J. as he then was, speaking for the majority of the Court, relying on what Bhagwati & Krishna Iyer, JJ. said in *Shamsher Singh v. State of Punjab* (1975) 1 SCR 814: (AIR 1974 SC 2192) observed "that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India and that the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Executive if it departs from the counsel given by the Chief Justice of India." In practice, the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order." Krishna Iyer, J. observed (at pp. 2384 and 2385 of AIR):—

"Although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power under Article 222 cannot be exercised whimsically or arbitrarily."

and further:

"It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India."

He added:

"The danger of arbitrary action or unsavoury exercise has been minimised by straight-jacketing of the power of transfer. Likewise, the high legal risk of invalidation of any Presidential order made in the teeth of the Chief Justice's objection, runs in an added institutional protection. For it is reasonable for the court before which a Judge's transfer is challenged, to take a skeptic view and treat it as suspect if the Chief Justice's advice has been ignored."

I am fully in agreement with those observations. It is open to a Judge who is ordered to be transferred to invoke the jurisdiction of the court and seek judicial relief against the transfer on the ground of violation of clause (1) of Art. 222 as construed by this Court. This constitutes the second of the two safeguards mentioned earlier.

911. While on this point, I think it necessary to emphasise that the power to transfer a Judge from one High Court to another under clause (1) of Art. 222 is an extraordinary power. Inasmuch as it can be exercised without the consent of the Judge, it can constitute a threat to the sense of independence and impartiality of the Judge. It must, in my opinion, be used most sparingly and only for very strong reason. It must be clearly understood that the onus of justifying the transfer lies heavily on the State.

911-A. In the debate before us point-of-reference was made to a policy contemplated by the Government in regard to the transfer of Judges of the High Court. It seems to me that any policy governing the application of clause (1) of Art. 222 must conform in all respects to the scope and content of clause (1) of Art. 222. The power to transfer is to be found in that clause, and every act of the Government, be it the framing and adoption of a policy or the actual order of transfer, must fall completely within the scope of that provision. The entire content of power vested in the President respecting the transfer of Judges of the High Courts must be traced to the confines of the clause. Accordingly, any policy framed and adopted in this behalf must be tested on the criterion of public interest, and it must be clearly understood that "public interest" means here the interest of the administration of justice. That is the sole purpose of the grant of the power under cl. (1) of Article 222. Now, if the framing and adoption of a policy is an act of the President under the power conferred by cl. (1) of Art. 222, it must be subjected to consultation with the Chief Justice of India. That is an imperative condition grafted on the exercise of all power relating to the transfer of Judges of the High Courts. That the framing and adoption of a policy should be governed by that condition is easily explicable if it is appreciated that the policy constitutes the basic consideration entering the order of transfer. All considerations controlling the transfer of a Judge of a High Court must fall within the scope of the consultative process. The Constitution intends that the Chief Justice of India should be consulted before a transfer is ordered by the President. The consultation must travel over the entire area of consideration which prompts the transfer. The scope of consultation is not limited to any particular. It must be remembered that the Consti-

tution has insisted on consultation with the Chief Justice of India in order to protect the administration of justice and its central principle, the independence of the judiciary, from arbitrary encroachment by executive power.

912. It is contended that policy making is the exclusive and absolute preserve of Governmental power. While that may be so ordinarily, it cannot be accepted here having regard to the plain terms of clause (1) of Art. 222. It is also urged that the policy can always be tested in a court of law for its constitutional validity, and therefore the intervention of the Chief Justice of India in his consultative capacity need not be contemplated. It is not possible to agree. The framing of a policy is an administrative exercise, and calls for making a choice of one or more considerations for executive action within the field of several considerations. When the Chief Justice of India is consulted on the formation of a policy by the President, the consultation involves an administrative choice operating on an administrative plane. When the President consults the Chief Justice of India under clause (1) of Art. 222, it is consultation in relation to an executive act.

The transfer of Shri K. B. N. Singh, Chief Justice, High Court of Patna:

913. Shri K. B. N. Singh was a Judge of the High Court of Patna from September 15, 1966. He was appointed Chief Justice of that Court and assumed charge on July 19, 1976. On January 19, 1981 the President issued a notification, after consultation with the Chief Justice of India, transferring Shri K. B. N. Singh as Chief Justice of the High Court of Madras with effect from the day he assumed charge of that office. The transfer has been challenged in Writ Petition No. 274 of 1981 and Transferred Cases Nos. 2, 6 and 24 of 1981. The principal contentions of the petitioners are firstly, that there has been no effective consultation as envisaged by clause (1) of Art. 222 inasmuch as all the material considered by the Chief Justice of India was not placed before the President, and the process of consultation was not marked by fair procedure, and, secondly, that the transfer cannot be said to have been made in the public interest; and if different considerations have prevailed with the President and the Chief Justice of India, neither can be described as related to public interest.

914. An examination of the several affidavits and of the correspondence between the Government and the Chief Justice of India discloses the following facts:

915. The Chief Justice of India decided on visiting the High Court of Patna in February, 1980 in order to meet the Judges of the High Court and members of the Bar. After informing Shri K. B. N. Singh, Chief Justice of the High Court of his proposed visit, he proceeded to Patna and during his stay there on February 24, 25 and 26, 1980 he met the Judges of the High Court individually and interviewed individual members of the Bar, and also met Judges of the District Court and members of the District Court Bar. Of twenty advocates of the High Court whom he met, there were fifteen senior advocates suggested by Shri K. B. N. Singh. He also met the members of the Advocates' Association collectively at a function arranged by them. Among other things he had also come to know that Shri K. B. N. Singh's mother was old and infirm and not in a good state of health. At that time he did not indicate to Shri K. B. N. Singh that there was any proposal to transfer him to another High Court because at that time there was no proposal to transfer him. It is clear that he returned from Patna greatly perturbed about the conditions prevailing there, and the matter continued to engage his mind thereafter. It was then that he conceived of the transfer of Shri K. B. N. Singh. There was at that time a proposal by the Government that the Chief Justices of all the High Courts should be transferred as a matter of policy to other High Courts, so that each High Court would be headed by a Chief Justice from outside. No final formulation of the scheme had been reached and no modality or mechanism had been decided on for implementing such a policy. From the correspondence and other material on the record it is apparent that the Chief Justice of India and the Law Minister were engaged in continuous discussion over a long period with regard to the appointment of the Chief Justices of High Courts. The discussion was embodied in their letters and also took place in personal meetings and over the telephone. On December 7, 1980, the Chief Justice of India wrote to the Law Minister "in furtherance to the discussion which we had yesterday", stating that he was "firmly opposed to a wholesale transfer of the Chief Justices

of High Courts", and that "such transfers may be made in appropriate cases for strictly objective reasons" and "personal considerations must, in the matter of such transfers, be wholly kept out". He mentioned that the transfer of some of the Chief Justices had been engaging his attention for the past few months and in this connection he had made personal enquiries and had met several lawyers and many Judges of the High Courts concerned. He recommended that Shri K. D. Sharma, then acting as Chief Justice of the High Court of Rajasthan, should be transferred as Chief Justice of the High Court of Kerala, and Shri K. B. N. Singh should be transferred from the High Court of Patna as the Chief Justice of the Rajasthan High Court. It appears that it was then realized that certain difficulties would arise if Shri K. D. Sharma was transferred to the High Court of Kerala. In a letter to the Prime Minister written on December 18, 1980 the Chief Justice of India proposed that the transfer of Shri K. B. N. Singh from Patna to Rajasthan should await further consideration. After a telephone talk with the Law Minister, the Chief Justice of India wrote on December 20, 1980 proposing the transfer of Shri M. M. Ismail, Chief Justice of the High Court of Madras as Chief Justice of the High Court of Kerala and the transfer of Shri K. B. N. Singh as Chief Justice of the High Court of Madras. On January 5, 1981, the Chief Justice of India telephoned Shri K. B. N. Singh and informed him of the likelihood of his transfer to Madras. He asked him if he had anything to say in the matter. Shri K. B. N. Singh wished to know why he was being transferred and the Chief Justice of India informed him that it was "Government policy" and that it was proposed to transfer Shri M. M. Ismail from Madras and it was necessary to appoint an experienced and senior Chief Justice in his place. Shri K. B. N. Singh informed the Chief Justice of India on the telephone that his mother was bed-ridden and he was not in a position to go with his mother to Madras. No other personal difficulty was disclosed. Shri K. B. N. Singh also observed that if his transfer was insisted on he would prefer to resign. The Chief Justice of India requested him not to act in haste but to give the matter close thought, and he added that he was also making a note of the difficulty mentioned by him and "it will have to be taken into consideration before a final decision was taken." The

Chief Justice of India requested him to come to Delhi to discuss the question of his transfer. On January 8, 1981 at 7-30 p.m. Shri K. B. N. Singh met the Chief Justice of India at his residence in Delhi and was with him for some time. He discussed the question of his mother's advanced age and illness; that was the only personal difficulty which he mentioned in the matter of his proposed transfer to Madras. The Chief Justice of India told him that he was unable to agree that the mother's circumstances presented any serious difficulty because there were other dependable persons in his family who could look after the mother and that, in any case, his brother Shri S. B. N. Singh, who was practising in the High Court, was quite capable of looking after the mother. Shri K. B. N. Singh replied that his mother was particularly devoted to him and he could not leave her to the care of his brother and other members of the family. He mentioned that some baseless complaints may have been made to the Chief Justice of India and that he desired to remove any wrong impression created by those complaints. The Chief Justice of India assured him that he was not proceeding on the basis of baseless complaints and that he did not believe that his conduct was blameworthy, but that if he wanted to explain any matter which according to him had created dissatisfaction about the working of the High Court he was welcome to do so. Upon that, Shri K. B. N. Singh told the Chief Justice how certain persons connected with the High Court were influenced by communal considerations and how he, on his own part, did not permit communal or other extraneous considerations to influence him administratively or judicially. The Chief Justice of India assured him that he did not hold him to blame, but that certain persons were exploiting their proximity to him and that had created unnecessary misunderstanding and dissatisfaction. The Chief Justice of India conveyed to Shri K. B. N. Singh that his transfer was proposed in the public interest and that it was not made by way of punishment, and that it was thought of also by the transfer of Shri Ismail from Madras to Kerala.

916. It seems clear that Shri K. B. N. Singh was informed by the Chief Justice of India in full detail of the proposal to transfer him from the High Court of Patna to the High Court of Madras, and keeping in mind the telephone conversa-

tion between them on January 5, 1981 and the personal discussion on January 8, 1981 it is apparent that Shri K. B. N. Singh was being transferred not because of any wrong or fault on his part or for any conduct for which blame could be attached to him, but because people were exploiting their proximity to him in matters which had created dissatisfaction and unnecessary misunderstanding in the High Court at Patna. It is also apparent that Shri K. B. N. Singh was aware that such a situation prevailed because he attempted to clear himself of any blame in connection with what was happening. He was invited by the Chief Justice of India to say whatever he wanted to in the matter which "according to him had created dissatisfaction about the working of the High Court". It is clear that the matter was discussed fully between the Chief Justice of India and Shri K. B. N. Singh and the latter had ample opportunity to say what he wanted to. And it is also clear that the proposal to transfer him from Patna was not by way of punishment. It is unfortunate that a situation had been allowed to develop in legal and judicial circles at Patna which could only be remedied by his transfer. That the transfer was intended to Madras was occasioned by the circumstance that Shri M. M. Ismail was being transferred from Madras to Kerala and it was necessary to send a senior and experienced Chief Justice to the High Court of Madras. The difficulty expressed by Shri K. B. N. Singh in regard to the condition of his mother's health was also considered by the Chief Justice of India, who felt that Shri S. B. N. Singh, his brother practicing law in the High Court, and other dependable persons in the family at Patna could be relied on to look after the mother. Every relevant circumstance, including the personal difficulty mentioned by Shri K. B. N. Singh was considered carefully and objectively by the Chief Justice of India and on an assessment of the relevant facts and circumstances he came to the conclusion that notwithstanding any difficulty posed by a different language in Madras, as Shri K. B. N. Singh was an experienced and senior High Court Chief Justice, he should be transferred from Patna to Madras. I am satisfied that a fair procedure was adopted and all that could reasonably be done in the circumstances was done in the matter.

917. It is urged there was no full and effective consultation between the Chief

Justice of India and the Government as the second discussion between the Chief Justice of India and Shri K. B. N. Singh took place in the evening of January 8, 1981 and the order was signed by the Prime Minister the next day. The Chief Justice of India, in his affidavit on oath has emphatically averred that "there was full and effective consultation between me and the President of India on the question of Shri K. B. N. Singh's transfer from Patna to Madras as the Chief Justice of Madras High Court. Every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer". There is no material on the record for doubting the statement. It must be remembered that the matter of Shri K. B. N. Singh's transfer had been under discussion all along for a considerable time between the Chief Justice of India on the one side and the Law Minister and the Prime Minister on the other, and the discussion had taken place through written correspondence as well as oral conversation by way of discussion in personal meetings and on the telephone. It is perfectly within the realm of credibility that what had passed between the Chief Justice of India and Shri K. B. N. Singh on January 8, 1981 had also been communicated to the Law Minister and the Prime Minister before the order of transfer was signed by the Prime Minister.

918. A point was raised that the Chief Justice of India had averred in his affidavit that the consultation was effected between him and the President of India and not that the consultation took place between him and the Law Minister and the Prime Minister. To my mind, it is clear that Chief Justice of India is referring to the President in the sense of the "Executive Government". This is amply borne out by the large volume of documentary material which shows that the Chief Justice of India was in communication with the Law Minister and the Prime Minister only. There is nothing to suggest that he met the President personally in this matter.

919. It is also contended that the proposal to transfer Shri K. B. N. Singh had already been made by the Chief Justice of India to the Government as early as December 1980 and this was before any discussion on the point between him and Shri K. B. N. Singh. Now it is clear from

in the nature of a suggestion calling for an examination of the matter. The Chief Justice of India had visited Patna and from the material in his possession he had formed an opinion that there was a case for considering the transfer of Shri K. B. N. Singh. The matter was only at the stage of consideration and clearly could not be finalised before Shri K. B. N. Singh had been taken into confidence. We must remember that it was the Chief Justice of India (Chandrachud J. as he then was) who had pronounced judgment in *Union of India v. Sankalchand Himatlal Sheth*, (1978) 1 SCR 423:(AIR 1977 SC 2328), where in considerable detail he has dwelt on the imperative need of a full and effective consultation which, as he observed there, could require the Chief Justice of India to elicit the facts directly from the Judge concerned. It was apparently pursuant to this that he considered it necessary to discuss the matter with Shri K. B. N. Singh otherwise, he would not have found it desirable to telephone from Delhi to Patna on January 5, 1981 and after discussing the matter with him then, to invite him for further discussion at Delhi on January 8, 1981. The proposal was pending, the consultation with the Government was going on and no final decision had been taken. As the Chief Justice of India has stated in his affidavit, the discussion with the Government continued even after the proposal. The process of consultation could continue right up to the moment the final decision was taken. The process of consultation continued actively throughout and there is no reason to doubt the objectivity which marked it. As the learned Solicitor General has pointed out, it must not be forgotten that the Chief Justice was not a personally interested party but was only discharging the duties and responsibilities cast on him by the Constitution. A few facts may be set forth again. On December 18, 1980, the Chief Justice of India requested the Prime Minister that the proposal to transfer Shri K. B. N. Singh to Rajasthan should await further consideration. On January 5, 1981, Shri K. B. N. Singh was informed by the Chief Justice of India that the difficulty mentioned by him concerning the infirmity and age of his mother was being noted by him and would be taken into consideration before a final decision was taken. It seems to me beyond dispute that the matter did not stand closed merely because of the proposal made in December 1980 to transfer him.

920. Then it is urged that clause (1) of Art. 222 contemplates that the process of consultation should be initiated by the President by a reference of the matter to the Chief Justice of India for his advice and that instead it is the latter who has initiated the process. I do not see any substance in this point having regard to the continuous consultation which was going on between the Chief Justice of India and the Government.

920-A. I shall now deal with the task of identifying the considerations which prevailed with the Chief Justice of India and the Government in transferring Shri K. B. N. Singh, and whether it can be said that those considerations fall within the expression "public interest."

921. When a Judge permits his judgment in a case to be influenced by the irrelevant considerations of caste and creed, of relationship or friendship, of hostility or enmity, he commits a breach of his oath. It is a case where justice is not done and is denied. It is a case of misbehaviour, to which the provisions of Art. 218 read with clauses (4) and (5) of Art. 124 are attracted. There is another kind of case where a Judge acts in accordance with his conscience on the basis of the facts and the law as he bona fide understands them, and yet because of surrounding circumstances, it may appear that justice has not been done even though in fact it may have been done. Where there is a danger that justice will not appear to be done, and the prevailing environment is linked with the person of the Judge, notwithstanding that he may have done nothing to promote it, the injury to the administration of justice can be as serious as a case where the Judge has consciously deviated from the standards of impartial judgment. Where there is a genuine apprehension that justice may not appear to be done, the ordinary rule is that the case pending before the Judge should be transferred to another Judge. But where the apprehension is rooted in local association, on links with members of the Bar or influences present in close proximity to the Judge and the circumstances are such that, notwithstanding that the conduct of the Judge has done nothing to promote it, there is grave and bona fide fear in the minds of honest citizens that the fount of justice may be polluted, its effect is not confined to a single case but spreads widely, endangering the purity of the entire administration of justice. Inas-

much as the administration of justice relies for its vitality on the strength of public confidence, it must range supreme and, therefore, if the Judge is transferred in these circumstances it must be regarded as a transfer in the public interest. The desirability of inducting Chief Justices and a proportion of the Judges from outside the State has been emphasised ever since the drafting of the Constitution. During the finalisation of the Draft Constitution a suggestion was received by the Drafting Committee that one-third of the Judges appointed to a High Court should be from outside the State. Successively, the idea has been promoted by the Law Commission of India in its Fourteenth Report and thereafter in its Eightieth Report, and also by the States Reorganisation Commission. The need has been affirmed from time to time and programmes to implement it, have been constantly mooted. The Union Government, according to the evidence before us, has been actively engaged during the last two years in securing an acceptance of the policy from the judiciary, and discussions have taken place from time to time between, the Chief Justice of India and the Law Minister. The Government has proposed that the policy should be implemented not only by appointing the Chief Justice and one-third of the number of Judges to a High Court from outside the State at the time of their initial appointment to the office, but should also be taken in hand presently by the transfer of sitting Chief Justices and Judges. It has been further proposed by Government that the transfers should be effected simultaneously in all the High Courts.

922. It seems from the material on the record that although the Chief Justice of India is in agreement with the need for appointment of Chief Justices and a number of Judges to the High Court from outside the State, he has not accepted yet the further suggestion of the Government that the transfer should be effected as a policy implemented en masse over all the High Courts. It seems that the Chief Justice of India is prepared to go so far only that the matter should be considered from case to case, on the objective merits of each case. This is evidently what he had in mind when he considered it desirable to propose the transfer of Shri K. B. N. Singh as Chief Justice from the High Court of Patna to the High Court of Madras. He did so plainly on the ground that although Shri

K. B. N. Singh himself was not to blame for this, people in the proximity of Shri K. B. N. Singh had created an atmosphere injurious to the administration of justice resulting in great disaffection. It is apparent that the reasons which weighed with the Chief Justice of India form the very basis of the policy promoted by the Government. The basic component of that policy is identifiable in the reasons which prevailed with the Chief Justice of India. When this view is taken, it is immediately clear what the Chief Justice of India meant when during the telephone conversation with Shri K. B. N. Singh on January 5, 1981, he explained that the transfer was prompted by Government policy. This also readily explains why the Government accepted the proposal to transfer Shri K. B. N. Singh. As the learned Solicitor General explained before us, the Government considered this as the first stage in the implementation of its policy, and although there was no finalisation in regard to the time and manner of inducting the Chief Justice and a proportion of the Judges in a High Court from outside the State, the proposal to transfer Shri K. B. N. Singh was rooted in the very considerations which found favour with the Government in promoting the policy conceived by it.

923. I am of opinion that the considerations which prevailed with the Chief Justice of India and the Government in the transfer of Shri K. B. N. Singh were substantially identical, that for the purposes of this transfer the Government had agreed that having regard to the reasons for the transfer it was prepared to consider the case on its individual merits and not to insist on the making of transfers generally for the time being. I am also of opinion that the considerations on which the transfer was made must, in view of what I have observed, be regarded as falling within the expression "public interest". In my judgment, there is no violation of clause (1) of Art. 222.

923-A. It is next urged that the provisions of the Memorandum issued by the Ministry of Home Affairs in the Government of India had not been complied with inasmuch as no enquiry had been made of the Chief Ministers of the States concerned before the transfer of Shri K. B. N. Singh. The learned Solicitor General has stated from the Government records in his possession that the Law Minister consulted the Chief Ministers of

Tamil Nadu on January 3, 1981, the Chief Minister of Kerala on January 4, 1981 and the Chief Minister of Patna on January 6, 1981 in regard to the proposed transfers of Shri M. M. Ismail and Shri K. B. N. Singh. Learned counsel for Shri K. B. N. Singh points out that there was opposition by the Tamil Nadu Government to the induction of Shri K. B. N. Singh as Chief Justice of the High Court of Madras on the ground that he was not acquainted with the Tamil language and would find difficulty in coping with his duties in the High Court at Madras. It is said that if the Chief Justice of India had been informed of this objection, Shri K. B. N. Singh would not have been transferred. I have observed earlier that the Chief Justice of India had considered this matter long before, and did not consider it as a substantial difficulty.

Validity of the Circular Letter dated March 18, 1981 issued by the Minister for Law, Justice and Company Affairs, Government of India:

924. The Circular letter was addressed by the Minister to the Chief Ministers of different States and to the Governor of Punjab pointing out that several bodies and forums, including the States Reorganisation Commission, the Law Commission and various Bar Associations had suggested that one-third of the Judges of a High Court should, as far as possible, be from outside the State in which the High Court was situated. It was said that the suggestion was made "to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations". He requested that the additional Judges working in the High Court of the State should be required to give their consent to be appointed as permanent Judges in another High Court in the country, and they could name three High Courts, in order of preference, where they would prefer such appointment. It was also requested that consent may similarly be taken from persons who have already been, or may in the future be, proposed for initial appointment. He requested further that it may also be made clear to the additional Judges that giving their consent and indicating their preference would not commit the Government in the matter of their appointment or in the matter of accommodating them according to their preference. Thereafter, it appears, some of the additional Judges, whose names were appearing on the list,

further appointment as Additional Judges for short periods of three months, six months or a year.

924-A. The validity of the Circular Letter has been challenged before us on several grounds including the ground that the contents of the letter constitute a threat to the judicial independence of the additional Judges inasmuch as, feeling pressured by the apprehension that unless they conveyed their consent to appointment to another High Court they would not be given further terms as additional Judges, some of them have conveyed their consent. It has been urged that the additional Judges have a right to be considered for appointment as permanent Judges in the High Courts where they are serving, and the Circular letter should be construed as an attempt to transfer them to some other High Court without operating through the consultative process which the President is obliged under the Constitution to enter into with the Chief Justice of India.

925. It seems to me unnecessary to enter into all these points of controversy, because to my mind if the Circular letter is regarded as intending to bind the additional Judges it can have no such effect in law, an appointment of a person as a Judge of a High Court must, as observed earlier, be an appointment to a particular High Court. For the purpose of making such appointment, the constitutional process must be initiated with respect to a particular High Court. The Constitution does not contemplate a single process in relation to several High Courts, collecting as many persons as there are vacancies all over India, and then in the discretion of the Government appointing each of them where the Government pleases. To adopt this procedure will be to equate the appointment of Judges with the appointment of members of an All India Service, a position which cannot constitutionally be countenanced. There must be a separate and distinct process in regard to appointment to each High Court. The Governor of the particular State and the Chief Justice of the particular High Court have to be involved in that process, besides the Chief Justice of India. It is in the course of such a process that a proposal for appointment is made to the person intended for appointment. In other words, a valid proposal, as part of the constitutional process, is one which offers an appointment to a particular High Court. It is only when consent is given to such a proposal that is to say,

consent to appointment in a particular High Court, that it can be said in law to be binding and effective. The Circular letter has invited the consent of the additional Judges in the most general terms, to appointment to any High Court other than the High Court in which they are serving as additional Judges. If it is intended to bind the additional Judges, it has failed in its purpose. Neither the proposal nor any consent given thereto has any legal status. It may be that the Circular letter was intended only for the purpose of obtaining information informally whether the additional Judges would be agreeable to being appointed as permanent Judges of other High Courts. But inasmuch as the consent given by the additional Judges cannot bind them, it will be open to them to consider any concrete proposal now made offering appointment to a particular High Court with a perfectly open and free mind, unhindered by any consent given earlier in pursuance of the Circular letter. It may be added that a concrete proposal can contemplate appointment only in accordance with the procedure prescribed in cl. (1) of Art. 217.

926. In this view of the matter, it would be sufficient to declare that the Circular letter cannot be acted on and any consent given pursuant to the Circular letter is not binding in law on those who have given it.

The claim of privilege against the disclosure of certain documents:

927. The law relating to the plea of privilege raised by the State against the disclosure of documents has advanced considerably in recent times and its evolution has been traced by brother Bhagwati who has discussed the present content of the law abroad, and has given substantial reason for taking the law forward in this country from the position enunciated by this Court in *State of Punjab v. Sodhi Sukhdev Singh*, (1961) 2 SCR 371: (AIR 1961 SC 493). I am in broad agreement with what he has said in regard to what the present state of the law in India should be.

928. But I think it desirable to add a note of warning. There is good reason to be circumspect. Traditions and beliefs which governed life until yesterday and held an important place in the polity cannot be rooted out overnight. Change to be valid must find general acceptance, and its pace will be determined by the education of experience. The past is ever

with us, and when the present takes hold it must do so conscious of its responsibility to the future. The rules now developed by this Court relating to the disclosure of documents need to be carefully applied. The balance between the conflicting claims of public interest represented by officialdom and the public interest flowing from the administration of justice often calls for a delicate assessment, into which perforce must enter considerations vital to the operations of Government on the one hand and the demands of adjudication on the other. The responsibility fixed on the Court is a serious one, and there is need to warn that this power which now vests in the Court can have grave consequences if the content of its potential is not truly appreciated and realised by those who wield it. Whenever a court breaks new ground, the development and recognition of new rights is often accompanied by the birth of problems surfacing also for the first time. New doctrines must be cautiously applied, and yet no court can shirk its duty if it finds that its power has been rightly invoked.

929. In regard to the plea raised by the State on the basis of clause (2) of Art. 74 of the Constitution, there is no denying, in my view, the accuracy of what has been observed by brother Bhagwati, that it is the advice and its reasons tendered by the Council of Ministers to the President which are protected from enquiry by a court, and no such protection extends to the material from which the advice proceeds.

930. On the facts of the case, it was material, to my mind, to ascertain whether indeed a full and effective consultation had taken place with the Chief Justice of India on the question whether Shri S. N. Kumar should be appointed for a further term as additional Judge, and for that purpose it became necessary to consider the contents of the letter dated May 7, 1981 addressed by the Chief Justice of the High Court to the Law Minister. Great emphasis was laid by the parties in their submissions on the question of full and effective consultation in point of fact, and it seemed in the context in which the question was debated that the disclosure of the letter of May 7, 1981 and the connected correspondence was imperative in order that justice be administered. It was not an easy decision for the Court to order disclosure, but after carefully balancing the rival

interests we came to the conclusion that the balance inclined in favour of a positive order.

Locus Standi:

931. What remains now is to consider the objection raised by the respondents to the maintainability of the petitions before us. My brother Bhagwati has dealt with this objection at some length, and has held that it has no substance. I find myself in general agreement with him, and need say nothing more.

932. Before concluding, I think it only right to record my appreciation and gratitude for the great and valuable assistance offered to the Court by the very able and erudite submissions made during the hearing of these cases. Eminent counsel appeared on both sides, who in the discharge of their responsibilities to the Court and to the parties represented by them, did not spare themselves and brought to bear to the hearing their vast learning and enormous industry, notwithstanding that the hearing had to proceed for several weeks.

933. In the result, Transferred Cases Nos. 19, 20, 21 and 22 of 1981 are allowed in so far that a declaration is granted that the Circular letter dated March 18, 1981 cannot be acted on and that the additional Judges concerned shall not be held bound by their consent, given in pursuance of the Circular letter, to their appointment as permanent Judges of High Courts other than those where they presently serve. In the Transferred Case No. 20 of 1981, the respondents are directed to reconsider the case of Shri S. N. Kumar for appointment as an additional Judge of the High Court of Delhi for a further term. Writ Petition No. 274 of 1981 and Transferred Cases Nos. 2, 6 and 24 of 1981 are dismissed.

934. In all these cases, having regard to the circumstances, there is no order as to costs.

VENKATARAMIAH, J.:— 935. The judgment can be conveniently divided into fourteen parts thus:

- I. Introduction
- II. *Locus standi* of the petitioners
- III. The doctrine of political question
- IV. The status of High Courts.

V. Art. 217 (1) — Appointment of a Judge of a High Court — History — Process of consultation under Art. 217 (1) — Is the opinion of the Chief Justice of India binding on the President? — Whether the Council of Ministers can tender

advice to the President on the question of appointment of a Judge? — Whether such advice interferes with the basic structure of the Constitution? — What is the practice prevailing in some other countries?

VI. Art. 224 (1) — Appointment of Additional Judges — History — The manner in which Art. 224 (1) is applied from its commencement and its effect on the principle of independence of judiciary — Has an additional Judge whose term prescribed under Art. 224 (1) has expired one right? — Does the manner in which Art. 224 (1) is being used give rise to any enforceable constitutional convention? — Are the principles of natural justice to be followed at the time of consideration of the question of re-appointment of an Additional Judge?

VII. Art. 222 — Transfer of High Court Judges — History — Does a transfer of a Judge of a High Court amount to a fresh appointment in another High Court? Does the majority judgment of this Court in Sankalchand Sheth's case holding that the consent of a Judge is not an essential condition of a valid transfer require reconsideration? — Does an order of transfer amount to a punishment? — Can a Judge be transferred on the basis of allegations of misbehaviour or of incapacity? — Does the expression 'Judge' in Art. 222 include a Chief Justice also? Is the policy of having the Chief Justice of every High Court from outside the State valid? — Whether ignorance on the part of a Judge of the regional language of the State in which a High Court is situated is an impediment to transfer the Judge to that High Court?

VIII. Question of executive privilege in respect of documents relating to appointment of High Court Judges.

IX. Whether there has been any error in the consultation preceding the decision not to appoint Shri S. N. Kumar?

X. The validity of the circular letter dated March 18, 1981 written by the Law Minister to the Chief Ministers.

XI. Validity of the transfer of Shri K. B. N. Singh.

XII. Cannot the Union Government be called upon to review the strength of Judges in every High Court and to appoint sufficient number of Judges?

XIII. Relief.

XIV. Concluding remarks.

PART I

936. At the commencement of the judgment it is my duty to thank the learned counsel who have argued in these cases with exceptional ability and skill, without whose assistance it would have been very difficult to prepare this Judgment. I sincerely thank all of them.

937. These Petitions are disposed of by this common judgment because common questions of law arise for consideration in them. A brief statement of facts involved in these cases is given below.

938. Transferred Case No. 22 of 1981 had originally been filed in the High Court of Bombay under Article 226 of the Constitution. Later on it was transferred to the file of this Court by an order made under Article 139A of the Constitution to be disposed of along with other connected cases. The petitioners in this case are Shriyuts Iqbal M. Chagla, C. R. Dalvi, M. A. Rane and Sorab K. J. Mody. They are advocates practising in the High Court of Bombay. Respondents Nos. 1 and 2 in this case are the Union Law Minister and the Union of India. Respondents Nos. 3 to 12 are the additional Judges of the High Court of Bombay appointed under Article 224 (1) of the Constitution. The above petition is filed questioning the validity of a circular letter dated March 18, 1981 addressed by the Union Law Minister to the Governor of Punjab and Chief Ministers (by name) (except the North-Eastern States) by which they were requested to obtain the consent of additional Judges working in the High Courts to their appointment as Judges of the High Courts other than those in which they were additional Judges on the lines indicated in the said circular letter. A request was also made in that letter to obtain consent to appointment as Judges from persons who had been or may in future 'be proposed by you' (that is by the Chief Ministers). It is alleged that aggrieved by the said letter, which according to them, amounted to a direct attack on the independence of the judiciary, which was a basic feature of the Constitution, the members of the Advocates' Association of Western India met at a Special General Meeting on April 3, 1981 and passed resolutions inter alia condemning the said letter as subversive of judicial independence and asking the Union Government to withdraw the said letter. The Bombay

Bar Association also passed similar resolutions at its Extraordinary General Meeting on April 7, 1981. On April 14, 1981 it is alleged that the Managing Committee of the Bombay Incorporated Law Society (representing the Solicitors practising in Bombay who were also advocates) passed similar resolutions and also authorised the petitioner No. 4 to join as a petitioner in this petition. The petitioners have inter alia alleged that the impugned letter which affected about one hundred additional Judges currently working in the various High Courts and which threatened them with 'transfer' to High Courts other than the one in which they were working was outside the scope of Article 222 of the Constitution which provided for such transfers and amounted to an unwarranted executive interference with the judiciary. They have also alleged that the manner of appointment of additional Judges under Article 224 (1) of the Constitution was a clear abuse of that provision which empowered the President to appoint additional Judges to clear off arrears in High Courts but not where the arrears were continuously rising. The petitioners have prayed for, among other reliefs, a declaration that the impugned letter of the Union Law Minister was ultra vires and void and that the Union Government should be directed not to act on the consent given by any of the Additional Judges. By a counter-affidavit filed by Shri K. C. Kankan, Deputy Secretary, Department of Justice, Ministry of Law, Justice and Company Affairs, New Delhi, the Union Government has opposed the petition. The Union Government inter alia has questioned the locus standi of the petitioners to file the petition and has further pleaded that by the impugned letter, the Union Government merely sought the consent of the additional Judges and others who had been or who were to be proposed for appointment as Judges to the effect that they were willing to be initially appointed as Judges in other High Courts. It is stated that the consent of the additional Judges had not been sought for their transfer under Article 222 of the Constitution. It is denied that there was any attempt to interfere with the independence of the judiciary. The policy of appointment of Judges in High Courts from outside is justified on various grounds set out in the affidavit. Accord-

ingly the Union Government has prayed that the petition may be dismissed.

939. Transferred Case No. 20 of 1981 was originally filed in the High Court of Delhi under Article 226 of the Constitution by Shri V. M. Tarkunde, Senior Advocate of the Supreme Court Bar after the Law Minister's letter of March 18, 1981 was written and three additional Judges of the Delhi High Court Sarv. Shri O. N. Vohra, S. N. Kumar and S. B. Wad who had originally been appointed as additional Judges for a period of two years with effect from March 7, 1979 were appointed as Additional Judges for a period of three months only from March 7, 1981. In addition to the declaration that the impugned letter of the Law Minister was unconstitutional and void, Shri V. M. Tarkunde has requested the Court, among other prayers, to issue a writ in the nature of mandamus to the Union Government (i) to convert the posts of additional Judges into permanent posts in various High Courts commensurate with the regular business of the High Courts and arrears in consultation with the Chief Justice of the concerned High Court and the Chief Justice of India and (ii) to convert 12 posts of additional Judges in the Delhi High Court into permanent posts having regard to the regular business and the arrears of that Court. In the course of the petition the propriety and constitutionality of appointing the three additional Judges referred to above for a period of three months only from March 7, 1981 have been questioned. The other allegations in the petition more or less are similar to the allegations made in the petition of Bombay lawyers. It is not necessary to go into certain events and proceedings that took place till the counter-affidavit was filed in this case on July 22, 1981 except the fact that Shri O. N. Vohra and Shri S. N. Kumar had ceased to be Judges with effect from June 7, 1981 as they had not been appointed as additional Judges for any further period and that Shri S. B. Wad had been appointed as an additional Judge from June 7, 1981 for one year more. In the counter-affidavit filed by Shri K. C. Kankan, Deputy Secretary to the Government of India, the petition is opposed. This counter-affidavit contains more or less similar pleas contained in the counter-affidavit filed in the petition filed by the Bombay lawyers and in addition to them certain further pleas are raised here in

justification of the action taken by the Union Government in not appointing Shri O. N. Vohra and Shri S. N. Kumar as additional Judges for a further period and in appointing only Shri S. B. Wad as stated above. The specific plea with regard to the non-appointment of Shri O. N. Vohra and Shri S. N. Kumar and the appointment of Shri S. B. Wad runs thus:—

“(w) & (x) Shri Justice Vohra, Shri Justice Kumar and Shri Justice Wad were appointed for a further period of 3 months from 7-3-1981. The short-term appointment was made to enable the Government to take a final view having regard to the complaints that had been received against some of them after consultation with the constitutional authorities. The petitioner's statement that both the Chief Justice of the Delhi High Court and the Chief Justice of India had recommended the appointment of these 3 Judges for a further period of 2 years is untrue and incorrect. It is strange as to how the petitioner could claim knowledge of the recommendations of the Chief Justice of India and Chief Justice of Delhi High Court. After careful consideration of the material available with it and after taking into account the views expressed by the Chief Justice of India and Chief Justice of Delhi High Court and after giving full consideration to the views of both, Government decided not to give appointments for a further term to Shri Justice O. N. Vohra and Shri Justice S. N. Kumar on the expiry of their term on 6-6-1981. Shri Justice Wad was however, appointed for a further period of 1 year from 7-6-1981.

It is neither necessary nor advisable to disclose to the additional Judges the reasons for their short-term appointments or for their non-appointment since this would bring them within the pale of public controversy and would involve disclosure of material which necessarily has to be kept confidential. There is no breach of the principles of natural justice in this”.

940. It may be mentioned here that Shri O. N. Vohra has remained absent in these proceedings but Shri S. N. Kumar has filed a separate affidavit and has presented his case through a counsel. In the course of his affidavit in addition to the pleas supporting the pleas urged by Shri V. M. Tarkunde, he has questioned the validity of the proceedings culminat-

ing in not appointing him as an additional Judge after June 7, 1981. The allegations made by Shri S. N. Kumar are controverted by an additional affidavit filed on behalf of the Union Government in this case.

941. Transferred Case No. 21 of 1981 was filed in the High Court of Delhi by Shri J. L. Kalra and others, all advocates, under Article 226 of the Constitution. The petitioners have prayed for the issue of a writ in the nature of mandamus to the Union Government to make an assessment of the number of permanent and additional Judges required for the High Court of Delhi having regard to its current business and the accumulated arrears to create such number of posts of permanent and additional Judges as may be necessary and to make appointments to those posts. The other reliefs asked in this petition are substantially the same as the reliefs prayed in Transferred Case No. 20 of 1981 filed by Shri V. M. Tarkunde. The allegations in the petition and in the counter affidavit in these two cases are also substantially the same. This petition, however, emphasises the fact that Article 224 (1) of the Constitution is being used for a purpose other than the one for which it is intended. The issues arising out of this petition are the same as those arising in Transferred Case No. 20 of 1981.

942. Transferred Case No. 19 of 1981 was filed under Article 226 of the Constitution before the High Court of Allahabad by Shri S. P. Gupta, Advocate, practising at Allahabad. Aggrieved by the circular letter dated March 18, 1981 which is impugned in Transferred Case No. 22 of 1981 filed by the Bombay lawyers, the non-determination of the necessary strength of permanent and additional Judges of the High Court of Allahabad as required by Articles 216 and 224 (1) of the Constitution, the appointment of some additional Judges of the High Court of Allahabad for short terms of six months on the expiry of the period specified in their warrants of appointment under Article 224 (1), the alleged misuse of Article 224 (1) of the Constitution by the Union Government in making appointments of additional Judges where permanent Judge had to be appointed and several other matters urged in the petition, the petitioner filed the above petition requesting the Court

to issue appropriate directions having regard to the submissions made in the petition and principally he has prayed for a declaration that the three additional Judges — Mr. Justice Murlidhar, Mr. Justice A. N. Verma and Mr. Justice N. N. Mithal must be deemed to have been appointed as permanent Judges under the warrants already issued to them and that the circular letter of the Law Minister is void. The reliefs prayed for by the petitioner more or less are identical with the reliefs in Transferred Case No. 22 of 1981. The allegations made in the petition and in the counter-affidavit will be dealt with in the course of the judgment as many of them are common to all these cases.

943. Writ Petition No. 274 of 1981 is filed by Miss Lily Thomas, an advocate practising in the Supreme Court of India under Article 32 of the Constitution. She has sought for a declaration that the transfer of Mr. Justice M. M. Ismail, Chief Justice of the High Court of Madras as the Chief Justice of the Kerala High Court is unconstitutional. She has also stated that the Union Government had acted illegally in not appointing Mr. Justice Subramanian Poti, the senior-most Judge of the Kerala High Court as the Chief Justice of that Court in the vacancy created by the appointment of Mr. Justice Balakrishna Eradi, Chief Justice of the Kerala High Court, as a Judge of this Court. She has contended inter alia that Article 222 of the Constitution which provides for transfer of Judges does not apply to Chief Justices and that in any event Article 222 of the Constitution cannot be used to defeat the claim of the senior most Judge of a High Court to become the Chief Justice of that Court whenever a vacancy occurs in the office of the Chief Justice. She has pleaded that the transfer of Mr. Justice M. M. Ismail had not been made in the public interest and when such transfer is made without consent of the Judge concerned would be unconstitutional. On behalf of the Union of India it is pleaded that the transfer had been made in consultation with the Chief Justice of India in the public interest after taking into consideration all relevant matters. It is pleaded that Art. 222 applies to Chief Justices also.

944. Mr. Justice M. M. Ismail who has been impleaded as the respondent No. 2 in this petition has filed an affida-

vit, the third paragraph of which reads thus:

"3. As soon as I was informed of the Notification of the President of India under Article 222 (1) of the Constitution of India, transferring me as the Chief Justice of the High Court of Kerala, I decided (1) not to proceed to Kerala to take charge as the Chief Justice of the High Court of Kerala, (2) not to challenge the legality or the validity of the order of the President so transferring me in any Court of Law and (3) to proceed on leave preparatory to premature retirement by resigning my office. In view of this I have nothing to submit to this Hon'ble Court in this Writ Petition and I do not want anyone to litigate for or against me. In these circumstances, I have nothing to represent with reference to the questions of law raised in the Petition and I do not want anything about me to be argued or debated".

945. Mr. Justice M. M. Ismail has since resigned from his office.

946. Transferred Case No. 2 of 1981 was originally filed under Art. 226 of the Constitution in the High Court of Madras by Shri A. Rajappa, an advocate practising in Madras. He has prayed for a declaration that the orders of transfer passed by the President on January 13, 1981 transferring Mr. Justice M. M. Ismail, Chief Justice of the Madras High Court as the Chief Justice of the Kerala High Court and the transfer of Mr. Justice K. B. N. Singh, Chief Justice of the Patna High Court as the Chief Justice of Madras High Court are void. The principal grounds urged in the petition are that the transfers in question interfere with the independence of the judiciary, a transfer without consent of a Judge is ultra vires under Article 222 of the Constitution and non-consultation with the Governor concerned amounts to violation of Article 217 (1) of the Constitution which should precede the appointment of a Chief Justice. The transfer of a Judge who does not know Tamil language to the High Court of Madras would not be in the public interest. There is also a plea that the transfers suffer from mala fides. Some of the pleas urged by Miss Lily Thomas in her petition are urged in this petition also. The Union of India has opposed the petition. It has relied on Art. 222 of the Constitution in support of the impugned orders of transfer. It is stated that the

transfers had been ordered in the public interest in consultation with the Chief Justice of India who is the only authority to be consulted under Art. 222 and that the procedure prescribed under Art. 217 (1) of the Constitution need not be followed when a transfer is ordered under Art. 222. The plea that the transfers have interfered with the independence of the judiciary is also denied. The allegation that the impugned orders had been made mala fide is also denied in the counter affidavit filed on behalf of the Union of India.

947. Transferred Case No. 6 of 1981 was originally filed under Art. 226 of the Constitution before the High Court of Madras by Shri P. Subramanian. The allegations and prayers made in this petition and the counter-affidavit filed by the Union of India are substantially the same as those in Transferred Case No. 2 of 1981 filed by Shri A. Rajappa.

948. Transferred Case No. 24 of 1981 was originally filed in the High Court of Patna under Article 226 of the Constitution by two advocates — Shri D. N. Pandey and Shri Thakur Ramapati Sinha questioning the validity of the order of transfer of Mr. Justice M. M. Ismail, Chief Justice of the Madras High Court, as the Chief Justice of the Kerala High Court and the order of transfer of Mr. Justice K. B. N. Singh, Chief Justice of the Patna High Court as the Chief Justice of the Madras High Court. The allegations in this petition are substantially the same as those in Writ Petition No. 274 of 1981, in Transferred Case No. 2 of 1981 and in Transferred Case No. 6 of 1981. But during the pendency of this petition in this Court, Mr. Justice K. B. N. Singh who had been impleaded as a respondent was transposed as a petitioner by an order of this Court. Thereafter Mr. Justice K. B. N. Singh has filed an affidavit inter alia stating that his transfer was not in the public interest and that the transfer had been ordered on irrelevant and insufficient grounds. These allegations have been denied by the Union of India. It has stated in the counter-affidavit filed in support of its case that the transfer of Mr. Justice K. B. N. Singh had been made after full and effective consultation with the Chief Justice of India in the public interest keeping in view all relevant considerations. The Chief Justice of India has also filed a counter-

affidavit to which detailed reference will be made in due course stating inter alia that Mr. Justice K. B. N. Singh had been transferred keeping in view all relevant matters in the public interest and not on any ground touching his character and conduct as a Judge.

949. India, that is Bharat, is a Union of States. It is not a federation of States like the United States of America. The word 'federation' is not used in the Constitution of India. There is no dual citizenship in India as we find it in the United States of America. The Constitution of India contemplates only one citizenship, only one loyalty and only one sovereignty. The geographical area covered by the States and the Union Territories mentioned in the First Schedule to the Constitution and such other areas that may be acquired constitute the territory of India which is an indivisible and indestructible whole though for administrative convenience is divided into States and Union Territories. Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; increase the area of any State; diminish the area of any State; alter the boundaries of any State and alter the name of any State in accordance with Art. 3 and Art. 4 of the Constitution. The principle of unity contemplated under the Constitution of India is much stronger than the principle underlying the Constitution of the United States of America. It is, therefore, necessary to remember and adopt it as our own rule of conduct what Washington wrote on June 8, 1783 in his message to the Governors of States in the United States of America. He wrote:

"There are four things which, I humbly conceive, are essential to the well-being, I may even venture to say, to the existence of the United States, as an independent power. Firstly, an indissoluble union of the States under one Federal head; secondly, a sacred regard to public justice; thirdly, the adoption of a proper peace establishment; and, fourthly, the prevalence of the pacific and friendly disposition among the people of the United State, which will induce them to forget their local prejudices and policies; to make those mutual concessions, which are requisite to the general pro-

sperity; and in some instances, to sacrifice their individual advantages to the interest of the community. These are the pillars on which the glorious fabric of our independency and national character must be supported."

(By courtesy: "The Constitution of India" by N. R. Raghavachariar (1951) p. 17).

950. A constitution of a country is a living document and cannot, therefore, be interpreted in a narrow pedantic sense. A broad and liberal spirit should inspire those who are called upon to interpret the Constitution. This does not mean that they are free to stretch or pervert the language of the Constitution. The broad purposes and the general scheme of every provision in the Constitution, its history, its objects and the result which it seeks to achieve should always be kept in view. Current usage and a priori reasoning should also be used as the tools of interpretation of the constitutional provisions. The Constitution of India in order to ensure sound administration has entrusted separate powers to different organs of the State, charging all of them with the joint responsibility of securing to all citizens of India, justice, social, economic and political, liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The said joint endeavour involves co-operation, mutual sympathy and understanding amongst all the organs. The Constitution demands that there should be mutual trust amongst them and there should be no room for suspicion. Distrust and a feeling of suspicion on the part of any of the organs of the State towards any other organ is bound to result in a great national calamity. We have worked the Indian Constitution for more than thirty years. The Constitution has undergone many changes. At the end of three decades of experience one is bound to feel in the same way in which Thomas Jefferson felt about the Constitution of the United States of America in 1816. He wrote to Samuel Karcheval on July 12, 1816:

"Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant too sacred

to be touched. They ascribe to the men of the preceding age a wisdom more than human and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and laboured with it. It deserved well of its country. It was very like the present, and forty years of experience in government is worth a century of book reading and this they would say themselves, were they to rise from the dead".

951. We must while interpreting the Constitution realise that many of the difficulties that we may encounter now had not been foreseen by its makers. Application of constitutional provisions to actual facts of life therefore requires judicial statesmanship. The following words of Professor Frankfurter at Harvard University (who later became Justice Frankfurter) with reference to the American Constitution are equally apposite to our own:

"Every legal system for a living society, even when embodied in a written constitution must itself be alive. It is not merely the imprisonment of the past; it is also the unfolding of the future. Of all the means for ordering the political life of a nation, a federal system is the most complicated and subtle; it demands the most flexible and imaginative adjustments for harmonising national and local interests. The constitution is not a printed finality but a dynamic process; its application to the actualities of Government is not a mechanical exercise, but a function of statecraft."

Let us now turn to the actual issues involved in these cases:

PART II

952. At the outset the question whether the petitioners who are advocates can file these petitions for the reliefs mentioned therein under Art. 226 or Article 32 of the Constitution has got to be considered. The contention is that members of the Bar who are not personally affected by the circular letter of the Law Minister, by the appointment of certain additional Judges for short terms of three months or six months, by the non-appointment of any of the additional Judges after the expiry of the tenure fixed under Art. 224 (1) or by the non-appointment of sufficient number of Judges of the High Courts or by the

transfer of some Judges have no locus standi to file these petitions. It is contended that neither qualitatively nor quantitatively these petitioners have sufficient interest to prosecute these petitions the result of which would not affect them either directly or even indirectly.

953. The attitudes of the courts on the question of locus standi do not appear to be uniform. They vary from country to country, court to court and case to case. Sometimes the tests applied by courts also vary depending upon the nature of the relief sought. In some cases courts have taken a very narrow view on this question holding that unless an applicant has either personal or fiduciary interest in the result of the application, no relief can be granted on his application even though it may appear that the impugned action or omission of the administrative authority concerned is not in accordance with law. The other extreme view is that the courts may in their discretion issue mandamus to an administrative authority at the instance of any member of the public. A close scrutiny of the authorities and texts cited before us shows that neither of the two extreme views is accepted as correct in majority of the cases. It is also seen that in many of them the courts have found some sort of special interest in the applicant which distinguishes him from the general public before granting the relief prayed for by him. A person who has a genuine grievance on account of an action which affects him prejudicially is ordinarily considered to be eligible to move the Court.

954. In England a member of the public who has no personal interest in the performance of a public duty by an administrative authority may as it may be done in India under Ss. 91 and 92 of the Code of Civil P. C., 1908 in a limited and qualified way instead of himself approaching the Court, move the Attorney-General to initiate action in courts for the benefit of the public. If the Attorney-General is satisfied that action is called for in any given case, (he) as the nominal plaintiff in a relator action "can obtain an injunction to prohibit either some breach of the criminal law or else some ultra vires act by a public authority, such as illegal local government expenditure" — H. W. R. Wade, Administrative Law, Fourth Edition, page 493. The learned author proceeds to observe:

"A similar practice seems to be developing in actions brought by private plaintiffs — despite the 'fundamental rule that the court will only grant an injunction at the suit of a private individual to support a legal right'. This, if it continues, may turn the injunction into a more general remedy of public law. Another consequence will be that there will be problems of standing, since a plaintiff without a personal legal right may be required to show that he has a sufficient interest to maintain the action."

955. If the Attorney-General declines to give his consent to a relator action the Court cannot question his exercise of discretion. This was firmly settled by the House of Lords in *Gouriet v. Union of Post Office Workers* (1978) AC 435 (CA) reversing a bold decision rendered by Lord Denning in the Court of Appeal in *Gouriet v. Union of Post Office Workers* (1977) 1 All ER 696 (CA) in which he had observed at page 719 thus:

".....When the Attorney-General comes, as he does here and tells us that he has a prerogative — a prerogative by which he alone is the one who can say whether the criminal law should be enforced in these courts or not — then I say he has no such prerogative. He has no prerogative to suspend or dispense with the laws of England. If he does not give his consent, then any citizen of the land — any one of the public at large who is adversely affected — can come to this court and ask that the law be enforced. Let no one say that in this we are prejudiced. We have but one prejudice. That is to uphold the law. And that we will do, whatever, befall. Nothing shall deter us from doing our duty."

956. After his decision was reversed by the House of Lords, Lord Denning in his book entitled 'The Discipline of Law' page 144 wrote thus:

"In administrative law the question of locus standi is the most vexed question of all. I must confess that whenever an ordinary citizen comes to the Court of Appeal and complains that this or that government department — or this or that local authority — or this or that trade union — is abusing or misusing its power — I always like to hear what he has to say. For I remember what Mr. T. P. Curran of the Middle Temple said in the year 1790:

'It is ever the fate of the indolent to find their rights become a prey to the

active. The condition upon which God hath given liberty to man is eternal vigilance'. The ordinary citizen who comes to the Court in this way is usually the vigilant one. Sometimes he is a mere busybody interfering with things which do not concern him. Then let him be turned down. But when he has a point which affects the rights and liberties of all the citizens, then I would hope that he would be heard; for there is no other person or body to whom he can appeal. But I am afraid that not everyone agrees with me."

957. The House of Lords having ruled in the *Gouriet's* case ((1978) AC 435) (supra) the Court's jurisdiction in England appears to have been confined to declaring contested legal rights subsisting or future, of the parties and of them only when the Attorney-General does not intervene. This is a step which the House of Lords appears to have taken with a view to stalling a new trend in public interest litigation which had been set by *Blackburn v. Attorney-General* (1971) 1 WLR 1037 (CA) and *Attorney-General ex rel. McWhirter v. Independent Broadcasting Authority* (1973) QB 629.

958. After the decision of the House of Lords in *Gouriet's* case ((1978) AC 435) (supra) it is noteworthy that Order 53 was introduced into the Rules of the Supreme Court in England in the year 1977. The relevant part of Order 53 which took effect on January 11, 1978, some six months after the decision in *Gouriet's* case reads:

"1. — (1) An application for — (a) an order of mandamus, prohibition or certiorari.....shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1) (b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to — (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari, (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and (c) all the circumstances of the case, it would be just and convenient for the declaration or injunc-

tion to be granted on an application for judicial review.

2. On an application for judicial review any relief mentioned in Rule 1 (1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

3. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave must be made ex parte to a Divisional Court of the Queen's Bench Division.

(3)-(4)

(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates, ..."

959. It appears that Order 53 was designed to stop technical procedural arguments of many types which had marred the true administration of justice, and to provide a machinery to determine at the preliminary stage of the granting of leave to prosecute an application for judicial review, whether the applicant has a sufficient interest in the matter to which the application relates. The phrase 'sufficient interest' which, it is stated, owed its origin to an interlocutory observation made by the Court in *R v. Cotham* (1898) 1 QB 802 at p. 804 and to its use by Avory, J. in his judgment in *Ex parte Stott* (1916) 1 KB 7 at p. 9 embraced all kinds of phrases 'a party', 'a person aggrieved', 'a person with a particular grievance' etc. used in various cases where the locus standi of the applicant concerned was questioned. After the aforesaid Order 53 came into force the application out of which the case *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.* (1981) 2 All ER 93 decided on April 9, 1981 by the House of Lords arose was instituted before the Queen's Bench. The facts of the case were these: There was a long standing practice in Fleet Street for casual employees on national newspapers to receive their wages without deduction of tax and to supply fictitious names and addresses when drawing their pay in order to avoid tax. Their true identities were known only to their unions which operated a closed shop and controlled all casual employment on the newspapers. In order to prevent the evasion of tax by

the casual employees, the Revenue made a special arrangement with the employers, the employees and the unions whereby the employees were required to register with the Revenue and submit tax returns for the previous two years (1977-78 and 1978-79) in return for an undertaking by the Revenue that they would not investigate tax evaded prior to 1977. The applicant, a federation of self-employed persons and small businessmen which claimed to represent a body of taxpayers, applied for judicial review under RSC Order 53 seeking (i) a declaration that the Revenue had acted unlawfully in making the arrangement and (ii) an order of mandamus directing the Revenue to assess and collect tax on the newspaper employees as required by law. The Revenue opposed the application on the ground that the applicant did not have 'a sufficient interest in the matter' relating to the application, as required by Order 53, Rule 3 (5) for the Court to grant it the necessary leave to apply for judicial review. The Divisional Court upheld that contention and refused the applicant leave. The applicant appealed to the Court of Appeal which held that, as a preliminary issue and on the assumption that the Revenue had acted unlawfully, the applicant was not a mere busybody but had a genuine grievance and therefore had a sufficient interest for the purpose of Rule 3 (5). The Revenue appealed contending that the duties imposed on them by the tax legislation, including in particular the duty of confidentiality as between the Revenue and each individual taxpayer, precluded the possibility of any other taxpayer or group of taxpayers from having any 'sufficient interest' in the performance by the Revenue of their statutory duties. The House of Lords held inter alia that whether an applicant for mandamus had a sufficient interest in the matter to which the application related, for the purposes of Order 53, Rule 3 (5) depended on whether the definition (statutory or otherwise) of the duty alleged to have been breached or not performed expressly or impliedly gave the applicant the right to complain of the breach or non-performance. Since the tax legislation, far from expressly or impliedly conferring on a taxpayer the right to make proposals about another's tax or to inquire about such tax, in fact indicated the reverse by reason of the total confidentiality of assessments and

negotiations between individuals and the Revenue, and since on the evidence the Revenue in making the impugned arrangement were genuinely acting in the care and management of taxes under the powers entrusted to them, the application made by the applicant should be dismissed because the applicant did not have a sufficient interest for the purposes of Rule 3 (5), or (per Lord Diplock) because it had not been shown that the Revenue had acted ultra vires or unlawfully in making the arrangement. Lord Wilberforce added that as a matter of general principle a taxpayer had no sufficient interest in asking the Court to investigate the tax arrears of another taxpayer or to complain that the latter had been underassessed or overassessed; indeed there was a strong public interest that he should not. Accordingly the appeal was allowed and the original application was dismissed.

960. In Canada, however, the rule has been that the principle requiring personal standing 'applies to legislation of a regulatory character which affects particular persons or classes but where no particular persons or classes are affected more than others, where the issue is justiciable and where the nature of the case is suitable the Court may grant declaratory relief to any citizen at its discretion as can be seen from the decision of the Supreme Court of Canada in *Thorson v. Attorney-General of Canada* (No. 2) (1974) 43 DLR (3d) 1. Dealing with the right of a taxpayer to dispute the constitutional validity of the Official Languages Act in Canada, Laskin, J. observed in that case thus:

"It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament, where the issue in such behaviour is justiciable legal question."

961. In Australia the prevailing view appears to be that in matters affecting public generally in order to maintain a petition for the issue of a direction to an administrative authority to act according to law 'while something less than an enforceable right would be sufficient, there nevertheless must be some special right in the prosecutor, over and above those held by the public at large or by all members of a particular class to which he belongs' (vide *W. Friedmann*:

'Principles of Australian Administrative Law' (Second Edition) page 180).

962. The question of locus standi of a petitioner under Art. 226 of the Constitution was considered by this Court in *Godde Venkateswara Rao v. Govt. of Andhra Pradesh* (1966) 2 SCR 172: (AIR 1966 SC 828). The facts necessary for appreciating the point decided in that case and the decision of this Court on the locus standi of the petitioner therein can be seen from the following passage occurring at p. 181 (of SCR): (at p. 833 of AIR).

"Has the appellant a right to file the petition out of which the present appeal has arisen? The appellant is the President of the Panchayat Samithi of Dharamajugudem. The villagers of Dharamajugudem formed a committee with the appellant as President for the purpose of collecting contributions from the villagers for setting up the Primary Health Centre. The said committee collected Rs. 10,000/- and deposited the same with the Block Development Officer. The appellant represented the village in all its dealings with the Block Development Committee and the Panchayat Samithi in the matter of the location of the Primary Health Centre at Dharamajugudem. His conduct, the acquiescence on the part of the other members of the Committee, and the treatment meted out to him by the authorities concerned support the inference that he was authorized to act on behalf of the committee. The appellant was, therefore, a representative of the committee which was in law the trustee of the amounts collected by it from the villagers for a public purpose. We have, therefore, no hesitation to hold that the appellant had the right to maintain the application under Art. 226 of the Constitution. This Court held in the decision cited supra that "ordinarily" the petitioner who seeks to file an application under Art. 226 of the Constitution should be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest; it can also relate to an interest of a trustee. That apart, in exceptional cases, as the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the

subject-matter thereof. The appellant has certainly been prejudiced by the said order. The petition under Art. 226 of the Constitution at his instance, therefore, is maintainable," (emphasis added).

963. In *Adi Pherozshah Gandhi v. H. M. Seervai*, Advocate General of Maharashtra, Bombay (1971) 1 SCR 863: (AIR 1971 SC 385), the expression 'person aggrieved' found in S. 37 of the Advocates Act, 1961 was considered by this Court. The appellant in that case was an advocate of Maharashtra. He was convicted by a Summary Court in London on a charge of pilfering from a Departmental Store and was sentenced to pay a fine. The State Bar Council called upon him suo motu to show cause why he should not be held guilty of misconduct. He submitted his explanation and the Disciplinary Committee of the Bar Council was satisfied that there was no reason for holding him guilty of professional misconduct. The Advocate-General of the State who had sent a notice of the proceedings as required by Section 35 (2) of the Advocates Act, 1961, and had appeared before the Disciplinary Committee, filed an appeal to the Bar Council of India under S. 37 of that Act, under which, any person aggrieved by an order of the Disciplinary Committee of the State Bar Council made under Section 35 of that Act, could prefer an appeal to the Bar Council of India. The appellant objected that the Advocate-General had no locus standi to file the appeal. The objection was overruled by the Disciplinary Committee of the Bar Council of India and the appellant was found guilty of professional misconduct. After examining the decision of the Privy Council in *Attorney-General of the Gambias v. Pierre Sarr N'Jie* (1961) AC 617 and other decisions cited before it, this Court held that the Advocate-General of Maharashtra could not be treated as a 'person aggrieved' who was entitled to file an appeal under S. 37 of the Advocates Act. The entire decision was based on the construction of the provisions (as they stood then) of the statute concerned, as it appeared to the Bench which decided the case. It may be noted that Section 37 of the Advocates Act has since been amended authorising the Advocate-General of a State expressly to file an appeal. In *Bar Council of Maharashtra v. M. V. Dabholkar* (1976) 1 SCR 306: (AIR 1975 SC 2092) the interpretation of the words

'person aggrieved' in the Advocates Act, 1961, again came up for consideration by this Court. In that case the right of the State Bar Council to file an appeal against the decision of the Bar Council of India before this Court was challenged on the ground that it was not an aggrieved party. That contention was negatived by Ray, C. J. by giving a liberal interpretation to the words 'person aggrieved' with the following observation at page 315 (of SCR); (at p. 2098 of AIR):

"The words 'person aggrieved' are found in several statutes. The meaning of the words 'person aggrieved' will have to be ascertained with reference to the purpose and the provisions of the statute. Sometimes, it is said that the words 'person aggrieved' correspond to the requirement of *locus standi* which arises in relation to judicial remedies.

Where a right of appeal to Courts against an administrative or judicial decision is created by statute, the right is invariably confined to a person aggrieved or a person who claims to be aggrieved. The meaning of the words "a person aggrieved" may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved". Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality. The role of the Bar Council under the Advocates Act is comparable to the role of a guardian in professional ethics. The words "person aggrieved" in Sections 37 and 38 of the Act are of wide import and should not be subjected to a restricted interpretation of possession or denial of legal rights or burdens or financial interests. The test is whether the words "person aggrieved" include "a person who has a genuine grievance because an order has been made which prejudicially affects his interests". It has,

therefore, to be found out whether the Bar Council has a grievance in respect of an order or decision affecting the professional conduct and etiquette.

The pre-eminent question is: what are the interests of the Bar Council? The interests of the Bar Council are the maintenance of standards of professional conduct and etiquette. The Bar Council has no personal or pecuniary interest. The Bar Council has the statutory duty and interest to see that the rules laid down by the Bar Council of India in relation to professional conduct and etiquette are upheld and not violated. The Bar Council acts as the sentinel of professional code of conduct and is vitally interested in the rights and privileges of the advocates as well as the purity and dignity of the profession.

The interest of the Bar Council is to uphold standards of professional conduct and etiquette in the profession, which is founded upon integrity and mutual trust. The Bar Council acts as the custodian of the high traditions of the noble profession. The grievance of the Bar Council is to be looked at purely from the point of view of standards of professional conduct and etiquette. If any decision of the disciplinary committee of the Bar Council of India is according to the State Bar Council such as will lower the standards and imperil the high traditions and values in the profession, the State Bar Council is an aggrieved person to safeguard the interests of the public, the interests of the profession and the interests of the Bar."

964. The above two decisions are in cases in which writs in the nature of certiorari were sought. This Court has however in cases in which writs in the nature of habeas corpus or of quo warranto are prayed for relaxed the rule that ordinarily an applicant under Article 226 should show that some personal right or fiduciary interest is prejudiced by the action or inaction of the authority concerned.

965. In *Jasbhai Motibhai Desai v. Roshan Kumar Haji Bashir Ahmed*, (1976) 3 SCR 58: (AIR 1976 SC 578 at p. 588), this Court observed that "while a procrustean approach should be avoided, as a rule the Court should not interfere at the instance of a 'stranger' unless there are exceptional circumstances involving a grave miscarriage of justice having an adverse impact on public interests".

966. In *Fertilizer Corporation Kamgar Union (Regd.) Sindri v. Union of India*, (1981) 2 SCR 52 at pp. 65-66: (AIR 1981 SC 344 at pp. 350, 351) the right of workers in a factory owned by Government to question the validity of a disposal of plant and equipment of the factory by the management was disputed. On that question Chandrachud, C. J. observed:

"That disposes of the question as regards the maintainability of the writ petition. But, we feel concerned to point out that the maintainability of a writ petition which is correlated to the existence and violation of a fundamental right is not always to be confused with the locus to bring a proceeding under Article 32. These two matters often mingle and coalesce with the result that it becomes difficult to consider them in watertight compartments. The question whether a person has the locus to file a proceeding depends mostly and often on whether he possesses a legal right and that right is violated. But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus to initiate a proceeding, be it under Article 226 or under Article 32 of the Constitution. If public property is dissipated, it would require a strong argument to convince the Court that representative segments of the public or at least a section of the public which is directly interested and affected would have no right to complain of the infraction of public duties and obligations. Public enterprises are owned by the people and those who run them are accountable to the people. The accountability of the public sector to the Parliament is ineffective because the parliamentary control of public enterprises is "diffuse and haphazard". We are not too sure if we would have refused relief to the workers if we had found that the sale was unjust, unfair or mala fide."

967. In the same case Krishna Iyer, J. after an elaborate discussion of the principle of 'locus standi' observed at pp. 76-77 (of SCR): (at pp. 356, 357 of AIR) thus:

"In the present case a worker, who, clearly, has an interest in the industry, brings this action regarding an alleged wrong-doing by the Board of Management, Article 43A of the Constitution

confers, in principle, partnership status to workers in industry and we cannot therefore, be deterred by technical considerations of corporate personality to keep out those who seek to remedy wrongs committed in the management of public sector. Locus standi and justiciability are different issues, as I have earlier pointed out.....

If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the court will not be ajar for him. But if he belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busybody, he cannot be told off at the gates, although whether the issue raised by him is justiciable may still remain to be considered. I, therefore, take the view that the present petition would clearly have been permissible under Article 226."

968. In *Municipal Council, Ratlam v. Vardhichand*, (1981) 1 SCR 97 at pp. 99-100: (AIR 1980 SC 1622 at pp. 1623-1624), Krishna Iyer, J. upheld the right of the people who were residents of Ratlam town to institute a case against its Municipal Council ventilating a public grievance thus:—

"It is procedural rules' as this appeal proves, 'which infuse life into substantive rights, which activate them to make them effective'. Here, before us, is what looks like a pedestrian quasi-criminal litigation under S. 133 Cr. P. C., where the Ratlam Municipality — the appellant — challenges the sense and soundness of the High Court's affirmation of the trial court's order directing the construction of drainage facilities and the like, which has spiralled up to this Court. The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage. If the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered. In that sense, the case before us between the Ratlam Municipality and

the citizens of a ward, is a path-finder in the field of people's involvement in the justicing process, sans which as Prof. Sikes points out, the system may 'crumble under the burden of its own insensitivity'. The key question we have to answer is whether by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis. At issue is the coming of age of that branch of public law bearing on community actions and the court's power to force public bodies under public duties to implement specific plans in response to public grievances."

969. All these Transferred Petitions were filed initially by advocates under Article 226 of the Constitution before one or the other High Court. The Writ Petition however is filed by an advocate under Art. 32 of the Constitution before this Court. The petitioners belong to different High Court Bars — Allahabad, Bombay, Madras, Patna and Delhi — and to the Supreme Court Bar. One important prayer made by them is that the Government should be directed to appoint sufficient number of permanent Judges in every High Court. The other points urged by them are that additional Judges should not be appointed for short terms like three months or six months, that Judges should not be transferred from one High Court to another without their consent and that the circular letter of the Law Ministry should be quashed. Their principal submission is that appointment of additional Judges for short terms and their transfer without their consent would interfere with the independence of the judiciary and would violate the directive principle of State policy contained in Article 50 of the Constitution which requires the State to take steps to separate the judiciary from the executive in the public services of the State. Whatever may be the position with regard to the other prayers made in these petitions, it is difficult to hold that on the first two questions the petitioners can be held to be having no 'standing' to file the petitions. It is no doubt true that the power to fix the number of permanent Judges to be appointed in each High Court is within the discretion of the President. But that power is coupled with a duty which the President owes to the public in general and to the lawyers and litigants in parti-

cular. If at any given point of time it is found that the number of Judges in a High Court is absolutely inadequate to meet its requirements, the members of the Bar who are vitally interested in the administration of justice can file a petition before the High Court to compel the Government to review the strength of the permanent Judges of that Court and to appoint adequate number of Judges. The members of the Bar are not called officers of courts only to impose obligations on them. They have certain rights too. It is significant that Art. 124 (3) (b), Art. 217 (2) (b) and Art. 233 (2) of the Constitution specifically state that the legal profession is a source of recruitment of Judges of the Supreme Court, High Courts and District Courts. Entries 77 and 78 of List I of the Seventh Schedule to the Constitution specifically refer to persons entitled to practice before the Supreme Court and the High Court. S. 29 of the Advocates Act, 1961, provides that only one class of persons can practise the profession of law, namely, advocates. Members of the Bar have a vital stake in the functioning of the judiciary. Members of the Bar and even litigants whose cases have remained undisposed for a long number of years on account of the Government not appointing sufficient number of Judges can therefore file a petition demanding appointment of sufficient number of permanent Judges in High Courts. The power under Art. 216 of the Constitution is an administrative power which can be regulated in an appropriate way by the courts like any other administrative power. It is not a matter of policy simpliciter. The question of appointment of sufficient number of additional Judges under Art. 224 (1) of the Constitution for the required period having regard to the arrears or the quantum of business in a High Court can also be agitated by lawyers and litigants. It is true that the Court should not ordinarily issue a mandamus in such cases unless it is satisfied that there has been a gross dereliction of duty on the part of the Government. That however is a point to be considered before granting or refusing to grant the relief. But it cannot in any event be said that a petition filed by lawyers for the abovesaid reliefs is liable to be dismissed at the threshold merely on the ground of locus standi. The petitioners satisfy all the tests which are laid down in the decisions re-

ferred to above to maintain the petitions on the two questions referred to above. During the pendency of these petitions, two further circumstances have come into existence. Mr. S. N. Kumar who was an additional Judge of the Delhi High Court when the petition of Shri V. M. Tarkunde was filed in the High Court has ceased to be an additional Judge as his term was not extended beyond June 6, 1981. He has, though as a respondent, by filing necessary pleadings questioned the action of the Government in not extending his term and also the validity of the circular letter of the Law Minister. In the case relating to the transfer of Shri K. B. N. Singh, Chief Justice of Patna High Court as Chief Justice of Madras High Court, he has been permitted to be transposed as the petitioner. He has filed an additional affidavit challenging the order of transfer. In view of these new circumstances much of the sting in the objection to the locus standi of the original petitioners to file the petitions is lost. It must also be stated that the learned Attorney-General also stated at the commencement of the hearing of these cases that he would not press his objection relating to the locus standi of the petitioners having regard to the magnitude and the importance of the constitutional questions involved in the cases.

970. But Shri P. R. Mridul, learned counsel appearing for the Law Minister, however, contends that the lawyers either as a class or individually cannot be permitted to file petitions for the issue of any direction to the Government concerning the appointment or transfer of Judges. He has depended upon the writings of L. A. Stein, S. M. Thio, Joel Grossman and Richard S. Wells and Louis L. Jaffe and a number of decisions in support of his submission. He has quoted copiously from 'Judicial Protection Against The Executive' published by the Max Planck Institute. Shri Mridul argues that an applicant must show that he has a legal or some special interest which is sufficient in law to move the Court and that the duty which is sought to be enforced is owed to him. I have carefully considered his submission. The conclusion reached by S. M. Thio in his essay entitled 'Locus Standi in Relation to Mandamus' at page 133 in Public Law, edited by J. A. G. Griffith on which Shri Mridul has relied is of significance. It runs thus:

"It may be seen from the above analysis of the cases that the uncertainty surrounding the locus standi of an applicant for mandamus is largely attributable to the variety of formulae employed by the courts to describe the nature of the interest required to support an application for mandamus, some of which are conflicting and others ambiguous. The employment of the traditional syntax or a "legal right" to describe the requisite interest coupled with the assertion that a mandamus applicant must show that the duty is owed to him personally has established two particular points. On the one hand, a strict rule limiting standing to a person who has a litigable right within the categories of private law. On the other hand, the courts have, in the absence of such a litigable right, accorded standing to a person who made out a "special interest" in the performance of the duty sought to be enforced. The courts, in some of these cases, paid lip service to the "legal right" test, but obviously using the term to connote any interest judicially recognised as worthy of protection rather than a right the invasion of which gives rise to civil actionability. They have, in the other cases, directly held it sufficient for a mandamus applicant to establish a "special interest" in order to have locus standi. As has been seen, the various judicial pronouncements requiring an applicant to show that the duty the performance of which is sought to be secured is one owed to him personally may be discounted since they were designed to bring out the point that where the repository of the duty was a Crown servant, it was imperative for the applicant to show that the duty was not one owed to the Crown, but that it was imposed on the Crown servant as persona designata and hence amenable to mandamus. On balance, the weight of authorities favour the more liberal "special interest" test under which the courts have accorded standing to persons who have a direct and substantial interest at stake. This is necessarily a matter of judicial discretion. However, the preponderance of cases reveal that

(1) Where the duty sought to be enforced is imposed on a public official or a public body for the benefit of a specific class of persons, persons within the class are competent to apply for mandamus without further ado. Persons outside the class may have locus standi if

they have a special interest in its performance i. e. an interest over and above that of the general public.

(2) Where the duty sought to be secured is a general one and is not specifically imposed for the benefit of a particular class of persons, the mandamus applicant must satisfy the "special interest" test. Where the failure to perform the duty has a de facto adverse effect on a class of persons over and beyond that sustained by the general public, any member of that class is competent to apply for mandamus without showing that he is more prejudiced than other members of the class. However, where the non-performance of the duty theoretically affects a class of persons more than the general public, but in actuality has only de facto effect on some members of the class, the mandamus applicant will probably have to show that his interest is more substantial than that of the interest-group to which he belongs".

971. Shri Mridul however fairly concedes that litigations of class character or public interest litigations (which may be called public injury cases) are an essential feature of modern civilised jurisprudence and there is no gainsaying the fact that in these cases of public wrongs and public injury a liberal approach is adopted by the courts to reach all forms of injustice particularly where prisoners, lunatics, minors and other weaker sections of people who cannot have access to court owing to their helplessness are involved. In support of this statement, he has brought to our notice the decision of this Court in *Mumbai Kamgar Sabha, Bombay v. Abdulbhai Faizullabhai* (1976) 3 SCR 591 at pp 596-597: (AIR 1976 SC 1455 at p 1458). in which Krishna Iyer, J. has observed thus:

"Fairness to respondent's counsel constrains us to consider in limine a flawsome plea forcibly urged that the Union figured as the appellant before us but being no party to the dispute (which was between the workers on the one hand and the establishments on the other) had no locus standi. No right of the Union qua Union was involved and the real disputants were the workers. Surely there is terminological lapse in the cause-title because, in fact, the aggrieved appellants are the workers collectively, not the Union. But a bare read-

ing of the petition the description of parties, the grounds urged and grievances aired, leave us in no doubt that the battle is between the workers and employers and the Union represents, as a collective noun, as it were, the numerous humans whose presence is indubitable in the contest, though formally invisible on the party array. The substance of the matter is obvious and formal defects, in such circumstances, fade away. We are not dealing with a civil litigation governed by the Civil Procedure Code but with an industrial dispute where the process of conflict resolution is informal, rough-and-ready and invites a liberal approach. Procedural prescriptions are handmaids, not mistresses of justice and failure of fair play is the spirit in which Courts must view processual deviances. Our adjectival branch of jurisprudence, by and large, deals not with sophisticated litigants but the rural poor, the urban lay and the weaker societal segments for whom law will be an added terror if technical mis-descriptions and deficiencies in drafting pleading and setting out the cause-title create a secret weapon to non-suit a party. Where foul play is absent and fairness is not faulted, latitude is a grace of processual justice. Test litigations, representative actions, pro bono publico and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural short-comings. Even Article 226, viewed in wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, backed by precedents, has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law. Therefore, the decisions cited before us founded on the jurisdiction under Art. 226 are 'nep8 and themselves somewhat out of tune with the modern requirements of juris-

prudence calculated to benefit the community."

972. Yet the contention of Shri Mridul is that even though the lawyers constitute a special group who can be said to be concerned with the administration of justice in the sense of having a professional interest in connection therewith, that by itself is not sufficient for holding that they can file the petitions in respect of the reliefs prayed for by them which concern only the Judges and not the lawyers. He strongly pressed before us the view expressed by this Court in the State of Gujarat v. Ambica Mills Ltd., Ahmedabad (1974) 3 SCR 760: (AIR 1974 SC 1300). I find that the said decision has not much relevance on the question before us and it is not necessary to deal with it at length.

973. It is also difficult to hold that the recognition of the 'standing' of the lawyers to file these petitions would in any way interfere with the doctrine of separation of powers since it is not the case of Shri Mridul that a person who has indisputably the right to file these petitions cannot in law raise the questions urged before us in these cases. If the issues are non-justiciable, the petitions may have to be dismissed on the ground that the impugned administrative action is beyond judicial review but this has no bearing on the question of 'locus standi' of the petitioners, who are lawyers. Lawyers are entitled to approach the Court to direct the Government to appoint sufficient number of permanent Judges and to appoint sufficient number of additional Judges for the maximum period of two years having regard to the arrears and the business of the Court. They may also legitimately agitate that additional Judges should not be appointed when permanent vacancies have remained unfilled for no good reason.

974. It has, however, to be made clear that it cannot be said that lawyers only because they have a right to practise in a court have 'locus standi' to file petitions in respect of every matter concerning judges, courts and administration of justice. There are many such matters in which they have no 'locus standi' to ask for relief. By way of illustration, lawyers cannot question the establishment of a new court on the ground that their professional prospects would be affected thereby. (See *V. R. Mudved-*

kar v. State of Mysore (AIR 1971 Mys 202). Even in these cases on the question of non-appointment of Mr. S. N. Kumar and on the question of transfer of Mr. K. B. N. Singh, the lawyer-petitioners may have no voice. But for the active participation of these two persons, the petitions regarding reliefs concerning them individually would have probably become liable to be dismissed on the ground that the lawyers have no 'locus standi' to make these prayers.

974A. But, since as already stated, Mr. S. N. Kumar and Mr. K. B. N. Singh have requested the Court to consider and if thought fit to grant relief in their favour and the learned Attorney-General has fairly stated that he would not raise the objection that the petitioners have no locus standi in view of the importance of the questions debated in these cases, we hold that the petitions cannot be rejected merely on the ground that the petitioners who are lawyers have no locus standi to file these petitions. Before leaving this topic, it has to be observed that the question of locus standi in the field of administrative law is still in a fluid state and it is not possible to lay down in any one case the principles which can govern all situations:

PART III

975. The Court cannot also decline to go into the question agitated in these petitions on the ground that they are political questions or questions within the exclusive domain of executive discretion. The doctrine of political question which was holding the field long time back in the United States of America has now been exploded. It had been assumed for sometime that the courts would not adjudicate claims to power by the legislative and executive branches because they presented 'political' and therefore non-justiciable questions. This claim was based on the principle of separation of powers recognised by the Constitution of the United States of America. Alexis de Tocqueville was one of the earliest writers who challenged in the year 1835 itself the correctness of the doctrine of political question. He said in his book entitled 'Democracy in America' (published by Oxford University Press in 1961, p. 82) thus:

"But the American Judge is brought into the political arena independently of his own will. He only judges the law,

because he is obliged to judge a case, The political question which he is called upon to resolve is connected with the interest of the suitors, and he cannot refuse to decide it without abdicating the duties of his post."

976. It should, however, be borne in mind that separation of powers does not mean a rigid analytical division. It is a general guiding principle. As Woodrow Wilson put it in 1908,

".....government is not a machine but a living thing..... No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick co-operation, their ready response to the commands of instinct or intelligence, their amicable community of purpose, ... Their cooperation is indispensable, their warfare fatal."

(Wilson; 'Constitutional Government in the United States' 56 (1908)).

977. Each one of the organs of the State — the legislature, the executive and the judiciary — has to discharge its legitimate duties having sound administration as the common goal.

978. The doctrine of political question was examined in the year 1962 by the Supreme Court of the United States of America in *Baker v. Carr* ((1962) 369 UC 186: 7 L ed 2d 663). That was a civil action in which the complaint was that the plaintiffs and others similarly situated had been denied equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States of America by virtue of debasement of their votes by reason of unconstitutional division of their electoral area situated in the State of Tennessee. The District Court dismissed their claim on two grounds namely, lack of jurisdiction over the subject matter and that the action was a non-justiciable one. The Supreme Court of the United States of America reversed the judgment of the court below and remanded the case to the District Court to dispose it of in the light of its decision. The Supreme Court held that the complaint of the appellants involved a justiciable cause upon which they were entitled to a trial and a decision. Brennan, J. who delivered the judgment on behalf of six of the Judges, in the course of his decision, observed at page 691 thus:

"We come, finally, to the ultimate inquiry whether our precedents as to what

constitutes a non-justiciable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none. The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy but simply arbitrary and capricious action".

979. In *Powell v. McCormack* ((1969) 395 US 486: 23 L Ed 2d 491) the label of political question was considered a misnomer and all cases in which such a plea was raised were cases in which really the question of jurisdiction of the court to decide the issue arising in them had been canvassed. The plaintiff in that case Adam Clayton Powell Jr. was duly elected from a congressional district of New York as a member of the United States House of Representatives in 1966. However, pursuant to a House resolution he was not permitted to take his seat on the ground that he had earlier wrongfully diverted House funds, had made false reports regarding foreign currency etc. Powell along with some others who were voters in the constituency then filed a suit claiming that the House could exclude him only if it found that he failed to meet the standing requirements of age, citizenship and residence contained in clause (2) of Article I of the Constitution of the United States of America and thus had excluded him unconstitutionally. The District Court dismissed the suit for want of jurisdiction over the subject matter. The Court of Appeal affirmed the dismissal although on somewhat different grounds,

One of the points raised before the Supreme Court of the United States of America was that the question involved was a political question and hence was not justiciable. The Supreme Court held that it was an error to dismiss the suit and remanded it for disposal in accordance with law. Chief Justice Warren who spoke for the Court disposed of the defence based on political question at page 532 thus:

"(25) Respondents' alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a 'potentially embarrassing confrontation between coordinate branches' of the Federal Government. But, as our interpretation of Art. 1 § 5, discloses a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due to (a) coordinate branch of government', nor does it involve an 'initial policy determination of a kind clearly for non-judicial discretion'. *Baker v. Carr*, 369 US 186 at 217: 7 L Ed 2d 663 at 686. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.....

xxx xxx xxx xxx

Thus, we conclude that petitioners claim is not barred by the political question doctrine, and, having determined that the claim is otherwise generally justiciable, we hold that the case is justiciable".

980. In sum, the political question doctrine, according to R. Berger, interposes no obstacle to judicial determination of the rival legislative-executive claims to receive or without information. The power to decide these claims plainly has not been lodged in either the legislative or the executive branch; equally plainly, the jurisdiction to demarcate constitutional boundaries between the rival claimants has been given to courts. The situation is the same when private parties are involved. This rule, of course, is subject to considerations such as national security and diplomatic relations,

This appears to be the position in the United States of America.

981. In our country which is governed by a written Constitution also many questions which appear to have a purely political colour are bound to assume the character of judicial questions. In the *State of Rajasthan v. Union of India* (1978) 1 SCR 1: (AIR 1977 SC 1361) the Government's claim that the validity of the decision of the President under Article 356 (1) of the Constitution being political in character was not justiciable on that sole ground was rejected by this Court. Bhagwati, J. in the course of his judgment observed in that case at pages 80-81 (of SCR): (at pp. 1413, 1414 of AIR) thus:

"It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare 'judicial hands off'. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is *Supremal*, he paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law".

982. The objection that the questions involved in these petitions are non-justiciable merely on the ground that they are political in character has to be

negatived. But it is made clear that the courts are not entitled to enquire into every sort of question without any limitation. There is still a certain class of questions such as international relations, national security which cannot be entertained by the Court. It is for the Court to determine in each case whether a particular question should be debated before it or not.

983. The questions raised in these petitions will be considered hereafter.

PART IV

984. We are concerned in these cases with High Courts and Judges of High Courts in our country.

985. Speaking on the nature of the Draft Constitution. Dr. Ambedkar in his speech delivered on November 4, 1948, in the Constituent Assembly said:

"All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary. On the other hand the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances.

There is another special feature of the proposed Indian Federation which distinguishes it from other federations. A Federation being a dual polity based on divided authority with separate legislative, executive and judicial powers for each of the two polities is bound to produce diversity in laws, in administration and in judicial protection. Up to a certain point this diversity does not matter. It may be welcomed as being an attempt to accommodate the powers of Government to local needs and local circumstances. But this very diversity when it goes beyond a certain point is capable of producing chaos and has produced chaos in many federal States. One has only to imagine twenty different laws — if we have twenty States in the Union — of marriage, of divorce, of inheritance of property, family relations, contracts, torts, crimes, weights and measures, of bills and cheques, banking and commerce, of procedures for obtaining justice and in the standards and methods of administration. Such a state of affairs not only weakens the State but becomes intolerant to the citizen who moves from State to State only to find that what is lawful in one State is not lawful in another. The Draft Constitution has sought

to forge means and methods whereby India will have Federation and at the same time will have uniformity in all the basic matters which are essential to maintain the unity of the country. The means adopted by the Draft Constitution are three.

- (1) a single judiciary,
- (2) uniformity in fundamental laws, civil and criminal, and
- (3) a common All India Civil Service to man important posts.

A dual judiciary, a duality of legal codes and a duality of civil services, as I said, are the logical consequences of a dual polity which is inherent in a federation. In the U. S. A. the Federal Judiciary and the State Judiciary are separate and independent of each other. The Indian Federation though a Dual Polity has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional law, the civil law or the criminal law." (Constituent Assembly Debates, Vol. 7 (1948-49) at pp. 34, 36-37).

986. The High Courts in India are established by the Constitution, Art. 376 of the Constitution; however, provided for the continuance of the Judges of a High Court in any Province holding office immediately before the commencement of the Constitution as Judges of the new High Court in the corresponding State. Art. 376 of the Constitution reads:

"376. (1) Notwithstanding anything in clause (2) of Article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 221 in respect of the Judges of such High Court.

Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court.

(2) The Judges of a High Court in any Indian State corresponding to any State specified in Part B of the First Schedule holding office immediately before the

commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in clauses (1) and (2) of Article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.

(3) In this article, the expression "Judge" does not include an acting Judge or an additional Judge."

987. After the commencement of the Constitution, the new High Courts were allowed to exercise the jurisdiction of the existing High Courts, until it was duly altered by appropriate Legislature, by virtue of Art. 225 of the Constitution which reads:

"225. Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts shall be the same as immediately before the commencement of this Constitution.

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction".

988. Some of the High Courts came to be constituted or reconstituted after the commencement of the Constitution under different laws made by the Parliament. An analysis of the various provisions of the Constitution and other laws having a bearing on the question shows that every High Court in India is an integral part of a single Indian judiciary and Judges who hold the posts of Judges of High Courts belong to a single family even though there may be a slight variation in two of the authorities who are required to be consulted at the time of the appointment. The provisions deal-

ing with the High Courts are found in Chapter V in Part VI of the Constitution containing provisions governing the States and the salaries of the Judges of a High Court are paid out of the funds of the State or States over which it exercises jurisdiction. Yet it is difficult to say that each High Court is independent of the other High Courts. A perusal of the other provisions in that Chapter shows that the State Legislatures and the State Governments have very little to do so far as the organization of the High Courts is concerned. Article 366 (14) of the Constitution states that a 'High Court means any Court which is deemed for the purposes of this Constitution to be a High Court for any State and includes (a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court and (b) any other Court in the territory of India which may be declared by Parliament by law to be a High Court for all or any of the purposes of this Constitution'.

989-990. Article 214 of the Constitution as it was originally enacted read:

"214. (1) There shall be a High Court for each State.

(2) For the purposes of this Constitution the High Court exercising jurisdiction in relation to any Province immediately before the commencement of this Constitution shall be deemed to be the High Court for the corresponding State.

(3) The provisions of this Chapter shall apply to every High Court referred to in this article".

Clauses (2) and (3) of Art. 214 were omitted by the Constitution (Seventh Amendment) Act, 1956 and Art. 214 (1) was renumbered as Article 214. Clause (2) of Art. 214 contained the necessary 'deeming' provision under which the High Courts exercising jurisdiction in any Province immediately prior to the commencement of the Constitution became High Courts under the Constitution as per definition contained in Art. 366 (14) of the Constitution. Cl. (3) of Art. 214 stated that Chapter V in Part VI of the Constitution did not apply to any particular High Court but generally to all the High Courts thereby suggesting that this Chapter could have very well been included in a separate part of the Constitution. The legislative power to constitute a High Court is vested in the Parliament by Entry 78 of List I of the Seventh

Schedule to the Constitution which reads:

"78. Constitution and organisation (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts".

991. It is today quite possible for the Parliament to pass a common High Courts Act governing all the High Courts in India replacing the existing laws governing them.

992. The appointment of a Judge of a High Court is made by the President in consultation with the Chief Justice of India, the Governor of the State concerned and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. A Judge may by writing under his hand addressed to the President, resign his office. He is removable from office by the order of the President passed after an address by Parliament presented in the manner provided in Article 124 (4) of the Constitution for the removal of a Judge of the Supreme Court. Art. 222 of the Constitution states that the President may after consultation with the Chief Justice of India transfer a Judge from one High Court to any other High Court without any kind of consultation with the Governors of the States concerned or the Chief Justices of those High Courts. Art. 224-A of the Constitution inter alia provides that notwithstanding anything contained in Chap. V in Part VI of the Constitution, the Chief Justice of a High Court for any State may at any time with the previous consent of the President request any person who has held the office of a Judge of that Court or any other High Court to sit and act as a Judge of the High Court for that State. Under para. 11 (b) (i) of the Second Schedule to the Constitution, the time spent by a Judge of any High Court on duty as a Judge or in the performance of such other functions (including functions connected with a different State) as he may at the request of the President undertake to discharge is treated as 'factual service'. Under Art. 231 of the Constitution, Parliament may by law establish a common High Court for two or more States or for one or more States and a Union Territory. Art. 139A (2) of the Constitution empowers the Supreme Court to transfer any case, appeal or other proceeding pending before a High

Court to any other High Court. By virtue of the proviso to cl. (1) of Art. 356 of the Constitution the powers vested and exercisable by a High Court remain unaffected by any proclamation issued under Art. 356 (1) by the President in relation to a State over which the High Court is exercising jurisdiction. These provisions indicate that all the High Courts organically form integral parts of a single system although their territorial jurisdictions are defined. No High Court can claim any superiority over the other either on the basis of its situation or on the basis that it is a successor to a High Court which was functioning in any Province immediately before the commencement of the Constitution or on the basis of the extent of its territorial jurisdiction. All the High Courts have the same status under the Constitution:

PART V

993. The scope of the power of the President to appoint Judges of the High Courts under Art. 217 (1) of the Constitution may be considered now. It may be appropriate to refer here to the position prevailing under the Government of India Act, 1935. Under Section 220 (2) of that Act every Judge of a High Court was to be appointed by His Majesty and he could hold office until he attained the age of sixty years. He was liable to be removed from his office by His Majesty on the ground of misbehaviour or of infirmity of mind or body if the Judicial Committee of the Privy Council on a reference being made to them by His Majesty reported that he ought on any such ground to be removed. The appointment of a Judge of a High Court under the Government of India Act, 1935 was thus a Crown appointment. The Governor-General was, however, given the power under Section 222 of that Act to appoint additional or acting Judges on behalf of the Crown for a temporary period. There was no requirement of any consultation with any specified judicial authority. When Section 220 of the Government of India Act, 1935 came up for discussion before the House of Commons in order to ascertain whether the appointments of High Court Judges was subjected to political pressure or not, a question was raised in the following way:—

"The Crown must, of course, have nominations made to it. Will those nominations be made by the Ministers, or will

they be put forward by the Governor acting in his discretion?

994. The above question was replied by the Solicitor-General of His Majesty's Government thus:—

"I do not think there is anything to fetter the Secretary of State in making inquiries from the Governor-General, the Governor or anybody he thinks proper. I think it is a perfectly unfettered duty".

(See Parliamentary Debates — Indian Affairs, Commons, 1934-35, Vol. II Col. 2685).

In the ordinary course, it is legitimate to assume that there must have been always consultation with the Chief Justice of the High Court concerned or with some others who were familiar with judicial matters whenever an appointment of a Judge to a High Court was made.

995. Article 193 (1) of the Draft Constitution stated that every Judge of a High Court was to be appointed by the President by a warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court of that State. In the Memorandum containing the views of the Judges of the Federal Court and of the Chief Justices representing all the Provincial High Courts prepared by the Conference of the Judges of the Federal Court and the Chief Justices of the several High Courts held in March, 1948 on the question of appointment of Judges of the High Court, it was represented to the Drafting Committee as follows:—

"The Chief Justice should send his recommendation in that behalf directly to the President. After consultation with the Governor the President should make the appointment with the concurrence of the Chief Justice of India. This procedure would obviate the need for the Chief Justice of the High Court discussing the matter with the Premier and his Home Minister and 'justifying' his recommendations before them. It would also ensure the recommendation of the Chief Justice of the High Court being always placed before the appointing authority, namely, the President. The necessity for obtaining the 'concurrence'

of the Chief Justice of India would provide a safeguard against political and party pressure at the highest level being brought to bear in the matter. It needs hardly to be pointed out, in this connection that under the system of responsible Government envisaged by the proposed Constitution, the President who is to make the appointment will be the constitutional head of the executive guided by the advice of the Council of Ministers who will of necessity be drawn from the political party for the time being in power, and there may thus be some risk of political and party considerations influencing the appointment of the highest judicial officers in the country which, under the existing Constitution, has so far remained on the whole free from such influences. The Governor-General and the Governors not being elected nor owing their appointment to political parties in this country. It is therefore suggested that Article 193 (1) may be worded in the following or other suitable manner:

Every Judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India (emphasis added)

We do not think it necessary to make any provision in the Constitution for the possibility of the Chief Justice of India refusing to concur in an appointment proposed by the President. Both are officers of the highest responsibility and so far no case of such refusal has arisen although a convention now exists that such appointment should be made after referring the matter to the Chief Justice of India and obtaining his concurrence. If per chance such a situation were ever to arise it could of course be met by the President making a different proposal, and no express provision need, it seems to us, be made in that behalf".

996. Ultimately Art. 217 (1) which provided for the appointment of High Court Judges was enacted in the following form:

"217. (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of

India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and"

997. It may be noted that the three different words 'recommendation', 'consultation' and 'concurrence' used in the proposal of the Conference of the Federal Court Judges and Chief Justices of High Courts were not adopted by the Constituent Assembly but only the word 'consultation' was used in respect of all the three functionaries referred to in Art. 217 (1).

998. In *Biswanath Khemka v. King Emperor*, 1945 FCR 99: (AIR 1945 FC 67), the effect of S. 256 of the Government of India Act, 1935 which provided that no recommendation should be made for the grant of magisterial powers to, or the withdrawal of any magisterial powers from any person save after consultation with the District Magistrate of the District in which he was working or with the Chief Presidency Magistrate, as the case might be, was considered by the Federal Court. The Federal Court held that the procedure of consultation prescribed in that section was directory and not mandatory and non-compliance with that would not render an appointment otherwise regularly and validly made ineffective or inoperative. The Court felt that any other view would lead to general inconvenience and injustice to persons who had no control over those entrusted with the duty of making recommendations for the grant of magisterial powers. It is noteworthy that the above view was taken by the Federal Court notwithstanding the fact that the words in the section were very emphatic and of a prohibitory character. In *State of Uttar Pradesh v. Manbodhan Lal Srivastava* 1958 SCR 533: (AIR 1957 SC 912) the provisions of Art. 320 (3) (c) of the Constitution were held by this Court to be directory and that they did not confer any right on a public servant. It was further held that the absence of consultation or any irregularity in consultation with the Public Service Commission by the Government before imposing a penalty on him at the end of a disciplinary enquiry and non-compliance with Art. 320 (3) (c) did not vitiate any such punishment, particularly when due enquiry had been held in accordance with Art. 311 of the Constitution and no defect in such enquiry had been pointed out. In reaching that conclusion, the

Court depended upon the statement in *Crawford* on 'Statutory Construction' which was to the following effect:

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other..."

999. The words prescribing the consultation machinery in Art. 217 (1) of the Constitution have to be construed in the context of the broad purposes and the general scheme of that provision; its history, its object, and the result which it seeks to achieve. It is equally necessary that the Court while construing a constitutional provision should bear in mind that it is a part of the organic law of the country and not just an ordinary piece of legislation. A High Court is the highest judicial authority in State and is the court of the last resort for the majority of cases. Along with the Supreme Court at the apex, the High Courts have to play the role of protectors of the rights and liberties of the people and should, therefore, be manned by independent and efficient Judges. Realising the importance of the High Court in a democratic country with a federal form of Government, the Constitution states that the Judges should be appointed after following the consultative machinery provided in Art. 217 (1). A citizen of India who has for at least ten years held a judicial office in the territory of India is eligible to be appointed as a Judge of a High Court. A citizen of India who has for at least ten years been an advocate of a High Court or of two or more High Courts in succession is also qualified for appointment as a Judge of a High Court. Article 217 is designed to select the best, known for their high character and unquestionable integrity from among the large number of qualified persons. Consequently the appointment of Judges of High Courts is not made by calling for applications or holding examinations because the really deserving persons would not make applications. The range of selection is, therefore, practically limited by the personal or acquired knowledge of the Chief Jus-

tice of the High Court concerned about the advocates or Judicial Officers. In that process it may be that many deserving advocates escape notice and consideration. An advocate who is thus left out of consideration cannot make a grievance of it before a court of law and claim that his case should be considered for such appointment. The paramount public importance attached to the post prevents institution of such action by a member of the Bar. From the nature of the provisions contained in Art. 217 (1) of the Constitution, it is also clear that any appointment made without following the procedure of consultation with the authorities mentioned therein, which appears to me to be mandatory, would not be a valid one.

1000. It is, however, contended on behalf of some of the petitioners and also on behalf of Shri S. N. Kumar that on a true construction of Art. 217 (1), the opinion expressed by the Chief Justice of India should be treated as final and binding on the President, having regard to the position of primacy assigned to the Chief Justice of India by the Constitution regarding matters connected with the Indian judiciary. It is also submitted that the Council of Ministers can have no voice in matters of appointment of Judges. Both these contentions are repudiated by the Central Government.

1001. The question is whether Article 217 (1) treats the opinion of any of the functionaries who have to be consulted thereunder and in particular of the Chief Justice of India as final and binding on the President. The Constitution has used different words signifying varying degrees of compulsive or binding character of the opinion of one constitutional dignitary or authority on the other wherever there is need for two or more of them participating in any decision making process under the Constitution. They are, for example, 'shall act according to such opinion' (Art. 103 and Art. 192), 'consent' (Article 127 (1), Art. 128, Art. 224A and Art. 348 (2)), 'advice' (Art. 74 and Art. 150), 'concurrence' (Art. 370 (1) (b) (ii)), 'approval' (Art. 130, Art. 146 (2) Art. 229 (2)), 'recommended by' (Art. 233 (2)) and 'after consultation with' or 'in consultation with' or 'be consulted' (Art. 124 (2), Art. 127 (1), Art. 146 (1), Art. 217 (1), Art. 217 (3), Art. 222, Art. 229, Art. 233 (1), Art. 320 (3),

Art. 341 (1), Art. 342 (1) and Art. 370 (1) (b) (i)). It is significant that the words 'after consultation with' in Article 150 were substituted by the words 'on the advice of' by the Constitution (Forty-fourth Amendment) Act, 1978 since the Parliament wanted, as can be seen from the Notes on Clauses in the relevant Bill which later on became the Constitution (Forty-fourth Amendment) Act, the President to prescribe the form of the accounts of the Union and of the States with the concurrence of and not merely in consultation with the Comptroller and Auditor General of India.

1002. From the scheme of the constitutional provisions, it appears that each of the three functionaries mentioned in Art. 217 (1) of the Constitution who have to be consulted before a Judge of a High Court is appointed has a distinct and separate role to play. The Chief Justice of the High Court is the most competent person to evaluate the merit and efficiency of a person recommended for the judgeship. The Governor is the proper authority who through the executive agency available to him may be able to report about the local position of the person proposed, his character and integrity, his affiliations and the like, which have a considerable bearing on the working of the person proposed for appointment as a Judge. The Chief Justice of India is brought into the picture to prevent any vagaries on the part of the Chief Justice of the High Court who may be moved on occasions by petty considerations such as communalism and favouritism or who may even be capricious in proposing names of persons for judgeship. The Chief Justice of India will naturally be able to assess the qualities of persons proposed having in view the standard of efficiency of Judges in all the High Courts in India and also to prevent unsatisfactory appointment being made on the basis of faulty recommendations made by the Chief Justices of High Courts. The position of the Chief Justice of India under Art. 217 (1) however is not that of an appellate authority or that of the highest administrative authority having the power to overrule the opinion of any other authority. From the specific roles attributed to each of them as explained above, which may to some extent be

overlapping also, it cannot be said that the Chief Justice of India has been given any position of primacy amongst the three persons who have to be consulted under Article 217 (1) of the Constitution. There are no express words conveying that meaning. The President has to take into consideration the opinions of all of them and he should not accept the opinion of any of them only on the sole principle of primacy. He has to take a decision on the question of appointment of Judges of the High Courts on the basis of all relevant materials before him.

1003. Art. 217 (1) confers the power of appointment on the President, who ordinarily has to act on the advice of the Council of Ministers under Art. 74 (1) of the Constitution. Now we have to examine whether there is any compelling reason to hold that the Council of Ministers would have no voice in the matter of appointment of a High Court Judge and the opinion of the Chief Justice of India would be binding on the President. It is necessary to refer here to certain articles of the Constitution. Art. 74 (1) provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President, who shall in the exercise of his functions, act in accordance with such advice. The proviso to that clause provides that the President may require the Council of Ministers to reconsider such advice either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration. It is thus clear that the only means of counteracting any advice tendered to him by his Council of Ministers available to the President where he feels that the advice should not be straightway acted upon is to remit it to the Council of Ministers for reconsideration. If after such reconsideration the Council of Ministers tenders its advice the President has to act in accordance with such advice. The advice thus tendered is binding on the President. A comparison of Article 74 (1) with Art. 163 (1) which also requires a Governor to act on the advice of his Council of Ministers shows that the Governor may in certain matters which are within his discretionary power act independently of his Council of Ministers. There is no such ex-

ception expressly made in Art. 74 (1) specifically excluding any matter from its scope. Art. 103 of the Constitution is another provision which has to be noticed here. It confers power on the President to decide the question whether a Member of Parliament has incurred any disqualification mentioned in Art. 102 (1) of the Constitution. It reads:—

"103. (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Art. 102, the question shall be referred for the decision of the President and his decision shall be final.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion."

1004. Cl. (2) of Art. 103 lays down the only method in accordance with which the President can decide a question arising under clause (1) thereof. It requires him to refer the said question to the Election Commission for its opinion and to decide the question according to its opinion. Art. 74 (1) therefore is excluded from operation by necessary implication. A question of similar nature arising in respect of a member of the State Legislature has to be decided under Art. 192 by the Governor concerned in accordance with the opinion of the Election Commission. Article 163 (1) therefore becomes inapplicable by necessary intendment to such a case. It is thus seen that wherever the opinion of another authority alone is binding on the President or a Governor, as the case may be, the Constitution uses appropriate words conveying such meaning.

1005. Under Art. 217 (3) of the Constitution which provides for the determination of the age of a Judge of a High Court, the President has to decide the age of a High Court Judge after consultation with the Chief Justice of India and this Court has observed in *Union of India v. Jyoti Prakash Mitter* (1971) 3 SCR 483: (AIR 1971 SC 1093) that the President cannot in deciding the case under Art. 217 (3) act on the advice of his Ministers. Here again Art. 74 (1) of the Constitution gets excluded by necessary implication.

But that case stands on an entirely different footing. The function of the President under Art. 217 (3) is a judicial function and that makes all the difference. This Court observed in the said case at pages 504-505 (of SCR): (at pp. 1105, 1106) thus:—

"It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Art. 217 (3) invested with judicial power of great significance which has bearing on the independence of the Judges of the higher Courts. The President is by Art. 74 of the Constitution the constitutional head who acts on the advice of the Council of Ministers in the exercise of his functions. Having regard to the very grave consequences resulting from even the initiation of an enquiry relating to the age of a Judge, our Constitution makers have thought it necessary to invest the power in the President. In the exercise of this power if democratic institutions are to take root in our country, even the slightest suspicion of appearance of misuse of that power should be avoided. Otherwise independence of the judiciary is likely to be gravely imperilled. We recommend that even in the matter of serving notice and asking for representation from Judge of the High Court where a question as to his age is raised, the President's Secretariat should ordinarily be the channel, that the President should have consultation with the Chief Justice of India as required by the Constitution and that there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India. Again we are of the view that normally an opportunity for an oral hearing should be given to the Judge whose age is in question, and the question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and the evidence against him after the same is disclosed to him. The President acting under Art. 217 (3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on col-

lateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. But this Court will not sit in appeal over the judgment of the President, nor will the Courts determine the weight which should be attached to the evidence. Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion."

1006. The power of appointment of a Judge of a High Court is an executive power and the analogy of Article 217 (3) is, therefore, inappropriate.

1007. The power of the Governor with regard to matters connected with appointment or dismissal of judicial officers was construed by this Court giving the final voice regarding such appointment or dismissal only to the Governor under Art. 233 of the Constitution notwithstanding the vesting of control over the subordinate judiciary in the High Court under Art. 235 in the case of the State of West Bengal v. Nripendra Nath Bagchi. (1966) 1 SCR 771 at pp. 789, 790: (AIR 1966 SC 447 at pp. 454, 455). In that case Hidayatullah, J. (as he then was) reconciled and interpreted Article 233, Art. 234, Art. 235 and Art. 311 thus:—

"That the Governor appoints District Judges and the Governor alone can dismiss or remove them goes without saying. That does not impinge upon the control of the High Court. It only means that the High Court cannot appoint or dismiss or remove District Judges. In the same way the High Court cannot use the special jurisdiction conferred by the two provisos. The High Court cannot decide that it is not reasonably practicable to give a District Judge an opportunity of showing cause or that in the interest of the security of the State it is not expedient to give such an opportunity. This the Governor alone can decide. That certain powers are to be exercised by the Governor and not by the High Court does not necessarily take away other

powers from the High Courts. The provisos can be given their full effect without giving rise to other implications. It is obvious that if a case arose for the exercise of the special powers under the two provisos, the High Court must leave the matter to the Governor. In this connection we may incidentally add that we have no doubt that in exercising these special powers in relation to inquiries against District Judges, the Governor will always have regard to the opinion of the High Court in the matter. This will be so whoever be the inquiring authority in the State. But this does not lead to the further conclusion that the High Court must not hold the enquiry any more than that the Governor should personally hold the enquiry.

There is, therefore, nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry if Article 235 vested such a power in it. In our judgment, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal, subject however to the conditions of service, to a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by cl. (2) of Art. 311 unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could have held the enquiry in this case. To hold otherwise will be to reverse the policy which has moved determinedly in this direction."

1008. Again in *Chandramouleshwar Prasad v. Patna High Court*, (1970) 2 SCR 666: (AIR 1970 SC 370) the power of appointment of District Judges exercisable by the Governor in consultation with the High Court arose for consideration. This Court recognised in that case that the power to appoint District Judges was vested with Governor but that such power could be exercised only after a full and effective consultation with the High Court. It held that if the

process of consultation was defective the appointment would become invalid. The Court did not, however, go to the extent of saying that any opinion expressed by the High Court was binding on the Governor.

1009. In *Samsher Singh v. State of Punjab* (1975) 1 SCR 814: (AIR 1974 SC 2192) which is a judgment of a Bench of seven learned Judges of this Court, Chief Justice Ray observed at page 843 (of SCR): (at p. 2209 of AIR) thus:—

"For the foregoing reasons we hold that the President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers. Where the Governor has any discretion, the Governor acts on his own judgment. The Governor exercises his discretion in harmony with his Council of Ministers. The appointment as well as removal of the members of the Subordinate Judicial Service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution. Appointments and removals of persons are made by the President and the Governor as the constitutional head of the executive on the aid and advice of the Council of Ministers. That is why any action by any servant of the Union or the State in regard to appointment dismissal is brought against the Union or the State and not against the President or the Governor."

1010. In the same case *Krishna Iyer, J.* with whom *Bhagwati, J.* agreed in his concurring judgment, has summed up the true legal position under Art. 74 and Art. 163 of the Constitution at page 875 (of SCR): (at p. 2230 of AIR) thus:—

"We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various Articles, shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well known

exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the Head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step."

1011. The above decision was delivered by this Court after a careful consideration of all aspects of constitutional law bearing on the point in the light of Art. 234 of the Constitution which entrusts the power of appointment of persons other than District Judges to the Judicial Service of a State to the Governor. In principle an appointment under Art. 217 (1) cannot be different from an appointment under Art. 234.

1012. The binding nature of an opinion expressed by an authority who has to be consulted before making an appointment of a Judge was disposed of by Chandrachud, C. J. in *Re. The Special Courts Bill, 1978* (1979) 2 SCR 476 at page 550 : (AIR 1979 SC 478 at p. 517) with the following words — ".....the process of consultation has its own limitations and they are quite well-known. The obligation to consult may not necessarily act as a check on an executive" Later on the learned Chief Justice again observed at pages 550-551 (of SCR): (at p. 518 of AIR):—

"Yet another infirmity from which the procedure prescribed by the Bill suffers is that the only obligation which cl. 7 imposes on the Central Government while nominating a person to preside over the Special Court is to consult the Chief Justice of India. This is not a proper place and it is to some extent embarrassing to dwell upon the pitfalls of the consultative process though, by hearsay, one may say that as a matter of convention, it is in the rarest of rare cases that the advice tendered by the Chief Justice of India is not accepted by the Government. But

the right of an accused to life and liberty cannot be made to depend upon pious expressions of hope howsoever past experience may justify them. The assurance that conventions are seldom broken is a poor consolation to an accused whose life and honour are at stake. Indeed, one must look at the matter not so much from the point of view of the Chief Justice of India, nor indeed from the point of view of the Government, as from the point of view of the accused and the expectations and sensitivities of the society."

1013. The substance of these observations is that the opinion expressed by the Chief Justice of India who has to be consulted before hand would not be binding as such on the executive. That was the reason for insisting upon in that case that the Government should appoint a Judge of the Special Court with the concurrence of the Chief Justice of India as otherwise there would have been no need for such insistence.

1014. The thesis that the Constitution prohibits the participation of the Executive in the appointment of Judges of superior courts and that the opinion of the Chief Justice of India alone should be binding on the President in such matters totally fails when we consider the question of appointment of the Chief Justice of India. Art. 124 (2) of the Constitution provides that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. From the above clause of Art. 124, it is obvious that when the appointment is to the post of the Chief Justice of India, it is not obligatory on the part of the President to consult any specified functionary. But he has to consult such of the Judges of the Supreme Court each one of whom may himself be an aspirant to the post and such other Judges of the High Courts he may consider necessary. In this situation, it is quite evident that the opinion of any one of the Judges who may be consulted cannot be treated as binding on the President. The power

of appointment rests with the President who has no doubt to take the decision on the advice given by the Council of Ministers after making the necessary consultation. When the 'primacy of judicial opinion' doctrine thus fails in the case of the appointment of the Chief Justice of India, it would not be appropriate to hold that it prevails in the case of appointments of other Judges of the Supreme Court and the Judges of the High Courts.

1015. Under Art. 217 (1) of the Constitution the President should, therefore, while making an appointment of a High Court Judge act on the advice of his Council of Ministers having due regard to the opinions expressed by the functionaries mentioned therein after a full and effective consultation. There is no scope for holding that either the Council of Ministers cannot advise the President on this matter or that the opinion of the Chief Justice of India is binding on the President although such opinion should be given due respect and regard.

1016. As a part of this very contention it is urged that the Executive should have no voice at all in the matter of appointment of Judges of the superior courts in India as the independence of the judiciary which is a basic feature of the Constitution would be in serious jeopardy if the executive can interfere with the process of their appointment. It is difficult to hold that merely because the power of appointment is with the executive, the independence of the judiciary would become impaired. The true principle is that after such appointment the executive should have no scope to interfere with the work of a Judge.

1017. In this connection out of curiosity I have looked into some of the books dealing with the modes of appointment of Judges in other countries. The methods by which Judges are chosen in the different countries of the world may be broadly classified according to Prof. J. W. Garner into three types — (1) election by the legislature, (2) election by the people and (3) appointment by the executive either absolutely or from a list of nominees presented by the courts or with the concurrence of an executive council or the upper chamber of the legislature. Choice by the legislature was a favour-

rite method of selection in the American States for sometime but this system has been abandoned in all the States except Rhode Island, Vermont, South Carolina and Virginia. In Switzerland the Judges of the federal tribunal are chosen by the legislative assembly of the federation. Election of Judges by the people was first introduced in France in 1790. With the advent of Napoleon this system was abolished as it had become discredited by them. In thirty eight of the States in the U. S. A. the method of popular election of Judges is the rule. In nearly all countries other than the United States of America, the Judges are appointed by the executive and even in the United States it is the method followed for the appointment of federal Judges and in six States for appointment of State Judges. In Belgium the Judges of the Court of Cassation are appointed from two lists of nominees each containing twice as many names as there are vacancies to be filled, one presented by the Court itself and another by the Senate. In France it is the custom when a vacancy occurs on the Bench it is for the President of the Court and the State's Attorney to propose the names of several persons to the Minister of Justice for his consideration. Generally he appoints one of the persons so recommended but sometimes for political reasons he prefers to follow the recommendations of a deputy, who may be an influential member of the Minister's party.

1018. In England the nominations to all vacancies among the superior Judges are made either by the Prime Minister or by the Lord Chancellor. The Prime Minister nominates the Law Lords, the Lords Justices of Appeal, the Lord Chief Justice, the Master of the Rolls and the President of the Probate Divorce and Admiralty Division. It is commonly assumed that the Prime Minister is guided by the Lord Chancellor. The ordinary Judges of the High Court often called puisne Judges are nominated by the Lord Chancellor. The Lord Chancellor is responsible for the lesser judicial appointments. (See R. M. Jackson, 'The Machinery of Justice in England' 1960 Edition p. 232).

1019. In his letter written by the end of 1951 of Morse Erskine, a member of the California Bar, Lord Jowitt who

was the Lord Chancellor in the Labour Government till October 1951, however, stated:—

"I think that I can fairly say that we have established a tradition in which "politics" and "influence" (in the appointment of judges) are now completely disregarded. The Lord Chancellor selects the man whom he believes to be the best able to fill the position. In my own case I had an unusually large number of appointments, and I can only recall appointing two men who were members of my own party.

You must remember these facts which help in establishing the tradition. The Inns of Courts are completely independent of any governmental control. The Lord Chancellor has always been a barrister, and must therefore be a member of one of the Inns. He is in close touch with all that goes on in his Inn of Court. How should I have felt if I had made a lot of unworthy appointments, when I noticed the cold looks that I should have received when next I went to lunch at the Inn.

Secondly, in practice, the Lord Chancellor would always consult with the Head of the Division to which he was called upon to appoint a Judge. If I had to appoint a Judge to the Queen's Bench Division, I should, in practice, always consult with the Chief Justice; if to the diverse Division, with the President, if to the Chancery Division, with the senior judge. In all my many appointments, I never in fact made one without the approbation of such a person. When it came to the Court of Appeal, I should consult the Master of the Rolls as to who was the most suitable person....."

(See 'The Life of the Law' Ed. by John Honnold. (1964) p. 270).

1020. Sir Albert Napier, the permanent secretary of the office of Lord Chancellor in a paper prepared in about the year 1963 said much the same thing as Lord Jowitt as follows:—

"The Lord Chancellor is the most appropriate Minister to advise on appointments and promotions for the very reason that he is a Judge and is qualified for that position by actual practice at the Bar. He knows by experience as an advocate the nature and degree of the knowledge and kind of

character and temperament which go to make the best judges. When he sits he hears eminent Barristers arguing before him. He is in almost daily touch as a Law Lord and a Benchman of his Inn, with the Lords of Appeal and other Judges and members of the Bar. The Bench of an Inn is a society where all are equal, and talk is free, and so far as precedence is necessary, it goes by date of election and not by rank. In such a society a bad appointment could not escape criticism, and if it were ever suggested to a Lord Chancellor that he should appoint or promote the wrong man for the wrong motive, he would know not only where his duty lay but that if he were to accede he would lose the respect of the whole profession." (See 'The Life of the Law' Ed. by John Honnold (1964) p. 270).

1021. The foregoing gives a fairly reliable picture of the English system of appointments of Judges. It is thus seen that in England the Judges are appointed by the Executive. 'Nevertheless, the judiciary is substantially insulated by virtue of rules of strict law, constitutional conventions, political practice and professional tradition from political influence.' (Vide Halsbury's Laws of England, Fourth Edition, Vol. 1 para 5).

1022. In Australia the Justices of the High Court and of the other courts created by the Parliament are appointed by the Governor-General in Council (See Sec. 72 (1) of the Commonwealth of Australia Constitution Act, 1900). The appointment of federal Judges is a cabinet matter which is formally ratified by the Executive Council. It is stated that the practice is that the Attorney-General would recommend to Cabinet persons for appointment though it is the Cabinet which will make the final decision.

1023. In Canada Judges of superior courts are appointed by the Governor-General. (Vide Section 96 of the British North America Act, 1867).

1024. In Japan, the Emperor appoints the Chief Judge of the Supreme Court as designated by the Cabinet and Judges other than the Chief Justice are appointed by the Cabinet.

1025. In India we have adopted the procedure contained in Art. 217 (1) of the Constitution for the appointment of Judges of the High Courts. We do not

find anything intrinsically wrong in this method. The process of consultation prescribed by Art. 217 (1) acts as a sufficient safeguard against the appointment of undesirable persons as Judges of the High Courts. Our experience has been that the independence of the judiciary has not in any way been impaired by reason of the President appointing Judges on the advice of his Council of Ministers after following the process of consultation prescribed in Art. 217 (1). This method appears to have been adopted so that the appointments of Judges may have ultimately the sanction of the people whom the Council of Ministers represent in a parliamentary form of Government. In that way only the Judges may be called people's Judges. If the appointments of Judges are to be made on the basis of the recommendations of Judges only then they will be Judges' Judges and such appointments may not fit into the scheme of popular democracy.

1026. As a corollary to the above contention, it is urged that an advocate or a member of the subordinate judiciary who is recommended by the Chief Justice of a High Court acquires a right to be appointed if his name is approved by the Chief Justice of India also and one of the learned counsel appearing in these cases said that such a person would be entitled to request the Court to issue a writ of mandamus compelling the President to appoint him as a Judge of the High Court. The soundness of this argument depends upon the process of appointment itself. Article 217 of the Constitution does not say in terms that the proposal for appointment of a person as a Judge should be initiated by the Chief Justice of the High Court. Let us assume for purposes of argument that he may initiate the proposal recommending the name of a person who according to him is qualified for the post. The Governor may or may not agree with the proposal. The Chief Justice of India may or may not agree with the proposal. Ultimately the appointing authority has to take a decision on the question. Under the scheme of Art. 217 the power to appoint a Judge of a High Court is vested in the President. While he is bound to consult the authorities mentioned therein and take into consideration their opinions, he is not bound by

their opinions. Ordinarily one does not expect the President to make an appointment by ignoring all the adverse opinions expressed by the functionaries mentioned in Art. 217. If there are conflicting opinions the President has to weigh them after giving due consideration to each of them and take a decision on the question. In any event it is difficult to hold that an advocate or a member of the Subordinate Judiciary whose name is approved by the Chief Justice of a High Court and the Chief Justice of India gets a vested right to be appointed as a Judge of a High Court. In fact he has no justiciable right at all. If for any reason he is not appointed he cannot move the Court to appoint him as a Judge of the High Court. The position of an additional Judge who is currently holding office and who is not reappointed stands on a slightly different footing and his case will be considered at the appropriate place.

PART VI

1027. The evolution of the system of appointing additional Judges in the High Courts for such period not exceeding two years as the President may specify needs to be examined now. Appointment of a Judge who is a member of the superior judiciary for such short period appears to be peculiar to our country. Such practice is not prevailing in the United Kingdom. Even in India we do not have Judges either in the Subordinate Judiciary or in the Supreme Court whose tenure is so short. We may have additional courts in the Subordinate Judiciary but they are manned by Judges belonging to regular judicial cadre, whose tenure is the same as the tenure of others in the cadre.

1028. Under Sec. 4 of the High Courts Act or the Charter Act, 1861 (24 & 25 Vict. c. 104) it was provided that all the Judges of the High Courts established under that Act held their offices during Her Majesty's pleasure provided that it was lawful for any Judge of a High Court to resign such office of Judge. Section 7 of that Act, however, provided that upon the happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice, the Governor-General in Council or Governor in Council as the case might be could appoint one

of the Judges of the High Court concerned to perform the duties of Chief Justice of that Court until some person was appointed to the office of the Chief Justice (this provision corresponds to Art. 223 of the Constitution). It also provided that upon the happening of a vacancy in the office of any other Judge of a High Court and during any absence of any such Judge or on the appointment of any such Judge to act as Chief Justice it was lawful to the Governor-General in Council or Governor in Council as the case might be to appoint a person with such qualifications as were required in persons to be appointed to the High Court to act as Judge of that Court and the person so appointed was authorised to sit and to perform the duties of a Judge of that Court until some person was appointed to the office of the Judge of that Court and had entered on the discharge of the duties of such office or until the absent Judge had returned from such absence or until the Governor-General in Council or Governor in Council as aforesaid saw cause to cancel the appointment of such acting Judge. (This provision corresponds to Art. 224 (2) of the Constitution. It may be noted that the President cannot cancel the appointment of an acting Judge under Art. 224 (2)).

1029. In the High Courts Act or the Charter Act, 1861, there was no provision for appointment of an additional Judge of a High Court with a restricted tenure as it is in Art. 224 (1) of the Constitution.

1030. Section 105 of the Government of India Act, 1915 contained almost the same provisions which were found in Sec. 7 of the High Courts Act or the Charter Act, 1861 providing for the appointment of acting Chief Justice and acting Judges. But Sec. 101 of the 1915 Act however made provision for the appointment of additional Judges. Sub-sec. (2) of Sec. 101 stated that each High Court should consist of a Chief Justice and as many other Judges as His Majesty might think to appoint. Clause (i) of the proviso to that sub-section authorised the Governor-General-in-Council to appoint persons to act as Additional Judges for such period not exceeding two years. Such provision for the appointment of additional Judges of High Courts appears

to have been made by this Act for the first time.

1031. Section 220 of the Government of India Act, 1935 as it was originally enacted provided that every High Court was to consist of a Chief Justice and such other Judges as His Majesty might from time to time consider it necessary to appoint. It further provided that the Judges so appointed together with any additional Judges appointed by the Governor-General in accordance with law could at no time exceed in number such maximum number as His Majesty in Council might fix in relation to the High Court concerned. Under the Government of India Act, 1935, every Judge of a High Court held his office until he attained the age of sixty years provided that he would cease to be a Judge of the High Court if any of the events mentioned in the proviso to Sec. 220 (2) happened earlier. Sec. 220 of the Government of India Act, 1935 underwent subsequently slight modifications which are of no materiality for the present purpose. Sec. 222 of the Government of India Act, 1935 which provided for the appointment of temporary and additional Judges of a High Court read immediately prior to the commencement of the Constitution as follows :

"222. (1) If the office of Chief Justice of a High Court becomes vacant, or if any such Chief Justice is by reason of absence, or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other Judges of the court as the Governor-General may in his discretion think fit to appoint for the purpose.

(2) If the office of any other judge of a High Court becomes vacant, or if any such judge is appointed to Act temporarily as a Chief Justice, or is by reason of absence, or for any other reason, unable to perform the duties of his office, the Governor-General may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of that Court, and the person so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be

deemed to be a judge of that Court until some person appointed by His Majesty to the vacant office has entered on the duties thereof or until the permanent judge has resumed his duties.

(3) If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such Court it appears to the Governor-General that the number of the judges of the Court should be for the time being increased, the Governor-General in his discretion may, subject to the foregoing provisions of this chapter with respect to the maximum number of judges appoint persons duly qualified for appointment as judges to be additional judges of the Court for such period not exceeding two years as he may specify."

1032. Article 166 of the Draft prepared by the Constitutional Adviser more or less adopted the language of S. 222 of the Government of India Act, 1935 with some modifications. The Drafting Committee, however, redrafted Art. 166 of the Draft Constitution prepared by the Constitutional Adviser by splitting it into two articles i.e. Arts. 198 and 199. The redrafted Arts. 198 and 199 of the Draft Constitution read as follows :

"198. (1) When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the court as the President may appoint for the purpose.

(2) (a) When the office of any other judge of a High Court is vacant or when any such judge is appointed to act temporarily as a Chief Justice or is unable to perform the duties of his office by reason of absence or otherwise, the President may appoint a person duly qualified for appointment as a judge to act as a judge of that court.

(b) The person appointed shall, while so acting, be deemed to be a judge of the Court.

(c) Nothing contained in this clause shall prevent the President from revoking any appointment made under this clause.

199. If by reason of any temporary increase in the business of any High

Court or by reason of arrears of work in any such court, it appears to the President that the number of the judges of the court should be for the time being increased, the President may, subject to the foregoing provisions of this Chapter with respect to the maximum number of judges, appoint persons duly qualified for appointment as judges to be additional judges of the court for such period not exceeding two years as he may specify."

1033. The Drafting Committee also introduced one more Article i. e. Art. 200 providing for the attendance of retired Judges at sittings of High Courts which conformed to the practice in the United Kingdom and the United States of America. That Article read:

"200. Notwithstanding anything contained in this Chapter, the Chief Justice of a High Court may at any time, subject to the provisions of this Article request any person who has held the office of a judge of that court to sit and act as a judge of the court, and every such person so requested shall, while so sitting and acting, have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a judge of that court:

Provided that nothing in this Article shall be deemed to require any such person as aforesaid to sit and act as a judge of that court unless he consents so to do".

1034. At the conference of the Federal Court Judges and Chief Justices of the High Courts which met in March, 1948, it was recommended that Art. 198 (2) (c) of the Draft Constitution which empowered the President to revoke the appointment of an acting judge appointed under Art. 198 (2) (a) should be omitted.

1035. The Drafting Committee received at this juncture a number of representations to delete the Article providing for the appointment of additional Judges and acting Judges. The comments of Tej Bahadur Sapru on the practice of additional Judges or acting Judges resuming practice after a short stay on the Bench were telling. He said:

"Additional judges, under the old Constitution, were appointed by the Governor-General for a period not exceeding two years. I do not know whe-

ther that condition has been reproduced in the proposed Constitution. This prohibition, however, does not apply to acting judges or temporary judges. I think the rule in future should be that any barrister or advocate, who accepts a seat on the Bench, shall be prohibited from resuming practice anywhere on retirement. I would not, however, apply this to temporary judges taken from the Services, who hold a seat on the Bench for a few months, but I would add that the practice of appointing additional and temporary judges should be definitely given up. When I said at the Round Table Conference that there were acting, additional and temporary judges in India, some of the English lawyers not accustomed to Indian law felt rather surprised. I am also of the opinion that temporary or acting judges do greater harm than permanent judges, when after their seat on the Bench for a short period they revert to the Bar. A seat on the Bench gives them a pre-eminence over their colleagues and, embarrasses the subordinate judges who were at one time under their control and thus instead of their helping justice they act as a hindrance to free justice. I have a very strong feeling in this matter and have during my long experience seen the evil effects of unchecked resumption of practice by barristers and advocates".

(B. Shiva Rao : 'The Framing of India's Constitution' Vol. IV pp. 172-173).

1036. In October, 1948, the Drafting Committee decided to drop both Article 198 (2) and Article 199 providing for the appointment of acting and additional Judges. It was of the view that it was 'possible to discontinue the system of appointment of temporary and additional Judges in High Courts altogether by increasing, if necessary, the total number of permanent Judges of such courts'. On June 7, 1949 after hearing the plea of Dr. B. R. Ambedkar 'that all Judges of the High Court shall have to be permanent', the Constituent Assembly adopted the recommendation of the Drafting Committee to delete Arts. 198 (2) and 199 of the Draft Constitution providing for the appointment of acting and additional Judges in High Courts. Accordingly the Drafting Committee deleted reference to appointment of acting and additional Judges altogether in the revised Draft Constitution

submitted to the Constituent Assembly on November 3, 1949 but retained only those provisions relating to appointment of acting Chief Justice and attendance of retired Judges at sittings of High Courts. In the Constitution as it was enacted finally by the Constituent Assembly there were provisions for appointment of Chief Justice, Judges, acting Chief Justices and attendance of retired Judges at the sittings of the High Court. (Vide Art. 217, Art. 223 and Art. 224). There was no provision for the appointment of acting or additional Judges. Since it was felt that the working of Article 224 as it was originally enacted which provided for the attendance of retired Judges at sittings of High Courts was not satisfactory and that there was need to introduce provisions for appointment of acting and additional Judges as it obtained in subsecs. (2) and (3) of S. 222 of the Government of India Act, 1935, by the Constitution (Seventh Amendment) Act, 1956, Art. 224 was substituted by the new Art. 224 which read thus :

"224. (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting judge of a High Court shall hold office after attaining the age of sixty years".

1037. Article 217 (1) was simultaneously amended in order to make the procedure of the appointment of permanent Judges applicable to additional and acting Judges too. After amendment, Art. 217 (1) reads :

"217. (1) Every Judge of a High Court shall be appointed by the Pre-

sident by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office in the case of an additional or acting Judge, as provided in Art. 224 and in any other case until he attains the age of sixty years....."

1038. The original Art. 224 which was replaced by the new Art. 224 was again reintroduced as Art. 224A by the Constitution (Fifteenth Amendment) Act, 1963 again providing for the attendance of retired Judges at sittings of High Courts. Simultaneously Art. 271 (1) was amended substituting "sixty two years" in the place of "sixty years" in it. Clause (3) of Art. 224 was also amended by substituting "sixty two years" in the place of "sixty years". This completes the history of Art. 224 of the Constitution.

1039. What is the true meaning of Art. 224 (1)? It empowers the President to appoint duly qualified persons to be additional Judges, if it appears to him by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein that the number of Judges of that Court should for the time being be increased. The two occasions when an additional Judge can be appointed are those mentioned in Art. 224 (1) of the Constitution, namely, (i) a temporary increase in its business or (ii) accumulation of arrears of work in the High Court concerned. Art. 224 (1) is not, therefore, intended for meeting a situation where the work of the High Court is gradually on the increase requiring the appointment of more number of permanent Judges. The reasons for the increase in the work of the High Courts according to the Fourteenth Report of the Law Commission were:

"The problem of arrears in the High Courts must in our opinion be viewed against the very large increase in the work of these courts in recent years, particularly during the period following the Constitution. Two main causes of this increase need mention. Firstly, the growing volume of ordinary litigation following the economic and industrial development of the country, has considerably added to the normal work of

all the Courts. We append a Table (Table 1) showing the extent of the increase under various heads. Secondly, there has been an expansion of the High Courts' special jurisdiction under a variety of fiscal enactments like the Income-tax and Sales Tax Act and other special laws. The fact of such expansion was noticed by the High Courts Arrears Committee as far back as 1949. A very recent example of the conferment of the special jurisdiction on the High Courts will be found in the Representation of the People Act by which the High Court is empowered to hear appeals from the decisions of Election Tribunal.

The fundamental rights conferred by the Constitution and resort to the remedies provided for their enforcement have contributed largely to the increase in the volume of work in the High Courts. Applications for the enforcement of fundamental rights, applications seeking to restrain the usurpation of jurisdiction by administrative bodies and applications or suits challenging the constitutionality of laws have made large additions to the pending files of the High Courts. It has to be observed that many laws have come in for challenge in the Courts on the ground of their inconsistency with the Constitution. The complexity of recent legislation has resulted in a large number of novel and difficult questions having been brought before the High Courts. Their decisions have not only taken longer time, but have led not infrequently to references to Full Benches which necessarily divert the available judge-power from what may be called normal judicial work. As a result of this large addition to their work, the disposal of ordinary civil and criminal work in the High Courts has suffered very considerably. This increase of work and its specially difficult and novel character can well be regarded as an important cause of the accumulation of old cases".

(Vide paragraphs 2 and 3 in Chapter 6 of Vol. I of the Fourteenth Report of the Law Commission).

1040. These observations were made in 1958. There are more reasons now for the increase in the work of the High Courts.

1041. The Law Commission in paragraphs 54 and 57 of Chap. 6 in Volume I

of its Fourteenth Report recommended thus :

"54. The large increase in the volume of annual institutions which has been referred to earlier must now, we think, be taken as a permanent feature. This position accordingly necessitates a thorough revision of existing ideas regarding the number of judges required for each High Court. The strength of some of the High Courts has been increased from time to time. In doing this, however, the post-Constitutional developments which have thrown a much heavier burden on the High Courts have, in our view, not been adequately taken into account. To expect the existing number of judges in the various High Courts to deal efficiently with the vastly increased volume of work is, in our opinion, to ask them to attempt the impossible. As pointed out to us by a senior counsel, if there is a congestion on the roads due to an increase in traffic, the remedy is not to blame the traffic but to widen the roads.

The first essential therefore, is to see that the strength of every High Court is maintained at a level so as to be adequate to dispose of what may be called its normal institutions. The normal strength of a High Court must be fixed on the basis of the average annual institutions of all types of proceedings in a particular High Court during the last three years. This is essential in order to prevent what may be termed the current file of the Court falling into arrears and adding to the pile of old cases. The problem of clearing the arrears can be satisfactorily dealt with only after the normal strength of each Court has been brought up to the level required to cope with its normal institutions. We suggest that the required strength of the High Court of each State should be fixed in consultation with the Chief Justice of that State and the Chief Justice of India and the strength so fixed should be reviewed at an interval of two or three years. Such a review will be necessary not only by reason of changing conditions but because the implementation of our recommendations made elsewhere will lead to a quicker disposal of work in the subordinate courts which, in its turn, will result in

an increase in the work of the High Courts.

57. We are of the view that the provisions of Article 224 of the Constitution should be availed of and additional judges be appointed for the specific purpose of dealing with these arrears. The number of such additional judges required for each High Court for the purpose of dealing with the arrears will have to be fixed in consultation with the Chief Justice of India and the Chief Justice of the State High Court after taking into consideration the arrears in the particular court, their nature and the average disposal of that court. The number of additional judges to be fixed for this purpose should be such as to enable the arrears to be cleared within a period of two years. The additional judges so appointed should, in our view, be utilised as far as possible exclusively for the purpose of disposing of arrears and not be diverted to the disposal of current work. *Pari passu* with the disposal of the arrears, the permanent strength of the High Court will have to be brought up to and maintained at the required level, care being taken to see that their normal disposal keeps pace with the new institutions and that they are not allowed to develop into arrears. The appointment of additional Judges for the exclusive purpose of dealing with the arrears is, in our view, called for in a large number of High Courts".

1042. The practice that grew in the High Courts was, however, different. Art. 224 (1) was treated as the gateway through which almost every Judge had to pass before being made permanent. It is indeed disturbing to notice that some Judges before they were made permanent had functioned as additional Judges for nearly five years.

1043. Article 217 (1) of the Constitution lays down the procedure to be followed in making the appointment of a Judge of a High Court. The President can appoint a High Court Judge after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. Art. 217 (1) as it was originally enacted referred to the appointment of permanent Judges only as there was no provision in the Constitution then to the appointment of

additional or acting Judges. When the new Article 224 of the Constitution was substituted in the place of the original Article 224 by the Constitution (Seventh Amendment) Act, 1956 providing for the appointment of additional and acting Judges, Art. 217 (1) also was amended requiring the appointment of additional and acting Judges also in the same manner, the only distinction maintained between the permanent Judges and the additional and acting Judges being the one relating to their tenure. A permanent Judge is entitled to be in office till he attains the age of sixty two years whereas the tenure of an additional or acting Judge is as specified by the President under Article 224 (1) or Art. 224 (2) of the Constitution as the case may be. It is, however, to be noted that the Constitution does not prescribe any difference in the mode of appointment of a permanent Judge or of an additional or an acting Judge. All of them should satisfy the same tests as to their fitness to be appointed as Judges irrespective of the

(Contd. on Col. 2)

fact whether they are appointed as permanent Judges or as additional or acting Judges. We shall hereafter confine our attention to the appointment of permanent Judges and additional Judges only.

1044. Article 216 of the Constitution reads :

"216. Every High Court shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint."

1045. It is well known that with the increase of the population and the number of laws and with the changes brought about in the economic, social and political life of the people, litigation in all courts has been continuously increasing. Naturally the number of cases filed in the High Courts which happen to be the highest courts in the case of a large number of matters have gone on growing. From the statements filed on behalf of the Central Government along with the affidavit dated Aug. 29, 1981 of Shri T. N. Chaturvedi, Secretary (Justice), Government of India, the following facts emerge :

	As on 31-12-1978	As on 31-12-1979	As on 31-12-1980
(a) The total number of main cases pending.	6,13,799	6,17,239	6,78,951
(b) Average disposal of main cases per Judge per year during the years 1978, 1979 and 1980.		860	
		Sanctioned strength	Actual strength
(c) The sanctioned strength of permanent Judges in all the High Courts as on 18-3-1981.		308	
(d) The actual strength of permanent Judges in all the High Courts as on 18-3-1981.			277
(e) The sanctioned strength of additional Judges in all the High Courts as on 18-3-1981.		97	
(f) The actual strength of additional Judges in all the High Courts as on 18-3-1981.			43
		405	320

1046. Hence on March 18, 1981 in all there were 320 Judges (permanent and additional) in all the High Courts. At the average rate of 860 main cases per year per Judge, 320 Judges can dispose of about 2,75,200 cases per year. To dis-

pose of the arrears of cases as on 31-12-1980 they need approximately four years since many of them are bound to be heavy Division Bench matters which consume a lot of time. Of them it may be noted that 2,59,827 cases were more

than two years old as on 31-12-1980. The fresh institutions in all the High Courts are also on the increase. Fresh cases instituted in all the High Courts were 4,85,880, 530,614 and 5,55,719 respectively in the years 1978, 1979 and 1980. If the total average disposal of all the existing Judges per year is only 2,75,200 cases then twice the number of existing Judges would be needed even to dispose of the new cases instituted every year having regard to the institutions in the year 1980, let alone the backlog of nearly 7,00,000 of cases. It is thus clear that the number of Judges in the High Courts, both permanent and additional is wholly inadequate to cope up with the situation which has arisen more on account of delay in filling up existing vacancies and on account of not increasing the strength of Judges of the High Courts to the requisite number from time to time. There appear to be some discrepancies in the statistics furnished in these cases. But it is admitted by the Government that they need at least 150 more additional Judges in addition to the sanctioned strength of 308 permanent Judges and 97 additional Judges to clear off the arrears in two years.

1047. Article 216 of the Constitution requires the President to appoint necessary number of Judges in each High Court. The word 'necessary' in Article 216 is a crucial one. It imposes a duty on the President to review the strength of Judges in each High Court from time to time and to increase the number of Judges as an when it is necessary. No steps appear to have been taken to do so properly and that is the reason why we have reached these staggering arrears. In the present situation, it appears, there should be at least 600 permanent Judges to fight the problem of arrears. If in any given High Court the arrears come down, then fresh appointments in that High Court may not be made. But steps have to be taken to appoint immediately at least 200 more Judges after making all the existing additional Judges permanent. In this state of affairs, it is difficult to understand as to why Judges are being appointed even now as additional Judges only for a period of two years or for lesser periods. When it is not disputed that a Judge appointed

under Art. 224 (1) of the Constitution is not a Judge on probation, what is the advantage of appointing additional Judges when there is need to appoint more permanent Judges? Surely there is no financial gain to the Government as the expenditure involved is almost the same whether a Judge is an additional Judge or a permanent Judge. On the other hand, the appointment of additional Judges even where permanent Judges are needed leads to two important disadvantages. First, the periodic processing of the papers relating to the renewal of the term of an additional Judge consumes a lot of time of the high functionaries who have to be consulted under Art. 217 (1). Secondly, an additional Judge concerned will not be able to deal with the matters as independently as a permanent Judge can. Because the conduct of an additional Judge would become subject to scrutiny by the Chief Justice of the High Court, the Governor, the Chief Justice of India and the President in connection with his reappointment just when his tenure specified under Art. 224 (1) is about to come to a close, it is natural that he would not be able to deal with the matters placed before him without fear of incurring the displeasure of any one of them. We have to bear in mind that the State and the Central Governments are the biggest litigants in every High Court and orders passed by an additional Judge are sure to displease them in one way or the other. It is no doubt true that an additional Judge takes the oath of office to deal with the matters without fear or favour, and affection ill-will, but we should remember that he is after all a human being. If an advocate who is at the age of about 45 years, is appointed as an additional Judge for two years, what should he do if at the end of two years he is dropped on the ground that he is not fit for being continued as a Judge? Having burnt his boats at the Bar, should he make fresh efforts to re-establish himself in the Bar? Will not his position be made more difficult if he is sent back with a label that he was not found fit to be continued as a Judge? Similarly in the case of a District Judge who is promoted as a High Court Judge, should he go back as a District Judge at the

end of the tenure fixed under Art. 224 (1)? Probably having in view all these difficulties at the time when the Constitution was enacted, no provision was made for appointing additional Judges. It was no doubt introduced in 1956 to meet emergencies arising out of sudden increase in arrears of cases. Art. 224 (1) was never intended for appointing almost every Judge first as an additional Judge and then as a permanent Judge. A perusal of the list of Judges of the High Courts maintained by the Government shows that not less than 4/5ths of the Judges have been initially appointed as additional Judges and then as permanent Judges. Only 1/5th of them are appointed as permanent Judges initially. This may be due to the existence of vacancies in the permanent strength when they were appointed as Judges. The sanctioned strength of permanent Judges, however, at no time represented the true position as it is found that always the permanent strength fell short of the requisite number. This is not a happy position at all but this is not all. Judges whose tenure is not assured as in the case of permanent Judges but whose continuance in office after the specified period is subject to the will of any other authority generally do not inspire confidence in the litigant public also. The decision of this Court in *Krishan Gopal v. Prakash Chandra*, (1974) 2 SCR 206: (AIR 1974 SC 209) supports this statement. That was a case where the appellant had questioned the jurisdiction of a retired Judge of the Madhya Pradesh High Court who had been requested to function as Judge under Art. 224A of the Constitution to try an election petition. This Court negatived that contention of the appellant holding that a retired Judge functioning under Article 223A had all the powers and jurisdiction of a sitting Judge. This Court also negatived another contention of the appellant which had been urged in support of the appeal. The appeal should have, therefore, been dismissed. The operative part of the judgment, however, was entirely different. It reads at page 215 (of SCR): (at p. 216 of AIR) thus:—

"The two legal contentions which have been advanced on behalf of the appellant in our opinion, are not well founded, and we have no hesitation to

repel them. All the same, looking to the special facts and circumstances of this case, we are of the opinion that it is fit and proper and in the interest of justice that the election petition filed by the appellant be tried by another learned judge of the High Court who may be assigned for the purpose by the Chief Justice of that Court. It seems indeed desirable that election petitions should ordinarily, if possible, be entrusted for trial to a permanent judge of the High Court, even though we find that additional or acting judges or those requested under Article 224A of the Constitution to sit and act as judges of the High Court, if assigned for the purpose by the Chief Justice, are legally competent to hear those matters. We therefore, set aside the order dated Aug. 10, 1973. The election petition filed by the appellant shall now be heard by a permanent judge who may be assigned for the purpose by the learned Chief Justice. The case may, therefore, be placed before the learned Chief Justice for necessary orders. The appeal is accepted accordingly. The parties in the circumstances shall bear their own costs of this Court and in the High Court". (Emphasis added)

1048. What does this decision mean? Additional or acting Judges appointed under Art. 224 (1) and (2) or retired Judges requested under Art. 224A of the Constitution are looked at with suspicion even by this Court. Why? The reason is obvious. This Court felt that cases like election petitions which had political overtones should not be entrusted to additional Judges or acting Judges whose tenure was dependent upon the pleasure of the Government which had the power to withhold its consent to the fresh appointments of the Judges concerned to be made at the end of the period specified under Art. 224. Is this not sufficient to hold that by constantly resorting to Art. 224 (1) where it could not be done, the Government has created a second class of Judges in the High Courts even though as we are aware their integrity, character and erudition are beyond question? The answer has to be in the affirmative.

1049. The appointment of a retired Judge whose tenure was at the pleasure of the Government to try criminal cases was found to be violative of Art. 21 of the Constitution by Chandrachud, C. J. in *In re. The Special Courts Bill, 1978's case* (AIR 1979 SC 478) (supra). In that connection, the learned Chief Justice observed at pages 549-550 (of SCR): (at p. 517 of AIR) thus:—

"The second infirmity from which the procedural part of the Bill suffers is that by clause 7, Special Courts are to be presided over either by a sitting Judge of a High Court or by a person who has held office as Judge of a High Court to be nominated by the Central Government in consultation with the Chief Justice of India. The provision for the appointment of a sitting High Court Judge as a Judge of the Special Court is open to no exception. In so far as the alternate source is concerned, we entertain the highest respect for retired Judges of High Courts and we are anxious that nothing said by us in our judgment should be construed as casting any aspersion on them as a class. Some of them have distinguished themselves as lawyers once again, some as members of administrative tribunals, and many of them are in demand in important walks of life. Unquestionably they occupy a position of honour and respect in society. But one cannot shut one's eyes to the constitutional position that whereas by Article 217, a sitting Judge of a High Court enjoys security of tenure until he attains a particular age, the retired Judge will hold his office as a Judge of the Special Court during the pleasure of the Government. The pleasure doctrine is subversive of judicial independence.

A retired Judge presiding over a Special Court, who displays strength and independence may be frowned upon by the Government and there is nothing to prevent it from terminating his appointment as and when it likes. It is said on behalf of the Government that if the appointment has to be made in consultation with the Chief Justice of India, the termination of the appointment will also require similar consultation. We are not impressed by that submission. But, granting that the argument is valid, the process of consultation has its own limitations and they

are quite well-known. The obligation to consult may not necessarily act as a check on an executive which is determined to remove an inconvenient incumbent. We are, therefore, of the opinion that clause 7 of the Bill violates Article 21 of the Constitution to the extent that a person who has held office as a Judge of the High Court can be appointed to preside over a Special Court, merely in consultation with the Chief Justice of India".

1050. This again supports the view that the present practice of appointing almost all the High Court Judges initially under Art. 224 (1) and later on as permanent Judges is not conducive to the independence of judiciary.

1051. It is important to bear in mind that the independence of the judiciary is one of the central values on which our Constitution is based. No other constitutional agency is shielded as are the superior courts in our country with so many built-in safeguards. The judges can, if they choose to, be guided by the doctrine of conscience only while discharging their duties. They are not expected to be under any kind of external pressure. They are circumscribed by 'expectations of neutrality and impartiality' and by the traditions of the legal profession which is always keeping a watchful eye on every action of a Judge. In all countries where the rule of law prevails and the power to adjudicate upon disputes between a man and a man, a man and the State, a State and a State, and a State and the Centre, is entrusted to a judicial body, it is natural that such body should be assigned a status free from capricious or whimsical interference from outside and the judges who constitute it should be granted a security of tenure that lifts them above the fear of acting against their conscience.

1052. Lord Chief Justice Sir Edward Coke is remembered with gratitude by all who cherish the independence of the judiciary as an inviolable part of a democratic Government. 'That when all the other judges basely succumbed to the mandate of a sovereign who wished to introduce despotism under the forms of judicial procedure, Chief Justice Coke did his duty at the sacrifice of his office'. The extract from 12 Coke, 63 which is found at pages 271

and 272 of the 'The Lives of The Chief Justices of England' by J. L. Campbell, Vol. I (1849) shows the courage with which Coke, C. J. resisted the attempts of King James I to interfere with the judicial proceedings. Archbishop Bancroft suggested that in order to curb the independence of Lord Coke the King himself should commence to decide whatever cause he pleased in his own person. Accordingly the King summoned all the Judges before him and his Council to know what they had to say against the said proposal. Coke, C. J. said :

"By the law of England, the King in his own person cannot adjudge any case, either criminal, as treason, felony, or betwixt party and party concerning his inheritance or goods; but these matters ought to be determined in some court of justice....."

Hearing this, King James asked :

"My Lords, I always thought, and by my soul I have often heard the boast, that your English law was founded upon reason. If that be so, why have not I and others reason as well as you the Judges?"

Coke, C. J. replied :

"True it is, please your Majesty, that God has endowed your Majesty with excellent science as well as great gifts of nature; but Your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this your realm of England, and I crave leave to remind Your Majesty that causes which concern the life or inheritance, or goods or fortunes, of your subjects are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before a man can attain to the cognizance of it. The law is the golden met-wand and measure to try the causes of your Majesty's subjects, and it is by the law that Your Majesty is protected in safety and peace."

1053. The foregoing demonstrates the true role of a Judge in a country where rule of law prevails.

1054. Speaking on the Judge's Remuneration Bill in the House of Commons in March, 1954 Sir Winston Churchill, the then Prime Minister of England observed in the course of his speech thus :

"The principle of the complete independence of the Judiciary from the Executive is the foundation of many things in our island life. It has been widely imitated in varying degrees throughout the free world. It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule. The only subordination which a judge knows in his judicial capacity is that which he owes to the existing body of legal doctrine enunciated in years past by his brethren on the bench, past and present, and upon the laws passed by Parliament which have received the Royal Assent. The judge has not only to do justice between man and man. He also — and this is one of his most important functions considered incomprehensible in some large parts of the world — has to do justice between the citizens and the State. He has to ensure that the administration conforms with the law, and to adjudicate upon the legality of the exercise by the Executive of its powers. The relations between the Judiciary and the Legislature are also exceptional and privileged. Parliament has deliberately maintained the judges in a special position, not only by charging their salaries to the Consolidated Fund so that they do not fall within the annual scrutiny of Parliament, but also by eschewing any claim to criticise a judge's conduct in his judicial capacity except on a specific Motion for an Address to the Crown for the judge's removal. That has worked, as far as one can see, without any adverse comment as long as any of us can remember.

Parliament has a vital interest in the efficiency and the integrity of the bench because Parliament and the Judiciary are interdependent and, from different angles, they exercise and enforce their control upon the Executive. Parliament decides what the law shall be and the judges decide what, in fact, Parliament has made it. The labours of Parliament in enacting the law depend for their effectiveness very largely on the fact that there is behind Parliament an independent judiciary applying and enforcing the law with high integrity and a great measure of commonsense and knowledge of daily life, and with high professional skill, and applying it in conformity with the intentions of Parliament. Perhaps only those who have led the life of a judge can know

the lonely responsibility which rests upon him. In criminal cases, and in some civil cases, he may have the assistance of a jury, but it is on his shoulders that even in these cases the heaviest burden lies. In other cases in which the honour and fortune of citizens are at stake, he has the sole responsibility of decision, and a heavy one it must be.

The service rendered by judges demands the highest qualities of learnings, training and character. These qualities are not to be measured in terms of pounds, shillings and pence according to the quantity of work done. A form of life and conduct far more severe and restricted than that of ordinary people is required from judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct." (Parliamentary Debates — Commons (1953-54) Vol. 525 at p. 1062).

1055. Moving the very same Bill in the House of Lords the Marquess of Salisbury described the high esteem in which Parliament regarded the judiciary thus :

"But even Parliament has put Judges in a very special position. It has taken the precaution, as we all know, of charging their salaries on the Consolidated Fund, so that they are not subject to the annual scrutiny of Parliament; it has also eschewed the right to criticise Judges in their judicial capacity. Parliament, which represents the British people, the whole electorate of the country, has throughout history been at special pains to protect the independence of the Judiciary. This, I should have thought, was both natural and right. After all, the legislation that rules our lives is, in fact, the joint creation of Parliament and the Bench; Parliament decides what the law ought to be, and the Bench decides what in fact it is. As I see it the work of Parliament largely depends for its effectiveness on the fact that both Parliament itself and the individual citizens of the country know there is behind it the Judiciary, which not only applies and enforces the law, but interprets it, where necessary, with high integrity and vast professional skill. I imagine that there can be no profession where professional skill based on long experi-

ence is more necessary than in the case of the Judiciary." (Parliamentary Debates — Lords (1953-54) Vol. 186 at p. 1019).

1056. The foregoing shows the importance of the independence of the Judiciary in our body-Politic.

1057. The next point which requires to be examined is whether an additional Judge who is appointed for a specified term and who is not reappointed after the expiry of the said term can complain before a court of law about his non-appointment. In other words whether such an additional Judge has any judicial remedy at all if he is aggrieved by the Government not appointing him as additional Judge for a further term or as a permanent Judge is the question which has to be considered here. Ordinarily wherever there is a right there should be a remedy, otherwise the right would be without meaning. On a fair construction of Art. 224 (1) of the Constitution which enables the President to appoint an additional Judge for a period not exceeding two years and of Art. 217 (1) of the Constitution which limits the tenure of an Additional Judge appointed to the period specified under Article 224 (1), it is not possible to make a declaration that an additional Judge should be deemed to have been appointed as a permanent Judge on the ground that when his appointment was made under Art. 224 (1) it was necessary for the President to appoint a permanent Judge in view of the quantum of work pending in the High Court concerned and not an additional Judge. The warrant of appointment has to be construed in accordance with the unequivocal language in which it is couched and nothing more can be read into it. The Constitution does not confer any right upon an additional Judge to claim, as of right, that he should be appointed again either as a permanent Judge or as an additional Judge. There is no such enforceable right. A court of law has no power to give effect to any right not recognised by law. It is also not the function of a court of justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights. It seems to be a very formidable proposition indeed to say that any court has a right to enforce what may seem to it to be

just, apart from the Constitution and the laws.

1058. As an aid to the construction of the relevant Articles of the Constitution and in particular Art. 217, and Art. 224 of the Constitution, it is urged, that the British constitutional convention regarding the tenure of Judges should be adopted. Elaborating this contention, it is urged that in England there are no Judges who may be equated with additional or acting Judges. "All the superior Judges other than the Lord Chancellor hold office during good behaviour subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament." This has been the accepted legal position since the Act of Settlement 1700 and it is so formulated with the object of securing the independence of the judiciary. By a constitutional convention the procedure for removal of a Judge by the presentation of an address has been evolved. Since the independence of the judiciary is an integral part of the scheme of the Indian Constitution it is argued that whatever constitutional conventions are prevalent in England whose system we have adopted in creating an independent judiciary free from executive interference should be followed while interpreting the words of Art. 217 and Article 224 of the Constitution. It is argued that when once a Judge is appointed to the High Court under Art. 224 (1) of the Constitution as an additional Judge by following the procedure of consultation prescribed in Art. 217, he should either be appointed as a permanent Judge if a vacancy arises before the end of his tenure fixed pursuant to Art. 224 (1) which cannot exceed a period of two years or reappointed as an additional Judge before the end of that period if the arrears of work in the Court to which he is appointed is such that there is a need to have an additional Judge for a further period. It is urged that when the occasion to appoint such additional Judge as a permanent Judge or as an additional Judge, as the case may be, arises even though consultation with the functionaries specified in Art. 217 of the Constitution should again be followed, the consultation on that occasion should be limited to the existence of a vacancy of a permanent Judge or the existence

of arrears, as the case may be, and not to any other question which may be relevant at the time of the initial appointment. In other words, the argument is that the consultation on the second occasion cannot relate to the capacity, integrity, behaviour etc. of the additional Judge and any other view, according to the petitioners, would be opposed to the spirit of the constitutional convention which should be followed in such a case as otherwise the whole process would be vitiated on account of the scope it gives for executive interference. Alternatively, it is urged that since almost all the additional Judges appointed after 1956 have been later on absorbed as permanent Judges, it should be held that a constitutional convention to appoint every additional Judge as a permanent Judge has come into existence and that such convention should be enforced by courts.

1059. About the applicability of the principle of judicial independence embodied in the provisions relating to the tenure of judges in the Act of Settlement, 1700, reference may be made here to *Terrell v. Secretary of State for the Colonies* (1953) 2 QB 482 in which a similar contention was urged in support of the case of the claimant therein. In 1930, the claimant, then in his 49th year was offered an appointment as a puisne Judge of the Supreme Court in Malaya. By a letter written on behalf of the Secretary of State, the claimant was informed that the qualifying terms for a pension was seven years and that the compulsory retiring age in the case of a Judge was 62, and the claimant accepted the appointment on those terms. In 1942, while the claimant was on leave in Australia, Malaya was occupied by the enemy and the Letters Patent appointing the claimant, of which there was no copy and those relating to other Judges, were lost or destroyed. On April 7, 1942, the claimant was informed that the Secretary of State could not justify retaining him now that his post was necessarily in abeyance and there was no alternative but to award him pension on abolition of his office and the claimant's appointment, accordingly, ended on July 7, 1942, 17 months before his 62nd birthday. On the question whether the claimant was liable in law to be re-

quired to retire before the age of 62, it was contended that the principle of judicial independence embodied in the Act of Settlement, 1700, was to be regarded as part of the law of the Straits Settlements, and that therefore the claimant held office during good behaviour and could not be removed; alternatively, that if he had been appointed during pleasure, the correspondence between the claimant and the Secretary of State constituted a contract enforceable against the Crown that the Crown would employ him until he attained the age of 62. It was held by Lord Goddard, C. J. that the provisions of the Act of Settlement relating to the tenure of office of Judges of the Supreme Court in England did not apply to the Straits Settlements or to any other colony; it was for the Crown by exercise of the prerogative or Parliament by statute to set up courts in an acquired territory, and the conditions under which Judges of those courts held office depended upon the terms on which the Crown or Parliament established them. Secondly that it was clear from a consideration of the Straits Settlements Act, 1866, Royal Letters Patent of 1911 which instructed the Governor that he might appoint Judges to hold office during His Majesty's pleasure, and the Royal Warrants relating to the courts in the Straits Settlements that Judges held office during the Royal pleasure; accordingly, the claimant having been appointed by Letters Patent issued pursuant to a Royal Warrant which following the terms of the Letters Patent of 1911, held office during the Royal pleasure. Thirdly, that it was a rule of law that once it was established that the Crown had the right to dismiss at pleasure, that right could not be taken away by any contractual arrangement made by an executive officer or department of State; a Judge appointed during pleasure was in no way (in a) different position from the point of view of dismissal from that of any other person in the Service of the Crown; having been appointed to hold office during pleasure no correspondence which took place before or after the claimant's appointment could affect the terms of appointment; accordingly, the termination of the appointment by the Crown was justifiable in law. It is thus seen

that the English court did not extend the benefit of the Act of Settlement, 1700, to a Judge appointed in a British colony. It is more difficult to extend the benefit of that Act to Judges functioning in an independent country like India governed by its own Constitution, even though the same pattern of administration of justice is continued even now as it was in the British India.

1060. The nature of constitutional conventions, understandings and practices, according to A. V. Dicey "make of a body, not of laws, but of constitutional or political ethics." They are not enforced or recognised by the courts. Freeman writes in his 'Growth of the English Constitution (1872)' that when an Englishman speaks of the conduct of a public man being constitutional or unconstitutional, he means something wholly different from what he means by conduct being legal or illegal'. Constitutional conventions in England are those which mainly govern the exercise of the royal prerogative. 'The right to dissolve or to convoke Parliament, to make peace or war, to make new peers, to dismiss a minister or to appoint his successor, even though vested in the Crown is always regulated in accordance with the wishes of the ministry. A ministry which is out-voted on any vital question in the House of Commons is bound to retire from office is an important constitutional understanding which is invariably obeyed. The aim of these precepts is to secure that Parliament or the Cabinet shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State — the majority of the electors or (to use popular though not quite accurate language) the nation.' A convention is a rule of constitutional practice which is neither enacted by Parliament as a formal legislation nor enforced by courts, yet its violation is considered to be a serious breach of constitutional morality leading to grave political consequences to those who have indulged in such violations. They are, according to O. Hood Phillips, 'rules of political practice which are regarded as binding by those to whom they apply, but which are not enforced by the courts or by the Houses of Parliament.' Constitutional conventions, understandings

or practices therefore constitute a source of constitutional law or binding rule of conduct though not enforced by courts. The true position may be summarised thus:—

"The people as a whole and Parliament itself, recognise that under the unwritten Constitution there are certain established principles which limit the scope of Parliament. It is true that the courts cannot enforce these principles as they can under the Federal system in the United States, but this does not mean that these principles are any the less binding and effective." — Prof. A. L. Goodhart.

1061. The conventions are evolved over a long period of political experience and are capable of regulating the operation of political power and are largely relied on particularly in those countries where there are no written Constitutions. They, however, vary from country to country in the Commonwealth. In India we have incorporated some of the conventions in the Constitution itself which has established a Parliamentary form of Government. Articles 74, 75, 77, 85 and 117 contain some of the British constitutional conventions in a modified form. Apart from those conventions which are incorporated in the Constitution, there may be some conventions which are followed by those in office out of political necessity. The latter however are not capable of enforcement in courts. The courts are not concerned with the 'constitutional practices' which are outside the Constitution. It is, therefore, difficult to make a declaration on the basis of any constitutional convention not found in the Constitution that an additional Judge who was appointed after following the same procedure prescribed for appointment of a permanent Judge should be deemed to have been appointed as a permanent Judge because the circumstances warranted the appointment of a permanent Judge at the time of his appointment, contrary to the express and unequivocal language of the warrant of his appointment.

1062. I must confess before proceeding further that the above argument appeared to be very attractive at one stage but on closer scrutiny it had to be rejected. In doing so I am influenced in no small measure by the following observations made in the dissenting

opinion of Justice Holmes in *Northern Securities Co. v. United States*, ((1903) 193 U. S. 197, 400, 401; 48 L. Ed. 679, 726). Justice Holmes said:—

"Great cases like hard cases make bad law. For great cases are called great not by reason of their real importance in shaping the law of future; but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well settled principles of law bend."

1063. But the question is whether an additional Judge can apply to the Court to direct the Government to consider his case for such reappointment having regard to the situation in which he is placed and the circumstances surrounding his case. This has presented some unusual difficulty in answering it. A rule of practice should, according to some legal philosophers who are principally concerned with what the law ought to be, be treated as binding if it is fair and operates in a fair society and if it involves mutual benefits to the participants, so that the party who receives or expects to receive benefits, must in his turn be willing to render benefits according to the practice, because such practice gives rise to expectations, which when violated would result in harm to one or the other. These philosophical reasons may appeal to the sense of morality but while interpreting the Constitution, it has to be seen whether there is any room for concluding that an enforceable right has come into existence as a consequence of such practice.

1064. Prof. P. S. Atiyah, who has tried to analyse the nature of promissory obligations in the light of the theories of 'promising' associated with the natural lawyers, the utilitarians and a number of other legal philosophers in his book entitled 'Promises, Morals and Law' (1981), Oxford, observes at pages 141-142 thus:—

"Some philosophers have recognised that the binding force of promises may vary in a similar sort of way, but the implications of this have not (I think) been properly grasped. At the lowest, recognition of these differing degrees

of bindingness must involve acceptance that pure expectations are not generally thought deserving of a high degree of protection and in some cases are not thought worthy of protection at all."

1065. If this is the position in the case of laws relating to promises of private individuals, the position in the case of an appointment under the Constitution would be weaker still unless there is any provision in the Constitution which expressly or by necessary intendment binds the authority concerned to act in a particular way.

1066. When the Chief Justice of a High Court feels that a member of the Bar should be invited to accept the post of a Judge of the High Court, after obtaining the consent of such advocate, he recommends that his case may be considered for appointment as a permanent or as an additional Judge depending on the vacancy which has to be filled up by such appointment. It is stated that in some High Courts including the Delhi High Court an undertaking would be taken from the advocate concerned when his name is recommended for the post of an Additional Judge that he would accept the post of a permanent Judge if offered before the expiry of the term of appointment as additional Judge. Even though such practice of taking an undertaking is not shown to be prevailing in all the High Courts, it is seen that a suggestion had been made by K. N. Wanchoo, Chief Justice of India in 1967 that such an undertaking should be taken. K. N. Wanchoo, C. J. recorded a note on June 29, 1967 as follows:—

"When a member of the Bar is appointed Additional Judge, it must be with a view to making him permanent in the course. If that is not possible, additional judgeship should not be offered to a member of the Bar. I agree therefore that an undertaking should be taken from the members of the Bar that they will accept a permanent judgeship when offered to them in the course....."

1067. As stated elsewhere the provision for appointment of additional Judges was included in the Constitution by the Constitution (Seventh Amendment) Act, 1956. From that time onwards nearly 500 persons have been appointed as Judges of

High Courts. About one-fifth of them were initially appointed as permanent Judges and the rest were appointed initially as additional Judges for a certain term and thereafter appointed as permanent Judges. Some of them were appointed as additional Judges twice or thrice before they were made permanent. Only a few of them were not made permanent, either because they had attained the age of retirement or they had resigned or for some other reason. The number of persons who were not made permanent on the ground that they were found unfit when their cases for reappointment were considered appears to be almost insignificant as it may not be more than five. But at no time the action of the Government in not reappointing an additional Judge as a permanent Judge was questioned before any Court as it is now done in these cases.

1068. What is to be noticed is that in almost every High Court a few posts have been kept as sanctioned posts of additional Judges as if they were part of the total strength. The result has been that unless all the sanctioned posts of additional Judges and at least one post of a permanent Judge have fallen vacant at a given point of time any new Judge appointed on that occasion being the junior most has to be appointed as an additional Judge and later on appointed as a permanent Judge when a vacancy arises in the permanent strength after all other additional Judges senior to him have been absorbed as permanent Judges. Such a thing could not have happened before the Constitution (Seventh Amendment) Act, 1956 came into force. At that time every Judge of a High Court had to be appointed only as a permanent Judge without any need for scrutinising his case again for purposes of reappointment as additional Judge or permanent Judge.

1069. From the information made available to the Court, it appears that subject to just exceptions in almost all the High Courts if a realistic review of the present strength is made the total number of permanent Judges needed will be much more the existing number of permanent Judges and additional Judges. This must have been the position for some years past. But still instead of increasing the number of posts

of permanent Judges and making appointments to them the practice of inducting a new member as an additional Judge first and making him permanent later on has been continued quite contrary to the letter and spirit of Art. 216 and Art. 224 (1) of the Constitution. Since invariably an additional Judge has been appointed as a permanent Judge in due course except in some rare cases, every member who is appointed as an additional Judge and who has not completed the age of retirement expects that he will be made permanent as and when a vacancy arises in the permanent strength and will be continued as an additional Judge by fresh appointments until such vacancy arises provided the arrears in the High Court requiring his continuance as an additional Judge persist. It cannot be said that such expectation on the part of an additional Judge is not well founded. In addition to such settled expectation on the part of the additional Judge, as the learned Attorney-General has submitted, even on the part of the Government there has always been reluctance to send back an additional Judge to the Bar after the completion of his term specified under Art. 224 (1) and to lose the services of a Judge with experience. These twin factors namely the expectation on the part of the additional Judge and the reluctance on the part of the Government distinguish the case of an additional Judge from the case of a new member who may be a competitor for the same post at the termination of the tenure of the additional Judge. Ordinarily the additional Judge is continued in service as a Judge or as an additional Judge unless there are any relevant circumstances which would outweigh the above mentioned factors. In the absence of any such cogent reasons for not appointing him again, the appointment of somebody else in his place would be an unreasonable or perverse act which entitles an additional Judge to move the Court for appropriate relief in the peculiar circumstances in which Art. 224 (1) is being operated till now.

1070. At this stage an allied contention urged in this connection may be disposed of. That contention is that an additional Judge cannot be dropped without giving him a reasonable op-

portunity of being heard in accordance with the principles of natural justice. We do not find any merit in this contention since the wide discretionary power of appointment exercisable by the President in the public interest under Art. 217 (1) is indicative of the absence of an obligation to act judicially. (Vide Para 65 Vol. I of Halsbury's Laws of England (4th Edn.)). It is seen that from the language of that Article that the Constitution has evinced an intention to exclude the operation of the rule of audi alteram partem by conferring on the President unfettered discretionary power subject only to the prescribed procedure of a consultation mentioned therein. (Vide Para 74, Vol. I of 'Halsbury's Laws of England' (4th Edn.)). Having regard to the high office to which appointment has to be made under Art. 217 (1) of the Constitution and to the association of the high dignitaries who have to be consulted before any such appointment is made the application of principles of natural justice as of right is ruled out and non-compliance with such principles would not vitiate the decision. But it may still be shown on the available material that there was no cogent reason for the decision.

1071. It is argued on behalf of the Government that there is no precedent in administrative law to such a conclusion being reached. There cannot be a precedent in England, in the United States of America and in Australia as there are no Additional Judges in those countries of the type we are having in India and in India too we do not have a precedent because no such case has come up before the Court so far. This case is indeed an extraordinary one. This Court, however, is under a duty to do complete justice when a matter comes before it. What kind of relief should be granted in such a case is governed by the facts and circumstances of the case and the legal provisions governing it. If the problem is a new one a new solution has to be evolved. A Judge who has cultivated assiduously a sense of right and wrong sometimes may even depend upon his hunch while moulding the relief to be granted in a given case. It is a part of the judging process. The following words of Judge

Hutcheson are illuminating indeed. He tells us :

"I must premise that I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision; the decree, as opposed to the logomachy, the effusion of the judge by which that decree is explained or excused.....The judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination appearing only in the opinion. The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case; and the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics. Accordingly, he passes in review all of the rules, principles, legal categories, and concepts "which he may find useful, directly or by an analogy, so as to select from them those which in his opinion will justify his desired result."

(See Jerome Frank: 'Law and the Modern Mind' (1963) p. 112).

1072. The following observations of Denning, L. J. (as he then was) in *Candler v. Crane, Christmas & Co.*, (1951) 2 KB 164 at p. 178 though in the minority are also relevant here. He observed :

"This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v. White* (1703) 2 Ld. Raym, 938, *Pasley v. Freeman*, (1789) 3 Term Rep. 51 and *Donoghue v. Stevenson*, (1932) AC 562, you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side, there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed."

1073. If a progressive view was possible in the English Common Law it should not be difficult to evolve solution in India under the Constitution to do justice within the bonds of law provided the case calls for legal redress,

1074. On the facts and in the peculiar circumstances of the case, the only thing which the Court can do here is to examine the material before it in order to ascertain whether the refusal to re-appoint the additional Judge concerned is based on any relevant grounds or not and to mould the relief on the basis of the finding on the above question by applying the relevant principles of administrative law. Any relief beyond this would be impermissible in view of the language of the relevant provisions of the Constitution. It is however made clear that even this limited enquiry is made possible only on account of the wrong application of Art. 224 (1) of the Constitution all these years. A similar enquiry may not be possible in the case of additional Judge to be appointed hereafter.

PART VII

1075. It is interesting to trace the history of the provision relating to the transfer of Judges from one High Court to another. The Draft Constitution of India did not contain any provision providing for such transfer. Cl. (c) of the proviso to Art. 193 (1) of the Draft Constitution merely stated that the office of the judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or of any other High Court. When two members of the Constituent Assembly Shri R. R. Diwakar and Shri S. V. Krishnamurthy Rao moved an amendment to cl. (1) of Article 193 of the Draft Constitution for adding cl. (d) which read as "(d) every judge shall be liable to be transferred to other High Courts" it was recorded that there was no need for the amendment as cl. (c) of Art. 193 (1) of the Constitution provided that the office of a judge shall be vacated by his being appointed to be a judge of another High Court. Perhaps the present Article 222 of the Constitution was not in view at that stage. (See B. Shiva Rao: 'The Framing of India's Constitution', Vol., IV p. 165). The note made by the Drafting Committee on the proposal of the Home Ministry that a convention should be established whereby a proportion of judges in every High Court could be recruited from outside the Province stated that there was no bar to the recruitment of Judges of High Court in any Province from outside the

Province or to the transfer of a judge of a High Court to another High Court and a convention might be established whereby a proportion of judges of a High Court could be recruited from outside the Province. (B. Shiva Rao: 'The Framing of India's Constitution', Volume IV, p. 186). In view of the suggestions made in the course of the discussion on the Draft Constitution, the Drafting Committee incorporated in the Revised Draft, Art. 222 which read as follows :

"222. (1) The President may transfer a Judge from one High Court to any other High Court within the territory of India.

(2) When a Judge is so transferred, he shall, during the period he serves as a Judge of the other Court, be entitled to receive in addition to his salary such compensatory allowances as may be determined, by Parliament by law and until so determined such compensatory allowance as the President may by order fix."

1076. In the letter dated November 3, 1949, forwarding the Revised Draft to the President of the Constituent Assembly referring to the newly added Art. 222, the Drafting Committee observed thus :

"Article 222 (new): We have proposed the insertion of this new article to enable the President to transfer a judge of a High Court from one High Court to another. The present provision in the Constitution would not permit of any compensatory allowance being given to judges on such transfer. Power has accordingly been reserved to Parliament to determine by law the compensatory allowance to be paid in case they are so transferred, and, until Parliament so determine, to the President to fix by order the quantum of such allowance."

1077. It may be seen that Art. 222 (1) which was incorporated in the Revised Draft gave the power to the President to transfer a Judge from one High Court to another without any obligation to consult any other functionary before doing so. But on the 16th November, 1949 an amendment to that Article was adopted by the Constituent Assembly which required the President to consult the Chief Justice of India before exercising the power of transfer. Art. 222 (1) was finally enacted as follows :

"222. (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court within the territory of India."

1078. Cl. (2) of Art. 222 was adopted in the form in which it had been proposed in the Revised Draft as set out above. Consequently Art. 217 was also suitably amended by introducing the word 'transferred' in proviso (c) to cl. (1) thereof. In defence of Art. 222 and in particular of cl. (2) of that Article providing for payment of compensatory allowance to a Judge who is transferred from one High Court to another High Court, Dr. B. R. Ambedkar spoke in the Constituent Assembly before Art. 222 was passed thus :—

"The only question that we are called upon to consider is when a person is appointed as a Judge of a High Court of a particular State, should it be permissible for the Government to transfer him from that Court to a High Court in any other State? If so, should this transfer be accompanied by some kind of pecuniary allowance which would compensate him for the monetary loss that he might have to sustain by reason of the transfer? The Drafting Committee felt that since all the High Courts so far as the appointment of Judges is concerned form now a central subject, it was desirable to treat all the Judges of the High Courts throughout India as forming one single cadre like the I. C. S. and that they should be liable to be transferred from one High Court to another. If such power was not reserved to the Centre the administration of justice might become a very difficult matter. It might be necessary that one Judge may be transferred from one High Court to another in order to strengthen the High Court elsewhere by importing better talent which may not be locally available. Secondly, it might be desirable to import a new Chief Justice to a High Court because it might be desirable to have a man who is unaffected by local politics and local jealousies. We thought therefore that the power to transfer should be placed in the hands of the Central Government."

We also took into account the fact that this power of transfer of Judges from one High Court to another may be

abused. A Provincial Government might like to transfer a particular Judge from its High Court because that Judge had become very inconvenient to the Provincial Government by the particular attitude that he had taken with regard to certain judicial matters, or that he had made a nuisance of himself by giving decisions which the Provincial Government did not like. We have taken care that in effecting these transfers no such considerations ought to prevail. Transfers ought to take place only on the ground of convenience of the general administration. Consequently, we have introduced a provision that such transfers shall take place in consultation with the Chief Justice of India who can be trusted to advise the Government in a matter which is not affected by local or personal prejudices.

The only question, therefore, that remained was whether such transfer should be made so obligatory as not to involve any provision for compensation for loss incurred. We felt that that would be a severe hardship. A judge is generally appointed to the High Court from the local bar. He may have a household there. He may have a house and other things in which he will be personally interested and which form his belongings. If he is transferred from one High Court to another obviously he cannot transfer all his household. He will have to maintain a household in the original Province in which he worked and he will have to establish a new household in the new Province to which he is transferred. The Drafting Committee felt therefore justified in making provision that where such transfer is made it would be permissible for parliament to allow a personal allowance to be given to a judge so transferred. I contend that there is nothing wrong in the amendment proposed by the Drafting Committee."

(The Constituent Assembly Debates, Vol. 11 (1949) pages 580-581)

1079. But by the Constitution (Seventh Amendment) Act, 1956, the words "within the territory of India" in clause (1) of Art. 222 and the whole of cl. (2) which provided for payment of compensatory allowance to a transferred judge were omitted. By the Constitution (Fifteenth Amendment) Act, 1963, a new cl. (2) was introduced into Art. 222.

After this amendment, Art. 222 of the Constitution reads thus :

"222. (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

(2) When a Judge has been or is so transferred he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix."

1080. This leads to the question whether under Article 222 of the Constitution, the consent of a Judge of a High Court is necessary to transfer him from one High Court to another High Court. The majority judgment of this Court in *Union of India v. Sankalchand Himatlal Sheth*, (1978) 1 SCR 423 : (AIR 1977 SC 2328) holds that the consent of a Judge for his transfer from one High Court to another High Court is not necessary. It is, however, contended before us that the said interpretation of Art. 222 is erroneous as it would affect adversely the independence of the judiciary. It is significant that Art. 222 does not state in express terms that the consent of the Judge concerned is a pre-requisite for his transfer. In places where consent of a Judge is needed the Constitution has stated that such consent should be obtained from the Judge concerned (vide proviso to Art. 128 and proviso to Art. 224A of the Constitution). Under Art. 127 (1) of the Constitution if at any time there is no quorum of the Judges of the Supreme Court available to hold or to continue any session of the Court, the Chief Justice of India may with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned request in writing the attendance at the sittings of the Supreme Court as an ad hoc Judge for such period as may be necessary of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India. Cl. (2) of Article 127 makes it obligatory on the part

of the High Court Judge who is so designated to attend the sittings of the Supreme Court in priority to other duties of his office at the time and for the period for which his attendance is required and while so attending he shall have all the jurisdiction, powers and privileges and shall discharge the duties of a Judge of the Supreme Court. It is significant that Art. 127 does not require the consent of the Judge to be designated under Art. 127 (1) to be obtained before asking him to function as an *ad hoc* Judge of the Supreme Court even though it may involve the shifting of his residence during the period specified in the letter of request sent to him under Art. 127 (1). A Judge of a High Court may have to be shifted from one place to another when the reorganisation of the State in which the High Court is situated takes place even though such shifting may not strictly amount to a transfer under Art. 222 (See *U. B. Raju v. State of Gujarat*, (1981) 1 SCR 613: (AIR 1980 SC 2075)) and such shifting may not depend upon the willingness of the Judge concerned. It cannot be said that any transfer or shifting of a Judge without his consent would amount to a punishment and would interfere with the independence of the Judge concerned or of the judiciary. If the requirement of the consent of the Judge in question is read into Art. 222 then the power conferred on the President ceases to be a power in the jurisprudential sense. A power is defined by Salmond as ability conferred on a person by the law to alter, by his own will directed to that end the rights, duties, liabilities or other legal relations either of himself or of other persons. Powers are either public or private. The former are those which are vested in a person as an agent or instrument of the functions of the State. We are not here concerned with the latter class. If Article 222 is construed as requiring the consent of a Judge to be transferred then the power of the President can be neutralised by the Judge withholding consent. Such a construction would virtually confer on an unwilling Judge an immunity against the exercise of the power by the President under Art. 222 even though public interest demands the transfer of the Judge. Article 222 would in that case become almost ineffective. That being

so, such a construction has to be avoided.

1081. One other reason which prompts me to say so is as follows: By way of comparison we may refer here to some of the provisions of the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5, C-49) of England which appears to have been used as a model for some of the relevant provisions of the Government of India Act, 1935 and of the Constitution. S. 3 of that Act corresponds to Art. 224A of the Constitution. Section 7 of that Act corresponds to Art. 127 and Section 8 of that Act corresponds to Article 128. S. 4 (1) of that Act provides for the establishment of three Divisions of the High Court and they are now called the Chancery Division, the King's Bench Division (now called the Queen's Bench Division) and the Family Division (formally known as the Probate Divorce and Admiralty Division). S. 4 (2) of that Act which provides for the attachment of a puisne Judge to one of the abovesaid three Divisions and his transfer from one Division to another reads:

"4. (2) The puisne Judges of the High Court shall be attached to the several Divisions thereof by direction of the Lord Chancellor and any such Judge may with his consent be transferred by a like direction from one of the said Divisions to another;

Provided that no direction shall be given for the transfer of a puisne judge from the King's Bench Division or from the Probate, Divorce and Admiralty Division without the concurrence of the President of that Division." (Emphasis added)

1082. The pattern of the above section shows that if the Constitution makers intended that the transfer of a Judge from one High Court to another under Art. 222 should be with his consent, they would have included necessary words in Art. 222. The words corresponding to the words "with his consent" in the above said S. 4 (2) are significantly absent in Art. 222 of the Constitution.

1083. It is argued by Shri H. M. Seervai, learned counsel for the petitioners in Transfer Case No. 22 of 1981 that the majority decision of this Court in *Sankalchand Sheth's case* (AIR 1977 SC 2328) (*supra*) holding that the

consent of the Judge concerned is not necessary for transferring him from one High Court to another High Court under Article 222 of the Constitution requires to be reconsidered for the reason that the assumption of Chandrachud, J. (as he then was) and Krishna Iyer, J. that there was no provision for transfer of Judges of High Courts in the Government of India Act, 1935 is erroneous and that every such transfer should be considered as a fresh appointment of the Judge concerned in the court to which he is transferred. It is contended that if the effect of a transfer under Art. 222 is a fresh appointment, the consent of the Judge so transferred should be considered as an essential pre-requisite of every such transfer. I should say at the outset that the argument is really an ingenious one, but it does not appear to have been presented in Sankalchand Seth's case (AIR 1977 SC 2328) (*supra*) in the form in which it is argued before us.

1084. We shall examine the above contention now urged before us in two parts — (1) Whether there was a provision for a transfer of a Judge under the Government of India Act, 1935 ? and (2) If, there was such a provision, whether the decision of the majority in Sankalchand Sheth's case (*supra*) requires to be reconsidered ?

1085. It is true that Chandrachud, J. (as he then was) and Krishna Iyer, J. have both stated in the course of their opinions that there was no provision in the Government of India Act, 1935 providing for the transfer of a Judge from one High Court to another High Court and both the learned Judges proceeded on the assumption that under that Act the induction of a Judge of one High Court in another was possible only by a fresh appointment. Even Bhagwati and Untwalia, JJ. who constituted the minority in Sankalchand Sheth's case (*supra*) proceeded on the same basis. Bhagwati, J. observed in that case at page 473 : "Neither in proviso (c) nor in any other provision of the Government of India Act, 1935 was the word 'transfer' used and there was also no specific provision in that Act conferring power to transfer a High Court Judge." Untwalia, J. observed in that case at page 510 : "Neither in proviso (c) nor in any other section of the Government of India Act was the word 'transfer' used or such

a power conferred in terms on the Governor-General." It is, however, asserted before us that there was a provision for transfer in the Government of India Act, 1935 for the following reason. Section 220 (2) of the Government of India Act, 1935 as it was originally enacted read :—

"220. (2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years :

Provided that—

(a) a judge may by resignation under his hand addressed to the Governor resign his office;

(b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed."

1086. On October 26, 1944, the British Parliament enacted the India (Miscellaneous Provisions) Act, 1944 by which cl. (c) was added at the end of the proviso, to sub-sec. (2) of S. 220 of the Government of India Act, 1935. Sec. 2 of the said amending Act of 1944 read :

"2. Judges to vacate office on transfer. — At the end of the proviso to sub-section (2) of section two hundred and twenty of the principal Act (which relates to the term of office of judges of High Courts) there shall be added the following paragraph :—

'(c) the office of a judge shall be vacated by his being appointed by His Majesty to be a judge of the Federal Court or of another High Court'."

1087. Section 6 of the said amending Act of 1944 provided that the above amendment made by S. 2 thereof in the Principal Act should be deemed to have been made therein immediately before the passing thereof and thus the newly added cl. (c) of the proviso to S. 220 (2) was given retrospective effect. Then reliance is placed on the speech of Earl of Munster made on July 4, 1944 in the House of Lords in support of the Bill which later became the said amending Act, the relevant part of which read thus :—

"Clause 2 of the Bill makes it clear that if a Judge of the High Court is transferred to another High Court or to the Federal Court, he shall not retain his office of a judge of the High Court from which he was transferred. This is the only Clause which will be retrospective. I might mention that there is a similar provision in Section 10 of the Supreme Court of Judicature Act, 1925 applicable to High Court Judges in this country." (Underlining supplied). See Hansard, (Lords) Vol. 132, Col. 632 of July 4, 1944.

1088. Reliance is also placed on two other speeches made in the House of Commons on September 27, 1944 on the same Bill, the relevant parts of which are given below :

1089. The Secretary of State for India (Mr. Amery) stated :

"The second clause clears up a doubt which had been expressed as to whether under the provisions of the Act a Judge transferred in India from one High Court to another or to the Supreme Court (sic) might not be considered as still holding his position in his original Court. In our own Judicature Act, 1925, that point is made clear in Sec. 10. This Clause simply adopts the Indian condition to the wording of our own Judicature Act." (Underlining supplied). (See Hansard, (Commons) Vol. 493, Col. 345 of 27-9-1944).

1090. Mr. Pethick Lawrence also observed :

"With respect to the Judges, I understand the proposal is merely intended to put beyond question what was certainly the intention in regard to them. That is, I understand the only part of the Bill which is retrospective. It is simply to clear up doubts....." (Ibid Col. 347)

1091. The argument constructed on the basis of the above material is that cl. (c) of the proviso to S. 220 (2) of the Government of India Act, 1935 provided for the transfer of Judges of one High Court to another High Court although it used the word 'appoint' and that is made clear by the use of the word 'transfer' in the marginal note of Section 2 of the amending Act of 1944 which introduced the amendment. I have carefully considered the above submission but I have to state that it requires lot of credulity to accept it in the circumstances of the case. The

source of inspiration for this argument is easily traceable to the marginal note to Section 2 of the India (Miscellaneous Provisions) Act, 1944, which reads: 'Judge to vacate office on transfer'. The importance of a marginal note in statutory construction so far as English statutes are concerned appears to be very little as can be gathered from the following words in Craies on 'Statute Law' (sixth Edn.) page 197 :—

"The sidenotes are not part of the Act and I believe are not considered or amended by the legislature". Lord Mac Naughten in the Privy Council considered it well settled that the marginal notes cannot be referred to for purposes of construction, *Thakurain Balraj Kunwar v. Rae Jagatpal Singh*, (1904) 31 IA 132, 142 and Lord Hanworth M. R. referring to the Superannuation Act of 1859, said: "It was contended that these catchwords could be used to explain the meaning of sections upon which they appear. As explained by Baggallay LJ in *Att.-Gen. v. G. E. Ry.*, supra, marginal notes are not part of an Act of Parliament. The Houses of Parliament have nothing to do with them, and I agree with the learned Lords Justices in that case that the courts cannot look at them *Nixon v. Att.-Genl.*, (1930) 1 Ch 566, 593".

1092. In Maxwell on 'The Interpretation of Statutes' (12th Edition) it is stated at pages 9-10 thus :

"The notes often found printed at the side of sections in an Act, which purport to summarise the effect of the sections, have sometimes been used as an aid to construction. But the weight of the authorities is to the effect that they are no parts of the statute and so should not be considered, for they are "inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons".

1093. In 'Statutory Interpretation' by Sir Rupert Cross (1976 Edition), we have a very instructive passage explaining the relative importance of certain parts of a statute, including side notes (or marginal notes). The learned author is of the view that although the long title, preamble (if any) and short title of a statute may be described as aids to the ascertainment of the intention of Parliament, crossheadings, sidenotes (or marginal notes) and punctuation merely indicate the intention of the draftsman. He proceeds to observe at pages 107-108, 113-114 thus :

"There is a bewildering mass of conflicting dicta on the question whether some of the above items can be treated as aids to construction at all and, when it is conceded that they may be so treated, upon their weight. This is due to a failure to distinguish between two stages in the process of interpretation at which the aids may be relevant. The first stage is that at which the judge has to decide whether he has any real doubt about the meaning of the word, phrase or passage which he is called upon to interpret. At this point it is hard to believe that he can or should have any inhibitions concerning the parts of the statute which he will read. No doubt he will begin with the section containing the word, phrase or passage in dispute. He can hardly help taking account of the punctuation and side note. If he is to fulfill his duty of reading the whole Act, when it is necessary to do so in order to determine whether there is an ambiguity, he must look at the long title, preamble (if any), short title and cross-headings. If, after this performance, the Judge is satisfied that the word, phrase or passage the meaning of which is in dispute really only has one meaning in the context, he must apply that meaning; but if he has doubts on the subject he will think again. It is at this point that the distinction between the enacting parts of a statute and the other parts becomes crucial. If the sole cause of doubt is a disparity between the otherwise clear and unambiguous words and a title, preamble, heading or side note, the judge must disregard his doubts and apply the otherwise clear and unambiguous words. This is because there is a rule of law according to which, although the parts of the statute which do not enact anything may be consulted as a guide to Parliamentary intent and hence to the meaning of the enacted word, effect must not be given to any doubts which they may raise about the meaning of that word. If, however, the judge has doubts about the meaning of the statutory provision he is considering for some such other reason as its lack of clarity or apparent pointlessness, he may take the title, preamble, heading or side note into consideration in determining how those doubts should be resolved. As we shall see, reservations have been ex-

pressed about the propriety of taking any of the above items into consideration, and it is necessary to be especially cautious when endeavouring to state the law with regard to the extent to which the short title and side notes, not to mention punctuation, may be taken into consideration, but it is submitted that the following remarks of Lord Upjohn in *Director of Public Prosecutions v. Schildkamp*, (1971) AC 1 at p. 28 amply justify the above general account of the relevance of the items mentioned at the beginning of this section to the judicial process of interpretation. The remarks were made with special reference to cross-headings :

"When the Court construing the Act is reading it through to understand it, it must read the cross-headings as well as the body of the Act and that will always be a useful pointer to the intention of Parliament in enacting the immediately following sections. Whether the cross-heading is no more than a pointer or label, or is helpful in assisting to construe, or even in some cases to control, the meaning or ambit of those sections must necessarily depend on the circumstances of each case and I do not think it is possible to lay down any rules".

The matter must now be considered in slightly greater detail.

.....
Side notes :—

Chandler v. Director of Public Prosecutions, (1964 AC 763) may be cited as conclusive authority for the proposition that side notes (frequently spoken of as "marginal notes") cannot be used as aids to construction in any circumstances. The defendants, members of the Committee of One Hundred, the aim of which was to further nuclear disarmament, participated in a demonstration at an airfield with the object of grounding all aircraft. They were charged with and convicted of an offence against Section 1 (1) of the Official Secrets Act 1911 which punishes those who approach prohibited places for a purpose prejudicial to the safety of the State. The side note reads "penalties for spying" and it was conceded that the defendants were not spying, but their appeal to the House of Lords was dismissed on the ground that they were acting for a purpose pre-

judicial to the safety of the State within the meaning of S. 1 (1). Lord Reid said :

"In my view side notes cannot be used as an aid to construction. They are mere catchwords and I have never heard of it being supposed in recent times that an amendment to alter a side note could be proposed in either House of Parliament. Side notes in the original Bill are inserted by the draftsman. During the passage of the Bill through its various stages amendments to it or other reasons may make it desirable to alter a side note. In that event I have reason to believe that alteration is made by the appropriate officer of the House — no doubt in consultation with the draftsman. So sidenote cannot be enacted in the same sense as the long title or any part of the body of the Act."

In spite of its great weight, three remarks may be made with regard to this passage. In the first place what Lord Reid said would seem to be equally applicable to cross-headings, yet we have just seen that this has not prevented them from being treated in much the same way as the long title and preamble. Secondly, even if it is the case that side notes cannot be called in aid in order to resolve doubts, it can hardly be the law that they are to be disregarded by the judge when he is perusing the Act with a view to ascertaining whether he has any doubts. No judge can be expected to treat something which is before his eyes as though it was not there. In the words of Upjohn, L. J. : "While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind. Finally, Lord Reid's remarks in *Chandler v. Director of Public Prosecutions* must be read in the light of his subsequent remarks in *Director of Public Prosecutions v. Schildkamp* (1971) AC 1 at p. 10 :

"But it may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act. I say more realistic because in very many cases the provision before the court was never even mentioned in debate in either

House, and it may be that its wording was never closely scrutinised by any member of either House. In such a case it is not very meaningful to say that the words of the Act represent the intention of Parliament but the punctuation, cross-headings and side notes do not."

1094. In *Bhinka v. Charan Singh*, (1959) Supp 2 SCR 798 at p. 809 : (AIR 1959 SC 960 at pp. 965, 966) Subba Rao, J. (as he then was) observed thus :

"Maxwell on Interpretation of Statutes", 10th Edn., gives the scope of the user of such a heading in the interpretation of a section thus, at p. 50 :

"The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words."

If there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that doubt."

1095. In *Indian Aluminium Company etc. v. Kerala State Electricity Board*, (1976) 1 SCR 70 at pp. 86, 87 : (AIR 1975 SC 1967 at p. 1976) Bhagwati, J. said :

"It is true the marginal note cannot afford any legitimate aid to a construction of a section, but it can certainly be relied upon as indicating the drift of the section, or, to use the word of Collins M. R. in *Bushell v. Hammond*, (1904) 2 K. B. 563 "to show what the section was dealing with".

1096. A reading of the passages and decisions referred to above leads to the view that the Court while construing a statute has to read both the marginal notes and the body of its provisions. Whether the marginal notes would be useful to interpret the provisions and if so to what extent depends upon the circumstances of each case. No settled principles applicable to all cases can be laid down in this fluctuating state of the law as to the degree of importance to be attached to a marginal note in a statute. If the relevant provisions in the body of the statute firmly point towards a construction which would conflict with the marginal note the marginal note has to yield. If there is any ambiguity in the meaning of the provisions in the body of the statute, the marginal note may be looked into as an aid to construction.

1097. The marginal note in question was not incorporated in the Government of India Act, 1935. Moreover, the marginal note differed in material respects from clause (c) which was added to the proviso to Section 220 (2) of the Government of India Act 1935 as clause (c) referred to appointments to the Federal Court and to another High Court. There could be no transfer of a High Court Judge to the Federal Court. He could become a Judge of the Federal Court only on being appointed as such under Section 200 (2) under a separate warrant of appointment. Even in the case of High Courts, a Judge of a High Court could become a Judge of another High Court under the Government of India Act, 1935 only by an appointment under Section 220 (2) by a warrant of appointment. There was no independent provision corresponding to Article 222 of the Constitution, providing for transfer in the Government of India Act, 1935. The Earl of Munster and Mr. Amery who spoke in the British Parliament on the subject were probably influenced by the marginal note in the amending Act and if I may say so got into an error of proximity when they relied on Section 10 of the Supreme Court of Judicature (Consolidation) Act, 1925, which established the Supreme Court of Judicature in England consisting of His Majesty's High Court of Justice and His Majesty's Court of Appeal both of which were in the same building at the Royal Courts of Justice. Even there S. 10 (2) of that Act provided that the office of any Judge of the High Court would be vacated by his being appointed as a Judge of the Court of Appeal and the same Act used 'transferred' in Section 4 (2) thereof where it was dealing with the transfer of a Judge of the High Court from one Division to another Division. The Marginal note and the speeches relied on are, therefore, of not much use. On this slender material we cannot hold that there was a provision for transfer of a High Court Judge under the Government of India Act, 1935. I am of the view that there is no error committed by the learned Judges in stating so in *Sankalchand Sheth's case* (AIR 1977 SC 2328) (supra) and the decision in that case is not liable to be reconsidered on the ground now urged before us.

1098. It is alternatively urged that as the Constitution has used the words 'transfer' and 'appointment' interchangeably in Art. 222 and in paragraph 11 (b) (iii) of the Schedule to the Constitution, the word 'transfer' in Art. 222 should be read as equivalent to 'appointment' and a transfer of a Judge therefore results in a fresh appointment which requires his consent. Para 11 (b) (iii) of the Second Schedule to the Constitution reads thus :—

"11 (b). "Actual service" includes—
(i) & (ii)

(iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another."

1099. The contention is that since a High Court Judge can become a Judge of the Supreme Court only by a fresh appointment and that in para 11 (b) (iii) of the Second Schedule to the Constitution the word 'transfer' is used to denote such appointment, it should be held that even when a High Court Judge is transferred to another High Court he must be deemed to have been appointed afresh in the Court to which he is transferred and because it is a fresh appointment his consent is necessary as it is needed under Art. 217 (1). In support of this submission reliance is placed on another part of Maxwell on 'The Interpretation of Statutes' (12th Edition) at page 286 where it is stated thus :

"Just as the presumption that the same meaning is intended for the same expression in every part of an Act is not of much weight, so the presumption of a change of intention from a change of language — which is of no great weight in the construction of documents — seems entitled to less weight in the construction of a statute than in any other case: for the variation is sometimes to be accounted for by the draftsmen's concern for "the graces of the style" and his wish to avoid the repeated use of the same words, sometimes by the circumstance that the Act has been compiled from different sources, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament".

1100. The decision in *State of Bombay v. Heman Santlal Alreja* (AIR 1952 Bom 16) is also cited before us for our consideration in support of this conten-

tion. In that case, the High Court of Bombay has observed at pages 23-24 thus :—

"The argument is very attractive and receives considerable support from two different expressions used in the Constitution. It is perfectly true that the ordinary and normal canon of construction requires that when we find in a statute or in a Constitution two different expressions used, as far as possible two different meanings must be given to these expressions, because it must be assumed that the Legislature or the Constituent Assembly did not use two different expressions without intending to convey two different meanings. But instances are not unknown where two different expressions have been used to convey the same meaning."

1101. In the aforesaid Bombay case the learned Judges were concerned with the apparent difference between two expressions 'law in force' and 'the existing law' of which the latter expression was more compendious than the former and could include within its scope both the former expression 'law in force' which meant law actually in force and any law potentially in operation such as law which had been suspended or which had not been extended to certain territories. The two expressions found place in Article 13 and Art. 372 respectively of the Constitution. On a consideration of the relevant circumstances, the Bombay High Court came to the conclusion that 'existing law' and 'law in force' had been used in the Constitution without any distinction or difference. We are not faced with any difficulty in this case of the sort with which the Bombay High Court had to deal in the above decision. The Constitution has used the word 'appointment' and 'transfer' to convey two different senses, the first meaning the initial induction of a person into a post and the latter meaning the shifting of a person from one post to another equivalent post. The members of the Constituent Assembly were quite familiar with this distinction which was well known to the bureaucracy at the time when the Constitution was enacted. The following history of the legislation supports the view that the two expressions are not used in the same sense as meaning 'appointment' only but they mean two different concepts as stated earlier. Cl. (c) of pro-

viso to S. 220 (2) of the Government of India Act, 1935 which is the earliest of the relevant clauses read as :—

"(c) the office of a Judge shall be vacated by his being appointed by His Majesty to be a Judge of the Federal Court or of another High Court"

1102. Clause (c) of the proviso to Art. 193 (1) of the Draft Constitution which did not contain a provision for the transfer of High Court Judges read as follows :

"(c) The office of the Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or of any other High Court"

1103. In the Revised Draft Constitution which was submitted to the Constituent Assembly on Nov. 3, 1949, in which a provision for transfer had been included in Art. 222, Cl. (c) of the proviso to Art. 217 (1) which almost remained unaffected read as :

"(c) The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or of any other High Court in any State specified in the First Schedule"

1104. But on November 16, 1949 the above clause was amended at the stage of the third reading of the Constitution emphasizing the difference between 'appointed' and 'transferred' and in order to bring it in accord with Article 222 which provided for transfer of High Court Judges. After the amendment it read as under :—

"(c) The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India" (emphasis added)

(See Constituent Assembly Debates, Vol. 11 p. 596).

1105. If the Constituent Assembly had thought that 'appointed' and 'transferred' were interchangeable, there would have been no need for the amendment as the provision in the Revised Draft Constitution was sufficient. But it deliberately amended the provision as stated above by distinguishing a 'transfer' from an 'appointment'. If in spite of this amendment, the Constituent Assembly has allowed para. 11 (b) (iii) in the Second Schedule to the Constitution to remain as it is, it only means that it thought that the word 'transfer' had

been used therein in a broad sense meaning a physical 'transfer' of the Judge concerned which included both appointment to the Supreme Court and transfer to another High Court and that is clear by the use of a common expression 'transfer' in respect of both the events which follow it in that clause. Moreover, this argument now pressed before us runs counter to Art. 222 of the Constitution which appears to be a complete Code on the topic of transfer of a High Court Judge. If transfer is a fresh appointment, Art. 217 (1) of the Constitution would immediately be attracted and that provision contains an entirely different procedure of consultation from what is contained in Art. 222 I, therefore, do not find any merit in this contention.

1106. The next contention urged against the correctness of the majority decision in *Sankalchand Sheth's case* (AIR 1977 SC 2328) (*supra*) is the one that appealed to *Untwalia, J.* in that case, namely, that a transferred Judge cannot become a Judge of the High Court to which he is transferred without taking a fresh oath in accordance with Article 219 of the Constitution in the form prescribed in the Third Schedule to the Constitution. The gist of the argument may be summarised thus: Article 219 provides that every person appointed to be a Judge of a High Court shall before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule to the Constitution. The form of the oath in the case of Judges of High Court reads :—

"I, A. B., having been appointed Chief Justice (or a Judge) of the High Court at (or of).....Swear in the name of God

solemnly affirm

that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."

1107. It may be noted that the place where the High Court is situated or the

State to which it pertains should be inserted in the blank space shown in the form of oath set out above. Cl. (c) of proviso to Art. 217 (1) of the Constitution states that the office of a Judge of a High Court shall be vacated by his being appointed by the President to any other High Court within the territory of India. The argument is that since a Judge of a High Court has to take a fresh oath when he is appointed as a Judge of the Supreme Court he should also take a fresh oath when he is transferred to another High Court before he enters upon his duties there for the reason that he ceases to be Judge of a High Court to which he is originally appointed on being transferred and the oath taken earlier would come to an end on such transfer as the oath is with reference to the High Court concerned, (which is inserted in the blank space in the form of oath). It is argued that it is not possible for a person to function as a Judge unless the oath is operative. If a transferred Judge has therefore to take a fresh oath then it is urged that the order of transfer would become a fresh appointment for which his consent would be required by necessary implication as it is necessary in the case of a first appointment under Art. 217 (1). It is difficult to agree with this contention. What is the object of an oath? An oath is taken by a Judge in order to show his allegiance to the Constitution and to affirm that he will duly and faithfully discharge his duties as a Judge without fear or favour, affection or ill-will and that he will uphold the Constitution. The essential part of it is what he swears or affirms to do. The words "having been appointed Chief Justice (or a Judge) of the High Court at (or of)" in the form of oath are only descriptive of the person who takes the oath. The oath is not confined to the High Court where he enters his office. It will operate as long as he discharges judicial duties either in that High Court or in any other High Court to which he may be transferred under Art. 222 of the Constitution or even when he discharges any other duty which he may be requested to do by the President as provided in para. 11 (b) (i) of the Second Schedule to the Constitution. The oath binds him even after his retirement. A perusal of some of the provisions of the Constitution

would establish this. Under Art. 127 of the Constitution a High Court Judge can be asked to discharge the duties of a Judge of a Supreme Court. Under Art. 224A a retired High Court Judge can be asked to sit in the High Court where he had worked as a Judge before his retirement or in any other High Court and decide cases. In neither of these two cases he has to take a fresh oath, even though he discharges judicial duties. It is contended that since in the first of these two cases he is not treated as a regular Supreme Court Judge but continues to be a High Court Judge and in the second case he is entitled to have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be a Judge of the High Court where he functions under Art. 224A no fresh oath would be necessary. This contention overlooks the necessity for taking the oath. The necessity for the oath is that the person who discharges judicial duties in a superior court should perform those duties without fear or favour, affection or ill-will. If that is so, can we say that the effect of the oath comes to an end when he leaves the High Court which is mentioned in the form of oath taken by him or is confined to that High Court? Then it would mean that a High Court Judge who is requested under Art. 127 or under Art. 224A would not be bound by the oath when he discharges judicial duties pursuant to those Articles. Such a construction cannot be permitted. The oath he has taken would be operating as long as he discharges any duty arising out of or traceable to his status of being a Judge of a High Court. A Judge functioning under Article 127 and Art. 224A cannot be freed from the obligations flowing from the oath even though a particular High Court is mentioned in the form of oath taken by him. The position cannot be different when a Judge of a High Court is transferred under Art. 222. On such transfer he may cease to be a Judge of the High Court where he was working before such transfer but he continues to be a Judge nonetheless and goes to the Court to which he is transferred as a Judge and not as a newly appointed person who is still to blossom into a Judge by taking the oath as prescribed by Art. 219 of the Constitution.

1108. Incidentally we may refer to the decision of the High Court of Allahabad in *Hira Singh v. Jai Singh* (AIR 1937 All 588) (FB) in which the question of a Judge not taking oath had arisen for consideration in a slightly different situation. In that case a preliminary objection was taken to the constitution of the Bench before which the case came up for hearing as the Bench consisted of Justice Uma Shankar Bajpai, who had been originally appointed as an additional Judge of that Court under the Government of India Act, 1915 and who after some extensions had been appointed as a permanent Judge on March 17, 1937 with effect from April 1, 1937. Part 3 of the Government of India Act, 1935 which came into force on April 1, 1937 provided that any Judge appointed before the commencement of that Part to any High Court would continue in office and should be deemed to have been appointed under that Part. One of the contentions, which appears to have been urged in this case, was that without taking a fresh oath as required by Sec. 220 (4) of the Government of India Act, 1935, Bajpai, J. could not function as a Judge. That contention was negatived by the Full Bench in the following way at page 590 :

"All that S. 220 (4) requires is that every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor or some other person appointed by him an oath according to the form prescribed. The oath is necessary before entering upon his office as a Judge. As already pointed out, Bajpai, J. entered upon his office as a Judge of this Court long ago and took the oath which was then prescribed under Cl. 3 of our Letters Patent. The mere fact that he has now been made a permanent Judge does not mean that he "enters upon his office" as a Judge of this Court afresh, necessitating a fresh oath which is required for a person who enters upon his office for the first time. If this were not the correct interpretation, then the result would be that every time that an additional Judge's term is extended, he would have to take a fresh oath. This is contrary to the established practice of this Court. It may also be pointed out that under S. 223 of the Act the powers of the Judges of a High Court in relation to the

administration of justice in this Court are the same as immediately before the commencement of Part 3 of this Act."

1109. This decision proceeded on the basis that an additional Judge once appointed does not change his status as a Judge even when his tenure is extended or is made permanent. We need not go to that extent in this case since we are concerned with a Judge who is transferred from one post to another equivalent post.

1110. I am of the view that no fresh oath need be taken by a Judge who is transferred before entering upon duties as a Judge in the High Court to which he is transferred since the oath already taken continues to bind him and the transfer is only traceable to the status which he had acquired after taking the oath earlier in the Court to which he was initially appointed. It is not correct to state that the effect of that oath comes to an end because he vacates his seat in the Court where he was functioning before his transfer. Since there is no necessity for a fresh oath after his transfer, even though as a matter of abundant caution the practice of taking fresh oath is prevailing now a days, it cannot be said that he is appointed afresh as a Judge in the Court to which he is transferred.

1111. There is one other ground to hold that the transfer does not result in a fresh appointment. If it is a fresh appointment in a new High Court with his consent, payment of an additional compensation under Art. 222 (2) of the Constitution to the Judge who becomes a Judge of that High Court under an order of transfer under Art. 222 (1) would become anomalous as the other Judges of that Court who are initially appointed to that Court would be getting the usual salary, allowances and other perquisites allowable in the case of a High Court Judge. It is only when a Judge is transferred in the public interest without his volition it can be said that payment under Art. 222 (2) would not be discriminatory as then he would be belonging to a different class. The payment under Art. 222 (2) can be justified only by holding that the transfer under Art. 222 (1) does not result in a fresh appointment in another High Court to which a Judge is transferred.

1112. If a Judge who is transferred under Art. 222 of the Constitution is to be treated as having been appointed afresh in the High Court to which he is transferred then he will have to be assigned a rank below all the other Judges who were working in that Court before he was transferred. It is only if it is held that he goes there as a person already appointed as a Judge though in another High Court then he can reasonably be assigned seniority over others who were appointed after he was appointed initially as a High Court Judge. Any other view would be irrational.

1113. The argument that a transfer can be made only with the consent of a Judge on personal grounds also does not appeal to me. While explaining this ground, an illustration of a Judge who on grounds of health is seeking transfer from one High Court to another was given. The illogicality of this submission becomes obvious when we consider whether there can be any justification for paying such a Judge the compensation under Art. 222 (2) after he is so transferred. There is no merit in this submission.

1114. Relying upon cl. (2) of Art. 222 of the Constitution which provides for payment of compensatory allowance in addition to his salary to a Judge who is transferred to another High Court from the Court to which he was originally appointed it is argued that transfer is a punishment or an injury for which compensation is provided under Article 222 (2) of the Constitution. It is difficult to accede to this submission. A transfer under cl. (1) of Art. 222 of the Constitution could not ever have been considered to be a punishment in disguise, the transfer being in the public interest. The transfers may not be on account of any conduct of a Judge which is not relished by the transferring authority. It may be on account of the public interest such as providing another High Court with a competent Judge who is able to discharge his duties effectively in that Court. Payment of such compensatory allowance does not imply that a transfer involves an element of punishment. It is difficult to imagine that Art. 222 was enacted by the Constituent Assembly as a measure of punishment to an erring Judge. It may be that when a

Judge is transferred in the public interest, he suffers some inconvenience but such inconvenience cannot be termed as a punishment. I am sure that the Chief Justice of India and the President will duly consider all aspects before ordering such a transfer.

1115. The following observations of Chandrachud, J. (as he then was) in *Sankalchand Sheth's case* (1978) 1 SCR 423: (AIR 1977 SC 2328) (supra) fully explain the true legal position at pages 444-445 (of SCR): (at p. 2339 of AIR) thus:

"Unquestionably, the fundamental principle on which these constitutional provisions and decisions rest cannot be allowed to be violated or diluted, directly or indirectly. But then the question is: Is there any need or justification, in order to uphold and protect the independence of the judiciary for construing Art. 222 (1) to mean that a Judge cannot be transferred from one High Court to another without his consent? I think not. The power to transfer a High Court Judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who, for some reason or the other, has fallen from its grace. The executive possesses no such power under our Constitution and if it can be shown — though we see the difficulties in such showing that a transfer of a High Court Judge is made in a given case for an extraneous reason, the exercise of the power can appropriately be struck down as being vitiated by legal mala fides. The extraordinary power which the Constitution has conferred on the President by Art. 222 (1) cannot be exercised in a manner which is calculated to defeat or destroy in one stroke the object and purpose of the various provisions conceived with such care to insulate the judiciary from the influence and pressures of the executive. The power to punish a High Court Judge, if one may so describe it, is to be found only in Art. 218 read with Art. 124 (4) and (5) of the Constitution, under which a Judge of the High Court can be removed from his office by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of

that House and by a majority of not less than two-thirds of the members of that House present and voting, has been presented to the President in the same session for such removal, on the ground of proved misbehaviour or incapacity. Thus, if the power of the President, who has to act on the advice of the Council of Ministers, to transfer a High Court Judge under Art. 222 (1) is strictly limited to cases in which the transfer becomes necessary in order to subserve public interest, in other words, if it be true that the President has no power to transfer a High Court Judge for reasons not bearing on public interest but arising out of whim, caprice or fancy of the executive or its desire to bend a Judge to its own way of thinking, there is no possibility of any interference with the independence of the judiciary if a Judge is transferred without his consent."

1116. The last sentence of the above passage is of great significance.

1117. It is clear from the above passage with which I respectfully agree, that an order of transfer made under Art. 222 is liable to be struck down by the Court if it is shown that it has been made for an extraneous reason, that is, on a ground falling outside the scope of that Article. Under that Article a Judge can be transferred when such transfer subserves public interest and the President "has no power to transfer a High Court Judge for reasons not bearing on public interest but arising out of whim, caprice, or fancy of the executive or its desire to bend a Judge to its own way of thinking". It is also clear from the above decision that "the power to punish a High Court Judge, if one may so describe it, is to be found only in Art. 218 read with Art. 124 (4) and (5) of the Constitution under which a Judge of a High Court can be removed from his office by an order of the President after an address by each House of Parliament." is presented in accordance with those clauses on the ground of proved misbehaviour or incapacity. The question debated before us is whether under Art. 222, it is open to the President to transfer a Judge from one High Court to another High Court on the ground of 'misbehaviour or incapacity' and whether the said ground falls within the scope of 'public interest' which is the only relevant consideration

on the basis of which a transfer can be made under that Article. It is argued that even though the observations made in the majority judgment which are extracted above point out that no valid transfer can take place under Art. 222 on the ground of misbehaviour or incapacity of a Judge, the following passage at page 446 (of SCR): (at p. 2341 of AIR) in the same judgment suggests to the contrary.

"Experience shows that there are cases, though fortunately they are few and far between, in which the exigencies of administration necessitate the transfer of a Judge from one High Court to another. The factious local atmosphere sometimes demands the drafting of a Judge or Chief Justice from another High Court and on the rarest of rare occasions which can be counted on the fingers of a hand, it becomes necessary to withdraw a Judge from a circle of favourites and non-favourites. The voice of compassion is heard depending upon who articulates it. Though transfers in such cases are pre-eminently in public interest, it will be impossible to achieve that purpose if a Judge cannot be transferred without his consent. His personal interest may lie in continuing in a Court where his private interest will be served best, whereas, public interest may require that his moorings ought to be severed to act as a reminder that "the place of justice is a hallowed place".

1118. In *Sankalchand Sheth's case* (AIR 1977 SC 2328) (supra) the main question for determination was whether a Judge could be transferred at all without his consent. The majority reached the conclusion that he could be transferred in public interest without his consent. The Court was not specifically concerned with the question whether such transfer could take place on a ground which could be the basis for Parliamentary proceedings for the removal of a Judge under Art. 218 read with Art. 124 (4) and (5) of the Constitution. Since this question has been directly raised in this case it requires to be examined more closely having regard to the scheme of the Constitutional provisions.

1119. Cl. (b) of the proviso to Art. 217 (1) of the Constitution states that a Judge of a High Court may be removed from his office by the President in the

manner provided in Cl. (4) of Art. 124 of the Constitution for the removal of a Judge of the Supreme Court. Art. 218 of the Constitution provides that the provisions of Cls. (4) and (5) of Art. 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court. Cls. (4) and (5) of Art. 124 read as follows:

"124. (4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4)."

1120. Cl. (5) of Art. 124 authorises the Parliament by law to regulate the procedure for the presentation of an address and for investigation and proof of the misbehaviour or incapacity of a Judge under Cl. (4) thereof. In exercise of the said power Parliament has enacted the Judges (Inquiry) Act, 1968 (Act 51 of 1968) which is applicable to Judges of both the Supreme Court and High Courts. The procedure prescribed by that Act is an elaborate one.

1121. Sections 3 to 6 of the abovesaid Act lay down inter alia that the proceedings for removal of a judge can be commenced with a notice of motion for presentation of an address to the President praying for the removal of a Judge of the Supreme Court or of a High Court in the case of a notice given in the Lok Sabha, signed by not less than one hundred members of that House and in the case of a notice given in the Rajya Sabha, by not less than fifty members of that House. The next step is the consideration of the said notice by the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha as the case may be who may on the basis of the material before him either admit the motion or refuse to admit it. If the notice is admitted, the Speaker or the

Chairman should keep the motion pending and constitute a committee of three members of whom one should be chosen from among the Chief Justice and other Judges of the Supreme Court, one from among the Chief Justices of the High Courts and one person who in the opinion of the Speaker or the Chairman as the case may be, is a distinguished jurist. If notices of motion are given on the same day in both the Houses, no committee can be constituted unless the motion has been admitted in both the Houses and if it is so admitted by both the Houses then the committee should be constituted jointly by the Speaker and the Chairman. The committee so constituted has to frame charge and hold an enquiry in accordance with the procedure prescribed therefor. At the conclusion of the enquiry if the committee reports that the Judge is not guilty of the charges, the motion pending in the House cannot be proceeded with. If the committee finds that the Judge against whom the enquiry is instituted is guilty of any misbehaviour or suffers from any incapacity then the motion should be taken up for consideration by the House concerned. If thereafter the motion is adopted by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting and an address is presented to the President in the prescribed manner by each House of Parliament in same session, a Judge of the Supreme Court or a High Court can be removed from office under proviso (b) to Art. 217 (1) of the Constitution.

1122. We are concerned here with the transfer of a Judge whose stock-in-trade if we may use this expression, is his reputation. People accept the decision of a Judge not because his decision is always correct but because it is rendered by a person known for his wisdom, integrity, character and impartiality. It is only on account of these qualities of a Judge, people have faith in the judiciary. The litigants naturally expect the presiding officer of a Court to be a virtuous person. If there is a slight rumour which would adversely affect his reputation, he ceases to command the respect of the people. Even a correct judgment given by a Judge who

is transferred would be viewed with suspicion, if it is known that a judge whose character and conduct are not above reproach is liable to be transferred from one High Court to another High Court, even when his transfer is effected in the public interest and not on the ground of his character or conduct. Then, how can a Judge who is transferred command the respect of the Bar and the people in the State to which he is transferred when his moral personality stands destroyed by the very act of transfer unless the order of transfer carries a postscript that he is not being transferred on any ground of misbehaviour or incapacity?

1123. The following words of the Bhagavad Gita are quite relevant here:
संभावितस्य चाकीर्तिर्मरणदतिरिच्यते II-34.

(To the honoured, infamy is surely worse than death).

1124. If a Judge with a bad reputation is transferred, then it would not subserve any public interest at all since people in the State to which he is transferred will not have faith in him. More than all, in the absence of any procedure for an enquiry in which a Judge can clear his conduct, is it fair to expose him to public ridicule? Can payment of compensation under Art. 222 (2) of the Constitution be of any avail to an honest Judge? Looking at the problem from another angle, can we say that the Constitution has provided for payment of a reward under Article 222 (2) to a Judge who is transferred on the allegation of misbehaviour or incapacity which is not established at an inquiry? All these questions may be set at rest by reading down Art. 222 as not conferring on the President the power to transfer a Judge on the basis of untested allegations or rumours about acts of misbehaviour or incapacity of the Judge and it appears that such a construction would not merely be in conformity with Arts. 218 and 124 (4) and (5) but also would be consistent with the independence of the judiciary. As the law now stands it is not open to any single individual, whether it is the President or the Chief Justice of India or anybody else to take cognizance of any allegations of misbehaviour or of incapacity of a Judge and to any legal action on their basis under the Judges (Inquiry) Act, 1968. One hundred Members of the Lok Sabha or fifty Members

of the Rajya Sabha alone can initiate any action on such allegations. Naturally, all others are excluded from taking cognizance of them and acting on them. In the absence of any categorisation of acts of misbehaviour or incapacity into different classes — like those on the basis of which Parliamentary proceedings for the removal of a Judge may be initiated and those on the basis of which an order of transfer under Art. 222 of the Constitution can be passed, it would be incorrect to hold that a transfer of a Judge can be made under Art. 222 on mere allegations of misbehaviour or incapacity of a Judge. Art. 218 and Article 124 (4) and (5) of the Constitution make it clear that Art. 222 cannot be resorted to in any such case, and if it is utilised by the President in that way, the transfer would have to be set aside on the ground of excess of jurisdiction. When once it is declared that a transfer of a Judge cannot be made at all on the ground of allegations of misbehaviour or of incapacity and can only be made in the public interest, the reputation of a transferred Judge would remain unsullied and no evil consequences such as those indicated above would follow.

1125. It should be stated here that the learned Attorney-General has fairly conceded that no transfer of a Judge under Art. 222 is possible on any of the grounds which may form the basis of a charge in a parliamentary proceeding under cls. (4) and (5) of Art. 124 read with Art. 218 of the Constitution. It is, therefore, declared that a transfer based on any such ground being outside the scope of Art. 222 is liable to be set aside. But a transfer made in the public interest in accordance with Art. 222 but without the consent of the Judge who is transferred is unassailable.

1126. It was faintly suggested by one of the petitioners that Art. 222 of the Constitution does not in terms apply to a Chief Justice of a High Court and hence the transfer of a Chief Justice was bad. This contention is based on the assumption that the word 'Judge' in Art. 222 does not include within its scope a 'Chief Justice.'

1127. It is submitted that Chief Justice is different from other Judges of a High Court for the following reasons: (a) Art. 216 of the Constitution states that a High Court should always have a

Chief Justice. It may not have any other Judges; (b) a Chief Justice's post has to be filled up by making a separate appointment under Art. 217 (1) even when it is filled up by a person who is already holding the post of a Judge and the method of consultation is different in his case; a Chief Justice has to take a fresh oath; (c) when a Judge is appointed, the Chief Justice has to be consulted; (d) when the Chief Justice's post is vacant or when the Chief Justice is absent, any other Judge may be appointed to perform the duties of the Chief Justice under Art. 223 and the Judge so appointed functions only as an acting Chief Justice; (e) under Art. 229, the Chief Justice alone is entrusted with the duty of appointing servants of the High Court and has control over them; (f) under the Second Schedule to the Constitution, the salary of a Chief Justice is fixed at Rs. 4,000/- per mensem whereas other Judges get Rs. 3,500/- only; (g) under Art. 159, a Governor has to make and subscribe the oath before the Chief Justice and only in his absence before the seniormost Judges available and (h) even in the official ranking assigned for ceremonial purposes, the Chief Justice is placed higher than the other Judges of a High Court. These points of distinction between a Chief Justice and a Judge of a High Court no doubt are there but they do not appear to be conclusive for deciding the question before us.

1128. The expression 'Judge' is not defined in the Constitution. We have, therefore, to go through all the relevant provisions of the Constitution to ascertain its true meaning. If we proceed on the basis that the expression 'Judge' does not include a 'Chief Justice,' several anomalous results follow. In Art. 217 (1) the procedure for appointment of a Judge is provided. It says that every Judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. This clause makes it clear that the expression 'Judge' includes a 'Chief Justice' also. If a Chief Justice is not a Judge, there would be no separate age of retirement for him. Cls. (a), (b) and (c) of the proviso to Art. 217 (1) would also

become inapplicable to a Chief Justice as the word 'Chief Justice' is not used in them. Similarly, Art. 217 (2) which prescribes qualifications of a Judge, Art. 217 (3) which provides the procedure for determination of the age of a Judge, Art. 219 which requires a Judge to make and subscribe an oath, Art. 220 which imposes restrictions on the right of persons who have held office as permanent Judges to practise in certain courts, Art. 221 which prescribes and protects the salaries of Judges and Art. 224A which provides for appointment of retired Judges to sit and act as Judges of a High Court would become inapplicable to a Chief Justice. Art. 225 which has preserved the powers of Judges of High Courts which they were exercising before the commencement of the Constitution becomes inapplicable to a Chief Justice. If the term Judge did not also include a 'Chief Justice' all Chief Justices of High Courts who were holding office immediately before the commencement of the Constitution had to vacate their offices on Jan. 26, 1950 because Art. 376 (1) and (2) referred to 'Judges' only. If the contention urged on behalf of the petitioners is accepted, the foregoing absurd results would ensue. Some other consequences of accepting this contention will be that the expression 'one Judge' occurring in Art. 133 (3) of the Constitution will not include a 'Chief Justice' of a High Court and by analogy, the word 'Judges' in Art. 145 (2) and (3) will not include the 'Chief Justice of India.'

1129. In these circumstances the reasonable way to construe the above Articles of the Constitution is to interpret the word 'Judge' wherever it appears in the Constitution as including the 'Chief Justice' also except where a particular provision expressly or by necessary implication distinguishes a Chief Justice from a Judge. In all other places, the word 'Judge' should be considered as having been used in a generic sense. The conclusion is so self-evident that it is not necessary to support it by authorities. Art. 222 of the Constitution, therefore, applies to all Judges of High Courts including a Chief Justice. Of course, a Chief Justice can only be transferred as a Chief Justice of another High Court and not as a Judge.

1130. I may say a few words here on the policy of appointing the Chief

Justice in every High Court from outside the State. In our country we are used to the British Chief Justices presiding over the High Courts for more than a century. Many of them turned out to be distinguished Judges and the fact that they were functioning in a country which they had not known before did not act as any hindrance to their work. Even the ignorance of any of the local languages did not act as a serious obstacle to their functioning efficiently.

1131. The Fourteenth Report of the Law Commission having considered the question of appointment of Chief Justices of High Courts from outside the State observed in Chapter VI thus :

"26. A large body of evidence before us has suggested that it should be made an invariable practice to fill a vacancy in the office of Chief Justice by appointing a Judge from outside the State. Such course, it is said, will have the advantage of giving the Chief Justice of India a wide choice in recommending a person suitable for that office. It has also been pressed upon us that bringing a Chief Justice from outside the State will have a very healthy influence, in that, it will promote a sense of unity in the country and prevent the Chief Justice being swayed by local connections and local influences. It may be mentioned that Chief Justices from outside the State have been appointed in some of the States and these appointments have proved a success. Though the analogy may not be very pertinent, we may refer to the practice of appointing Governors who do not belong to the State, which has been in vogue since the advent of the Constitution.

27. On the other hand it has been urged with considerable force, that it would not be fair, that competent persons on the Bench of the State High Court should be shut out from the chance of occupying the office of the Chief Justice in their own States. It has also been pointed out that the proposed practice may prevent members of the Bar from accepting appointments as Judges, the opportunity of serving as Chief Justices in their own States being denied to them.

28. On the whole we are of the view that it would be difficult to lay down such an inflexible practice. It should, we think, be clearly understood, that

the seniormost puisne Judge of a Court should not merely by reason of his seniority have an expectation of succeeding to the office of the Chief Justice. In every case of a vacancy in the office of the Chief Justice, the senior puisne Judge should be appointed to the office, only if he has the necessary qualifications. Indeed the Chief Justice of India may well bear in mind the desirability of appointing a Chief Justice from outside the State by reason of the consideration we have mentioned. Even in cases where the seniormost puisne Judge is fit to occupy the office, it would be doing no injustice to him to leave him out and appoint him to a similar office in another State."

1132. The 80th Report of the Law Commission observed in Chapter VI thus:

"6.19. It would not be a healthy practice in case the seniormost Judge is considered not suitable for the office of Chief Justice to appoint a junior Judge from the same court as Chief Justice. In such an event, the proper course, in our opinion, would be to appoint some Judge from outside the State. It should also be ensured that the Judge so appointed as Chief Justice should have been on the High Court Bench for a sufficiently long time and should have that much seniority as a Judge as not to cause resentment in the senior Judges of the High Court that someone junior in service has been appointed in supersession of their claim. While appointing someone from outside the State as Chief Justice of the High Court, care must also be taken to see that his tenure as Chief Justice is not so long as to block the chances of not only the seniormost Judges but also of other Judges in the High Court. By the words "blocking the chances," we mean not only preventing the appointment of a person as Chief Justice but also substantially reducing the length of his term as Chief Justice. Of course, arithmetical exactitude and precision in these matters cannot be insisted upon."

1133. Neither of the above two Reports of the Law Commission, however, notices any impropriety in appointing Chief Justices from outside. Such practice has its own distinct advantages particularly in these days. Since the Chief Justice of India has got to be

consulted before appointing a Chief Justice of a High Court one may feel assured that there will be very little room for anything prejudicial to the community of High Court Judges happening by the implementation of the policy of appointing Chief Justices of the High Courts from outside the State. The advantages of having some Judges in every High Court from outside have been considered by some high-power bodies earlier.

1134. The States Reorganisation Commission presided over by Justice S. Fazal Ali, former Judge of the Supreme Court of India in its Report prepared in the year 1955 observed at paragraph 861 thus:—

"861. Guided by the consideration that the principal organs of State should be so constituted as to inspire confidence and to help in arresting parochial trends, we would also recommend that at least one-third of the number of Judges in a High Court should consist of persons who are recruited from outside that State. In making appointments to a High Court Bench, professional standing and ability must obviously be the overriding consideration. But the suggestion we have made will extend the field of choice and will have the advantage of regulating the staffing of the higher judiciary as far as possible on the same principles as in the case of the Civil Service."

1135. In para 58 of the Summary of Conclusions and Recommendations given at the end of its Report, the States Reorganisation Commission recommended:

"58. At least one-third of the number of Judges in the High Court of a State should consist of persons who are recruited from outside that State. (para 861)."

1136. The Study Team on Centre-State Relationships (Shri M. C. Setalvad, former Attorney-General was the Chairman of the Team) appointed by the Administrative Reforms Commission also considered the question of appointment of High Court Judges in its Report submitted in the year 1968. Dealing with the recommendations of the States Reorganisation Commission on the above questions, the Study Team observed:

"We would nevertheless suggest that, without necessarily preparing panels, the recommendation of the States Re-

organisation Commission should be given effect to as far as possible. Some "outside" appointments are made even now but these are few and far between. A serious effort to increase their number will make its own contribution to efficiency, independence and national integration. Unlike the suggestion for the panel, this proposal does not affront any canons of delicacy and discretion. And yet a couple of objections might be raised and need to be dealt with :—

(a) obviously, when appointing an "outsider", it will be necessary to consult the Chief Justice and the government of the State from which he hails. As the Chief Justice of the High Court in which the vacancy occurs will not have any personal knowledge of the suitability of the candidate, he will be unable to give his opinion although constitutionally required to do so. The objection is of a technical nature. The spirit behind the present procedure is that the opinion of the Chief Justice who knows the candidate's reputation and ability should be given due weight. We notice that "outside" appointments have been made in the past without any constitutional difficulties arising. The same could continue to happen in the future. Difficulties might arise if Chief Justices of High Courts to which "outsiders" are allocated object frequently to candidates so allocated. But the whole approach recommended here postulates an enlightened national policy on the problem to which Chief Justices can be expected to subscribe. Normally, therefore, a Chief Justice should not object to the allocation of a carefully selected man. There is in any case no virtue in making any Bench the monopoly of the local Bar irrespective of available merit there or not;

(b) it may be thought that the authority and prestige of a High Court would be affected in case members of an outside Bar are appointed to it. This is an insubstantial objection, because a High Court must command respect for the quality of justice that it dispenses and not for its ability to promote members of its Bar to the Bench. Leaving this aside, the proposal in any case does not envisage that more than one-third of the number of judges of a High Court will come from outside. This cannot seriously affect the prestige and autho-

rity of the High Courts and the Chief Justices. Besides, any fancied diminution in the position of the Chief Justice on account of this one-third component from outside will be offset by the fact that candidates from his State may be going to other High Courts through a selection procedure in which he is associated."

(Vide Report of the Study Team on Centre-State Relations, Vol. I pages 188-190).

1137. Accordingly the Study Team recommended at page 195 Volume I of its Report that as far as practicable, one-third of the number of Judges of a High Court should be from outside.

1138. It appears from paragraph 13.21 of Volume I of the Report of the Study Team that the Chief Justices themselves had pressed for the transferability and the formation of an all-India cadre of Judges. The relevant part of that paragraph reads :

"13.21.....Transferability and the formation of an all-India cadre of Judges was urged by the Chief Justices on the following grounds :—

(i) that such a cadre would have the advantages of extending the field of choice of High Court Judges and of regulating the staffing of the higher judiciary on the same lines as that of the civil service;

(ii) that a judiciary so recruited would be more independent having less local connections;

(iii) that the difficulty experienced in constituting division benches in hearing cases as one or more of the judges recruited from the State had been engaged in the case at an early stage either as counsel or as party or happened to be related to one or more of the litigants would be avoided;

(iv) that a unified cadre of High Court Judges with free transfers all over the country would help to break down the barriers of regionalism which held sway in many parts of the country".

1139. The foregoing shows that the Chief Justices did not find anything objectionable in the transfers of Judges provided they were made in accordance with Article 222 of the Constitution. The Study Team, however, followed the recommendation made in the Fourteenth

Report of the Law Commission but added:

"We consider that it is important to make "outside" appointments a reality, and that once that is done it is not necessary to insist on a regular system of transfers".

1140. The 80th Report of the Law Commission has also approved the above idea of having some Judges in every High Court from outside.

1141. The principle underlying this policy is not something new to oriental countries. In the latter half of the eighteenth century in China, there was in vogue a rule called the 'Law of Avoidance'. "The 'Law of Avoidance' required that no one be appointed to high positions in his native province and no two members of the same family be allowed to work in the same locality or service, so as to prevent nepotism and the forming of cliques". (Immanuel C. Y. Hsu: 'The Rise of Modern China', Second Edition, p. 62)

1142. One of the arguments in favour of appointing one-third of the Judges in every High Court from outside the State is that such a step would assist in bringing about national integration. It is my view that there is a good deal of substance in this argument although some dismiss the idea very lightly. Clauses (a) to (e) of Article 51A of the Constitution need to be quoted here :

"51A. It shall be the duty of every citizen of India—

(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities;....."

1143. Article 51A of the Constitution which lays down the fundamental duties of the citizens of India was introduced into the Constitution with effect from Jan. 3, 1977 probably to remind Indians of certain values which they were slowly neglecting during the period of thirty

years following the independence of the country. Even in the year 1963 itself by the Constitution (Sixteenth Amendment) Act, 1963, the form of oath to be taken by a Judge which is set out in the Third Schedule to the Constitution was amended by adding the words "that I will uphold the sovereignty and integrity of India". The preamble of the Constitution was amended with effect from January 3, 1977 by substituting the words "unity and integrity of the Nation" in the place of the words "unity of the Nation" which were there earlier. These amendments had to be made to fight the divisive forces which were raising their ugly heads in different corners of India. The nation should be grateful to the makers of the Constitution for enacting the provisions relating to the Indian judiciary which have brought into existence an unitary judicial system in a federal Constitution. Law (dharma) has always been an unifying force in India. The entire country from Kashmir to Kanya Kumari possesses this great inner bond of unity. Judges and lawyers who are the votaries of Indian law should feel proud of their heritage. Just as the Indian soldier feels proud of defending the borders of the country treating the whole country as a single unit, Judges and lawyers should feel that they are a part of a single judicial system operating throughout India and that they are not just members of one State or another. They should be prepared to work in any part of India irrespective of the State in which they are born or brought up. Today no High Court can afford to remain isolated from other High Courts as a judicial island. Lawyers and Judges of one High Court should be prepared to receive with open arms lawyers and Judges of other High Courts. They should also be prepared to spare the services of their Judges to be utilised in other High Courts. It is only then the dream of an integrated Bar and of an integrated judiciary will be fully realised. The Indian judicial system in one way is a great forging instrument of unity which, if properly used, can assist the country in bringing about national integration which is no longer a mere slogan. National integration is an absolute necessity now. If national integration is not a matter of public interest, what else can be in the public interest?

1144. It is difficult to believe that Judges who day in and day out are applying decisions of English, American and Australian courts while administering justice will not be able to pick up the local laws in force in the State in which High Court to which they are transferred is situated. Are not the Judges of the Supreme Court who come from different States deciding cases from all the States in which very often they have to construe one local law or the other? The argument that the efficiency of Judges will suffer if they are transferred is merely an argument of despair which has got to be rejected.

1145. The plea that a Judge of a High Court should always know the language of the region is again unsustainable. The Constitution makers knew that in India there were a number of regional languages. Yet they enacted Art. 222 of the Constitution without any limitation. A Judge of one High Court who does not know the regional language of another State may be transferred to the High Court of that State. It is well known that many Britishers who did not know any Indian language discharged their functions very efficiently as High Court Judges in India before the commencement of the Constitution. The language of the High Courts has always been English. Even after the commencement of the Constitution, many Judges who did not understand the local language have functioned as High Court Judges to the satisfaction of all concerned. When the reorganisation of State took place in 1956, the States Reorganisation Commission consisting of Shri Justice Fazal Ali, Shri H. N. Kunzru and Shri K. M. Panikkar strongly pleaded as stated earlier for appointment of at least one-third of Judges of a High Court from outside the State. English is now the language of the Supreme Court and all the High Courts. Article 348 of the Constitution reads:

"348. (1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

(a) all proceedings in the Supreme Court and in every High Court;

(b) the authoritative texts —

(i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the

House or either House of the Legislature of a State,

(ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinance promulgated by the President or the Governor of a State, and

(iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State, shall be in English language.

(2) Notwithstanding anything in sub-clause (a) of clause (1), the Governor of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State:

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub-clause (b) of cl. (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in or Acts passed by the Legislature of the State or in Ordinances promulgated by the Governor of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article."

1146. Judges of one High Court trained in English language should not, therefore find any difficulty in carrying on their duties in other High Courts which are situated in other States. All the high-power bodies which have expressed their opinion in favour of transfers of Judges have felt that the advantages flowing from the transfers of High Court Judges would outweigh the disadvantages, if any, including those flowing from the various regional languages of India. It is not possible to hold that the transfers of Judges would be opposed to the public interest on this ground also.

1147. It is pertinent to deal with a statement made in *Sankalchand Sheth's case* ((1978) 1 SCR 423) (supra) at p. 454: (AIR 1977 SC 2328 at p. 2347) which reads as follows:

"Policy transfers on a wholesale basis which leaves no scope for considering the facts of each particular case and which are influenced by one-sided governmental considerations are outside the contemplation of our Constitution".

1148. On the basis of this it is argued that policy transfers as such are not permissible under Art. 222 of the Constitution. I do not understand the above said observations as conveying that meaning and if they so convey that meaning, then it has to be observed that they are too broadly made. What the above statement means is that even where a transfer is made pursuant to a valid policy, each transfer should receive adequate consideration at the hands of the authorities concerned. All other relevant matters in relation to the Judge who is proposed to be transferred pursuant to the policy should be considered before ordering his transfer. If on such consideration it is found that he should not be transferred, the proposal should be given up and the question of transferring another Judge in furtherance of the policy may be taken up for consideration. By doing so the policy remains unaffected and the public interest to be served by the policy also would not suffer. But if it is argued that the above statement bars every transfer made pursuant to a policy which is in the public interest then it has to be held that to the extent it bars such transfers is opposed to the provisions of Art. 222 which empowers the President to transfer a Judge after due consultation with the Chief Justice of India, of course, in the public interest and is thus not binding as such a construction would curtail the width of the power under Art. 222.

1149. I am of the view that in view of the foregoing reasons and opinions expressed by several expert bodies any transfer of a Judge of a High Court under Art. 222 of the Constitution in order to implement the policy of appointing the Chief Justice of every High Court from outside the State concerned and of having at least one-third of the Judges of every High Court from outside the State, of course, after consultation with the Chief Justice of India would not be unconstitutional.

PART VIII

1150. In order to establish their case, learned counsel appearing for Shri V. M. Tarkunde and Shri S. N. Kumar, called upon the Union Government to produce the records pertaining to the consultations made by the President under Article 217 (1) of the Constitution in so far as the case of Shri S. N. Kumar was concerned. The demand made by them was opposed by the Union Government on the ground of privilege. It was contended by the Union Government that the documents whose discovery was sought being those containing communications made by high constitutional functionaries regarding a high level appointment it would not be proper to compel the Union Government to produce them.

1151. The question which relates to the circumstances in which the Government can claim that the documents, the production of which is demanded before a court of law, should not be compelled to be produced on the ground of privilege is of great constitutional importance. In *Duncan v. Cammell, Laird & Company Ltd.* (1942) AC 624, decided during the Second World War by the House of Lords such a question arose for consideration. On June 1, 1939, the submarine, *Thetis*, which had been built by the respondents in that case under contract with the Admiralty was undergoing her submergence tests in Liverpool Bay, and while engaged in the operation of a trial dive sank to the bottom owing to the flooding of her two foremost compartments and failed to return to the surface with the result that all who were in her, except four survivors were overwhelmed. Ninety-nine men lost their lives. A large number of actions were instituted by those representing, or dependent on, some of the deceased against respondents and three other persons claiming damages for negligence. All of these actions, except two, were stayed until after the trial of two test actions, which were consolidated, the plaintiffs in those two test actions being the appellants in the above case. The respondents in their affidavits of documents objected to produce certain documents called for by the appellants on the ground that they (the respondents) had been asked by the Treasury

Solicitor on behalf of the First Lord of the Admiralty not to produce the said documents which had come into their possession under a contract with the Government and to claim Crown Privilege in respect of them. The First Lord of the Admiralty also filed an affidavit stating that the documents in question had been considered by him and he had formed the opinion that it would be injurious to the public interest that any of the said documents should be disclosed to any person. The documents, to the production of which objection was thus taken included (either in original or in copy) the contract for the hull and machinery of the *Thetis*, letters written before the disaster relating to the vessel's trim, reports as to the condition of the *Thetis* when raised, a large number of plans and specifications relating to the various parts of the vessel etc. The trial Judge declined to allow inspection of the documents and the Court of Appeal affirmed his decision. The House of Lords also upheld the claim of privilege by a unanimous decision, holding that a Court of law should uphold an objection taken by a public department called on to produce documents in a suit between private citizens if on grounds of public policy they ought not to be produced and that documents otherwise relevant and liable for production must not be produced if the public interest required that they should be withheld. The House of Lords in that case laid down two tests on which documents may be withheld — one based on the contents of the documents and the other namely the class to which the documents belonged, which on grounds of public interest must be withheld from production. It proceeded to lay down that an objection validly taken on the ground that it would be injurious to the public interest was conclusive. But it was held that the mere fact that the minister of the department did not wish the documents to be produced was not an adequate justification for objecting to their production. Production could also be withheld when the public interest would otherwise be damaged as where disclosure would be injurious to national defence or to good diplomatic relations or where the practice of keeping a class of documents secret was necessary for the proper functioning of the public

service. In such a case, it was held that the Court should not require to see the document for the purpose of ascertaining whether disclosure would be injurious to the public interest. It was further held that it was essential that the decision to object should be taken by the minister who was the political head of the department concerned and that he should have seen and considered the contents of the documents and himself formed the view that on grounds of public interest they ought not to be produced and such objection should ordinarily be taken in an affidavit of the minister. This decision, it may be seen, laid down that privilege could be claimed in respect of a document on two alternative grounds viz., (a) that the disclosure of the contents of the document would be injurious to the public interest by endangering national security or diplomatic relations and (b) that the document belonged to a class which should not be disclosed to ensure the proper functioning of public service. Viscount Simon who spoke for the House of Lords in this case expressed his disagreement with the decision of the Privy Council in *Robinson v. State of South Australia* (No. 2) (1931) AC 704, in which it had been held that it was proper for a court to inspect the documents in respect of which privilege had been claimed to determine whether their production would be prejudicial to the public welfare. In the course of his speech, the noble Lord observed at page 641 thus:

"As Lord Parker said in another connection: 'Those who are responsible for' the national security must be the sole Judges of what the 'national security requires': *The Zamora* (1916) 2 AC 77 107. In *Robinson v. State of South Australia* (No. 2) (1931) AC 704, the Judicial Committee reversed the decision of the Supreme Court of South Australia, which had refused to order the inspection of documents which the Minister in charge of the department objected to produce on grounds of public policy, and remitted the case to the Supreme Court with the direction that it was one proper for the exercise of the Court's power of inspecting documents to determine whether their production would be prejudicial to the public welfare. I cannot agree with this

view. Their Lordships' conclusion was partly based on their interpretation of a rule of Court which was in the same terms as O. XXXI, R. 19A, sub-rule (2), of the Rules of the English Supreme Court. This sub-rule provides: "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a Judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege." In my opinion, the Privy Council was mistaken in regarding such a rule as having any application to the subject-matter. The doubt expressed on the point by *du Parcq L. J.* in the present case is fully justified. The withholding of documents, on the ground that their publication would be contrary to the public interest, is not properly to be regarded as a branch of the law of privilege connected with discovery. "Crown privilege" is for this reason not a happy expression. Privilege, in relation to discovery, is for the protection of the litigant and could be waived by him, but the rule that the interest of the State must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation, and, indeed, is a rule on which the Judge should, if necessary, insist, even though no objection is taken at all."

1152. Nearly five years after the judgment in *Duncan's case* (1942) AC 624 (supra) the Crown Proceedings Act, 1947 was passed by the British Parliament and the Crown privilege recognised under the common law was regulated by Section 28 of the said Act. But that section was, however, subject to the proviso that it could not override any rule of law which authorised or required the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the refusal to answering of the question would be injurious to the public interest.

1153. *Robinson's case* ((1931) AC 704) (supra) which was dissented from by the House of Lords as stated above arose out of an action in South Australia. The Judicial Committee had held in that case that a South Australian Rule which

provided that where on an application for an order for inspection, privilege was claimed for any document it was lawful for the Court or a Judge to inspect it for the purpose of deciding as to the validity of the claim applied where privilege was claimed for an official document on the ground that its disclosure would be contrary to the interests of the public even though the claim was supported by a statement to that effect by the Minister responsible. It was further held that the Court had always in reserve, the power to inquire into the nature of the document for which protection was so sought and to require some indication of the injury which would result from its production. The Judicial Committee added that the claim to protection in the case of documents relating to trading, commercial or contractual activities of a State could rarely be sustained especially in time of peace and that documents would prejudice the case of the State in the litigation or assist the other party was a compelling reason for their production only to be overborne by the gravest reasons of State policy or security.

1154. In three cases which came before the Court of Appeal after *Duncan's case* ((1942) AC 624) (supra) was decided by the House of Lords, while it was held that on matters touching national security and foreign affairs, the application of the principle enunciated in the *Duncan's case* (supra) in an unqualified manner was not open to question, doubts were entertained about its application without modification to a class of documents (See *Merricks v. Nott-Bower* (1964) 1 All ER 717; *Re Grosvenor Hotel, London* (No. 2) (1964) 3 All ER 345 and *Wednesbury Corporation v. Ministry of Housing and Local Government* (1965) All ER 186). When it was asserted by the Attorney-General that so long as the objection was taken in proper form, the Judge must treat the claim of privilege as conclusive, in *Re Grosvenor Hotel's case* (supra) Lord Denning, M. R. after referring to the practice prevailing in Scotland and Commonwealth countries, observed at pages 361-362 thus :

"In view of these developments, I think that it is open to the House and I believe to us, to reconsider the matter:

and I must say that, in my judgment, the law of England should be brought into line in this matter with that of Scotland and of the rest of the Commonwealth. The objection of a Minister, even though taken in proper form, should not be conclusive. If the Court should be of opinion that the objection is not taken in good faith, or that there are no reasonable grounds for thinking that the production of the documents would be injurious to the public interest, the Court can override the objection and order production. It can, if it thinks fit, call for the documents and inspect them itself so as to see whether there are reasonable grounds for withholding them: ensuring, of course, that they are not disclosed to anyone else. It is rare indeed for the Court to override the Minister's objection, but it has the ultimate power, in the interests of justice, to do so. After all, it is the Judges who are the guardians of justice in this land; and if they are to fulfil their trust, they must be able to call on the Minister to put forward his reasons so as to see if they outweigh the interests of justice."

1155. The privilege based not on their contents but on the class to which the documents belonged was held to be not acceptable. On balance however the Court of Appeal upheld the privilege in the light of the above observations.

1156. It is interesting to notice here the recommendation made by the General Council of the Bar in England in a memorandum issued by it in Feb., 1956 after a critical examination of the decision in Duncan's case (1942) AC 624 (supra). In para 15 of that memorandum the Council recommended thus:

"We therefore recommend—

(1) A departmental head seeking the exclusion of any evidence should be required to state in his affidavit whether the adduction of such evidence would be prejudicial to the national security, including diplomatic relations, or some other head of public interest, which he should specify.

(2) In either case the departmental head should be required to state whether the evidence would be so prejudicial when adduced in open or in closed Court.

(3) Where his claim to privilege is based on ground of national security it should be conclusive.

(4) Where his claim is based on grounds of public interest other than national security it should be examinable by the Court.

(5) The Court should be given power to order a hearing or partial hearing in closed Court on the ground that publication of any evidence to be given in the course of the proceedings would be prejudicial to the national safety or the national interest.

(Vide Appendix 4 to 'Law and Orders' by C. K. Allen, 2nd Edn.)

1157. Lord Chancellor Viscount Kilmuir also made a statement on June 6, 1956 in the House of Lords on the question of Crown privilege arising out of the decision in Duncan's case ((1942) AC 624) (supra). In the course of that statement after referring to the two grounds on which privilege could be claimed according to Duncan viz., (a) that the disclosure of the particular document would injure public interest e. g., by endangering public security or prejudicing diplomatic relations and (b) that the document fell within a class which the public interest required to be withheld from production, Lord Kilmuir stated thus:

"The claiming of Crown privilege on the first ground that I have mentioned has always been acceptable to the Courts and public opinion. Where, however, the claim has been made on the ground that the document belongs to a class, especially, in proceedings where the Crown's position seems very like that of an ordinary litigant, it has been criticised on the ground that the administration of justice is itself a matter of public interest and should be weighed against the other head of public interest, that is, 'the proper functioning of the public service.'"

The reason why the law sanctions the claiming of Crown privilege on the 'class' ground is the need to secure freedom and candour of communication with and within the public service, so that Government decisions can be taken on the best advice and with the fullest information. In order to secure this it is necessary that the class of documents to which privilege applies should be clearly settled, so that the person giving advice or information should know that he is doing so in confidence. Any system whereby a document falling within

the class might, as a result of a later decision, be required to be produced in evidence, would destroy that confidence and undermine the whole basis of class privilege, because there would be no certainty at the time of writing that the document would not be disclosed.

It is sometimes suggested that a claim for privilege on the class basis should be referred to and decided by a Judge. This suggestion goes much further than the position in Scotland, where the power of the Judge is only exercisable 'in very special circumstances' and does not permit any examination of the ground of the claim. This ground namely, 'the proper functioning of the public service', must in our view be a matter for a Minister to decide, with his knowledge of government and responsibility to Parliament, rather than for a Judge.

A Judge assesses the importance of a particular document in the case that he is hearing, and his inclination would be to allow or to disallow a claim for privilege according to the contents and the relevance of the document, rather than to consider the effect on the public service of the disclosure of the class of documents to which it belongs. The result would be that the same kind of document would sometimes be protected and sometimes disclosed, which would, as I have said, be destructive of the whole basis of the class privilege.

I would emphasise that claims of Crown privilege are made in respect of all documents falling within the class, irrespective of whether their production would be favourable or unfavourable to the Crown's interests. All Crown lawyers are familiar with cases in which the Crown's interests have in fact been prejudiced by the application of the rule.

The proper way to strike a balance between the needs of litigants and those of Government administration is, in our opinion, to narrow the class as much as possible by excluding from it those categories of documents which appear to be particularly relevant to litigation and for which the highest degree of confidentiality is not required in the public interest."

(Vide Appendix 4 to 'Law and Orders' by C. K. Allen, 2nd Edition, pp. 467-468).

1158. The three decisions of the Court of Appeal referred to above which had been decided by Lord Denning M. R. Harman and Salmon, L. JJ., came up for consideration again before the Court of Appeal in *Conway v. Rimmer*, (1967) 2 All ER 1260 consisting of Lord Denning, M. R. Davies and Russell, L. JJ. The relevant facts of this case were these. The plaintiff, a probationer police constable was prosecuted by a Superintendent in the constabulary on a charge of stealing an electric torch belonging to another probationer constable. The prosecution failed and the plaintiff was acquitted but soon afterwards he was dismissed from the police force as unlikely to become an efficient police officer. The plaintiff sued the Superintendent for malicious prosecution. On discovery in the action, the Home Secretary claimed Crown privilege for a class of documents which included the probationary reports relating to the plaintiff and the report leading to his prosecution; the privilege was claimed on the ground that discovery of documents of that class would be contrary or injurious to the public interest. The claim of privilege was in proper form. It was not suggested that the claim was not taken in good faith or that the Home Secretary was mistaken in thinking the documents to be of the class stated. The Registrar of the Court directed the defendant to produce the documents. But Browne, J., allowed the appeal by the defendant and the Attorney-General and disallowed the claim for discovery. It is this order which was questioned before the Court of Appeal. In this case, Lord Denning who was in the minority directed the production of the documents. The other two learned Judges, however, felt that *Duncan's case* ((1942) AC 624) (*supra*) could not be departed from by the Court of Appeal and that the observations in the three cases referred to above questioning the validity of the privilege based on the class to which the particular document belonged were not binding. Davies L. J. with whom Russell, L. J. agreed observed at pp. 1271-72 thus :

"I turn now to the 1964 trilogy of cases, namely, *Merricks v. Nott-Bower* (1964) 1 All ER 717; *Re Grosvenor Hotel London* (No. 2) (1964) 3 All ER 354; and *Wednesbury Corporation v. Ministry of Housing and Local Government* (1965) 1

All ER 186, mentioned earlier in this judgment and decided in this Court by the same trinity of Judges, viz., Lord Denning, M. R., Harman and Salmon, L. JJ. The judgment in those cases are, of course, most weighty and most interesting; but, with the greatest respect, I cannot accept them as decisions that English Law is other than I have suggested that it is. Some general observations may be made about those cases. In the first place, in not one of them did the Court order production of the documents in question or itself inspect them; so that, whether or not the observations made in those cases were obiter, as in that state of affairs I am inclined to think that they were, the Crown had no opportunity of challenging in the House of Lords the validity of the views expressed in this Court. Secondly, in each case the Court was much exercised about the form and sufficiency of the Minister's certificate or affidavit. In the present case no such question arises. Third, all those decisions proceeded on the basis that there was a difference or dichotomy, as Harman, L. J. called it in *Re Grosvenor Hotel, London* (No. 2) (1964) 3 All ER at pp. 364, 365 between contents cases and class cases; though it would appear that Salmon, L. J. would make a sub-division between high "class" cases and low "class" cases (See (1964) 3 All ER at pp 370 and 371). I am bound to say that I can see no logical distinction, though there obviously may be a practical one, between high class cases and low class cases, any more than there is between class cases and contents cases. Fourth, all of the judgments, proceeded on the basis that the observations of Viscount Simon in *Duncan's case* (1942) 1 All ER 587, as to class cases were obiter and wrong. Fifth, very little weight was attached in any of those cases to the decision in *Auten v. Rayner* (1958) 3 All ER 566. Finally, all the Judges were exercised in their minds as to desirability of the law of England in this respect being the same as that of Scotland and of Commonwealth countries, such as Australia, Canada and New Zealand. Whether the law in those Commonwealth countries, whose Courts are, of course, influenced by *Robinson v. State of South Australia* (No. 2) (1931) All ER Rep 333; is precisely the same as the law of Scotland, as laid down in *Glasgow Corp'n. v.*

Central Land Board, 1956 SC (HL) 1 is, perhaps, open to doubt. That it is desirable that the law on this important constitutional matter should be the same every where is beyond question; but, in my judgment, the only tribunal in this country which can achieve that object is the House of Lords, who now have the power to alter or vary the decision at which, as I have said, in my opinion they arrived in *Duncan's case* (1942) 1 All ER 587".

1159. The appeal was dismissed in accordance with the opinion of the majority.

1160. The clock was thus again put back by the Court of Appeal. *Conway's case* ((1967) 2 All ER 1260) (supra) was taken up in appeal before the House of Lords in *Conway v. Rimmer* (1968) 1 All ER 874 (HL). After a review of a number of decisions which had been rendered before *Duncan's case* ((1942) AC 624) including *Robinson's case* ((1931) AC 704) decided by the Privy Council and the decisions of the Court of Appeal subsequent to the decision in *Duncan's case*, the House of Lords reversed the decision of the Court of Appeal. It directed that the documents in question should be produced before the Court which had called them for its inspection and if it was found that their disclosure would not be prejudicial to the public interest or that any such possible prejudice would be insufficient to justify non-disclosure, an order for disclosure of the reports should be made.

1161. It is important to note that in this case one Lord after another rejected the contention that the possibility of future disclosure would affect candour. Lord Reid observed at page 881: "So far as I know, however, no one has ever suggested that public safety has been endangered by the candour or completeness of such reports having been inhibited by the fact that they may have to be produced if the interests of the due administration of justice should ever require production at any time" Lord Morris observed at page 891: "In many decided cases, however, there have been references to a suggestion that if there were knowledge that certain documents (e. g. reports) might in some circumstances be seen by eyes for which they were never intended the result would be that in the making of

similar documents in the future, candour would be lacking. Here is a suggestion of doubtful validity. Would the knowledge that there was a remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated. The law is ample in its protection of those who are honest in recording opinions which they are under a duty to express. Whatever may be the strength or the weakness of the suggestion to which I have referred it seems to me that a Court is as well and probably better qualified than any other body to give such significance to it as the circumstances of a particular case may warrant". Lord Hodson observed at page 904: "It is strange if civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied other fellow subjects". Lord Pearce said at page 912: "There are countless teachers at schools and universities, countless employers of labour who write candid reports unworried by the outside chance of disclosure....."

Lord Upjohn observed at pages 914-915: "The reason for this privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high level communications, however, innocent of the prejudice to the State the actual contents of any particular document might be, that is obvious. It has nothing whatever to do, however, with candour or uninhibited freedom of expression, I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of the day". Commenting on this decision, H. W. R. Wade wrote: "Their Lordships heaped withering criticism upon this class "principle" which is that complete classes of official reports and documents ought to be

kept secret, at whatever cost to the interests of litigants, merely because otherwise there would not be "freedom and candour of communication with and within the public service" (Vide 'Crown Privilege Controlled at Last' by H. W. R. Wade (1968) 84 The Law Quarterly Review 171 at p. 172). Duncan's case ((1942) AC 624) (HL) (supra) stood accordingly modified.

1162. In *Rogers v. Home Secretary*, (1973) AC 388, the appellant required the production of a certain letter written about him to the Gaming Board for Great Britain which had the duty to make unusually extensive inquiries not only into the capacity and diligence of all applicants for licences to maintain gaming establishments but also into their character, reputation and financial standing and any other circumstances appearing to the Board to be relevant before issuing licences under the Gaming Act, 1968. Applications made by a Company of which the appellant was a director had been refused by the Board. It was the custom of the Board to obtain confidential information about applicants from the police. The appellant said that there came into his possession from an anonymous source a copy of a letter written about him to the Board by Mr. Ross, Assistant Chief Constable of Sussex. Obviously this letter had been abstracted by improper means from the files of the Board or of the Police. The appellant said that this letter contained highly damaging libellous statements about him and that he wished to take proceedings to clear his reputation. The means he chose for doing that was to seek to prosecute Mr. Ross for criminal libel. To succeed he had to prove the letter. So he applied for its production. The Attorney-General opposed the summons and he succeeded. The House of Lords in appeal in the above case upheld the privilege. Lord Reid observed in the course of his speech at pages 400-401 thus:—

"The ground put forward has been said to be Crown privilege. I think that that expression is wrong and may be misleading. There is no question of any privilege in the ordinary sense of the word. The real question is whether the public interest requires that the letter shall not be produced and whether that public interest is so strong as

to override the ordinary right and interest of a litigant that he shall be able to lay before a Court of Justice all relevant evidence. A Minister of the Crown is always an appropriate and often the most appropriate person to assert this public interest, and the evidence or advice which he gives to the court is always valuable and may sometimes be indispensable. But, in my view, it must always be open to any person interested to raise the question and there may be cases where the trial Judge should himself raise the question if no one else has done so. In the present case the question of public interest was raised by both the Attorney-General and the Gaming Board. In my judgment both were entitled to raise the matter. Indeed I think that in the circumstances it was the duty of the board to do as they have done.

The claim in the present case is not based on the nature of the contents of this particular letter. It is based on the fact that the board cannot adequately perform their statutory duty unless they can preserve the confidentiality of all communications to them regarding character, reputation or antecedents of applicants for their consent.

Claims for "class privilege" were fully considered by this House in *Conway v. Rimmer*, 1968 AC 910. It was made clear that there is a heavy burden of proof on any authority which makes such a claim. But the possibility of establishing such a claim was not ruled out. I venture to quote what I said in that case at p. 952:

"There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in *Duncan v. Cammell Laird & Co. Ltd.*, (1942) AC 624, 642, whether the withholding of a document because it belongs to a particular class is really 'necessary for the proper functioning of the public service'."

I do not think that "the public service should be construed narrowly. Here the question is whether the withholding of this class of documents is really necessary to enable the board adequately to perform its statutory duties. If it is, then we are enabling the will of Parliament to be carried out."

1163. In a later case before the House of Lords i. e., *Burmah Oil Co. Ltd. v. Bank of England* (1979) 3 All ER 700 it was again laid down that there was no rule of law that a claim by the Crown on the grounds of public interest for immunity from production of a class of documents of a high level of public importance was conclusive and that the Court had the power to inspect the documents before deciding whether they should be disclosed after balancing the competing interests of preventing harm to the State or the public service by disclosure and preventing frustration of the administration of justice by withholding disclosure.

1164. In the last decision of the House of Lords to which our attention is drawn i. e., *Science Research Council v. Nasse*, (1980) AC 1028, the question as to how far confidentiality could be a ground for claiming privilege in respect of any document arose for consideration. That case arose out of disputes between two employees and their employers which were raised before the Industrial Tribunal. The employees' complaint was that they had been discriminated against by their employers in the course of their employment. Before the Tribunal they were called upon for production of some documents. The Court of Appeal had allowed appeal of the employers holding that if the documents were disclosed it would be in gross breach of faith and could lead to industrial trouble. Dismissing the appeal, the House of Lords held that while no principle of public interest immunity protected such confidential documents and that they were not immune from discovering by reason of confidentiality alone, the Tribunal in the free exercise of its discretion to order discovery should have regard to the fact that they were confidential and that discovery would be a breach of confidence, so that accordingly, relevance alone though a necessary ingredient did not provide an automatic test for discovery, the ultimate test being whether discovery was necessary for disposing fairly of the proceedings and in order to decide whether it was necessary, the tribunal should inspect the documents considering whether special measures such as "covering up" or hearing in camera should be adopted. Dealing with the rule of 'public

interest immunity' claimed by a person who is called upon to produce any document, Lord Scarman observed in the above case thus:

"Whatever may be true generally of the categories of public interest, the 'public interest immunity', which prevents documents from being produced or evidence from being given is restricted, and is not, in my judgment, to be extended either by demanding ministers or by the courts. And, though I agree with my noble and learned friend, Lord Edmund-Davies, in believing that a Court may refuse to order production of a confidential document if it takes the view that justice does not require its production, I do not see the process of decision as a balancing act. If the document is necessary for fairly disposing of the case, it must be produced notwithstanding its confidentiality. Only if the document should be protected by public interest immunity, will there be a balancing act. And then the balance will not be between 'ethical or social' values of a confidential relationship involving the public interest and the documents relevance in the litigation but between the public interest represented by the state and its public service i. e., the executive Government, and the public interest in the administration of justice: see Lord Reid. Thus my emphasis would be different from that of my noble and learned friends. 'Public interest immunity' is, in my judgment restricted to what must be kept secret for the protection of government at the highest levels and in the truly sensitive areas of executive responsibility."

1165. In England, according to Prof. S. A. De Smith, as matters now stand "a government department can seldom expect to succeed in a claim based solely on prospective detriment to that facet of the public interest which requires candid expressions of opinion within the public service. In any event the Court will prefer to rest a decision to exclude evidence on a more general ground than 'Crown privilege' — e.g., that it is contrary to the public interest to require the disclosure in legal proceedings of information obtained in confidence for a limited purpose. Courts are likely to accept without question a Minister's certificate that disclosure would be injuri-

ous to national security or diplomatic relations, or that the document relates to Cabinet proceedings; but in any marginal case they can be expected to insist on privately inspecting the documents or classes of documents and then rejecting claims to exclude evidence of 'routine' matters but accepting claims to exclude documents referring to matters of high policy. It is doubtful whether any material distinction is now to be drawn between 'contents' claims and 'class' claims."

1166. The scope of the powers of Courts in England where a claim to privilege is made is also explained at para 90 in Volume 13 of Halsbury's Laws of England, (Fourth Edition) thus:

"90. Powers of Court.— The decision whether to allow or reject the claim to Crown privilege, and if so to what extent, is and remains the decision of the Court, and the view of the political minister that the production or disclosure of documents or information, whether because of their actual contents or because of the class of documents to which they belong is not conclusive. The Court will give full weight to the view of the minister in every case, but it has and is entitled to exercise a residual power, and indeed a duty, to examine the objection and the grounds raised by the minister to support his view that production would be injurious to the public interest. If, in spite of the certificate or affidavit of the minister, the Court is satisfied that the objection is not taken bona fide or that the grounds relied on by the minister are insufficient or misconceived or not clearly expressed or that there are no reasonable grounds for apprehending danger to the public interest, the Court has a residual power to override the objection. For this purpose, the Court is entitled to see the documents before ordering production, and the Court can see the documents without their being shown to the parties, but the minister should have a right to appeal before the documents are in fact produced.

The Court will more readily uphold an objection on the ground of the contents of a document, and for this purpose the minister need not go into any detail. But where the minister raises the objection to production on the

ground that the documents belong to a class the production of which would be injurious to the public interest, he must describe with some particularity the nature of the class and the reasons why they should not be disclosed. For this purpose the proper test to be applied is whether the withholding of a document because it belongs to a particular class is really necessary for the proper functioning of the public service, and the term "public service", in this context should not be construed narrowly. In considering a claim to Crown privilege in relation to a class of documents, the fact that the documents were communicated in confidence the Crown is a very material consideration, but nevertheless the Court may conclude that the public interest in such confidentiality is outweighed by the public interest that they should be disclosed in the administration of justice."

1167. In Australia too the very same position prevails. It is sufficient to refer to the observations of Gibbs, A.C.J. of the High Court of Australia in *Sankey v. Whitlam*, 21 Aus LR 505, decided in Nov. 1978 at page 542 which are as follows:

"What are now equally well established are the respective roles of the Court and of those usually the Crown, who assert Crown privilege. A claim to Crown privilege has no automatic operation; it always remains the function of the Court to determine upon that claim. The claim, supported by whatever material may be thought appropriate to the occasion does no more than draw to the Court's attention what is said to be the entitlement to the privilege and provide the Court with material which may assist it in determining whether or not Crown privilege should be accorded. A claim to the privilege is not essential to the invoking of Crown privilege. In cases of defence secrets, matters of diplomacy or affairs of Government at the highest level, it will often appear readily enough that the balance of the public interest is against disclosure. It is in these areas that even in the absence of any claim to Crown privilege (perhaps because the Crown is not a party and may be unaware of what is afoot), a Court, readily recognizing the proffered evidence for what it is, can as

many authorities establish of its own motion enjoin its disclosure in Court. Just as a claim is not essential neither is it ever conclusive although, in the areas which I have instanced the Court's acceptance of the claim may often be no more than a matter of form. It is not conclusive because the function of the Court once it becomes aware of the existence of material to which Crown privilege may apply is always to determine what shall be done in the light of how best the public interest may be served, how least it will be injured."

1168. In Canada the prevailing view of law appears to be the same as stated above as can be seen from the decision of the Supreme Court of Canada in *Regina v. Snider*, (1954) 4 DLR 483 at p 489 in which Rand, J. has stated thus:

"Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the Court is whether they might, on any rational view, either as to their contents or the fact of their existence be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a Minister of the Crown avers its existence, then the Courts must accept his decision. On the other hand, if the facts, as in the example before us, show that, in the ordinary case, no such interest can exist, then such a declaration of the Minister must be taken to have been made under a misapprehension and be disregarded. To eliminate the Courts in a function with which the tradition of the common law has invested them and to hold them subject to any opinion formed, rational or irrational by a member of the Executive to the prejudice, it might be of the lives of private individuals, is not in harmony with the basic conceptions of our polity. But I should add that the consequences of the exclusion of a document for reasons of public interest as it may affect the interest of an accused person are not in question here and no implication is intended as to what they may be.

What is secured by attributing to the Courts this preliminary determination of possible prejudice is protection against Executive encroachments upon the administration of justice; and in the

present trend of government little can be more essential to the maintenance of individual security. In this important matter, to relegate the Courts to such a subserviency as is suggested would be to withdraw from them the confidence of independence and judicial appraisal that so far appear to have served well the organization of which we are the heirs. These are considerations which appear to me to follow from the reasoning of the Judicial Committee in *Robinson v. South Australia*, (1931) AC 704".

1169. In the United States of America, the question relating to the limits of executive privilege came up for consideration before the Supreme Court in *Marbury v. Madison*, 5 US 137 probably for the first time. In that case William Marbury and three others severally moved the U. S. Supreme Court for a rule of James Madison, Secretary of State for the United States, to show cause as to why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as Justices of the Peace in the District of Columbia. In the affidavit filed in support of the petition they pleaded that Adams the former President had nominated the applicants to the Senate for their advice and consent to be appointed Justices of the Peace; that the Senate advised and consented to the appointments, that commissions in due form were signed by the said President appointing them Justices, that the seal of the United States was in turn affixed to the said commissions and that Madison had declined to cause them to be delivered even though they had acquired the right to the offices. In the course of the proceedings certain questions were put to the Attorney-General Levi Lincoln relating to the Commissions and where they had been kept and on objection being raised to the questions the Court said that if Mr. Lincoln wished time to consider what answers he should make, they would give him time, but they had no doubt he ought to answer. There was nothing confidential to be disclosed. If there had been he was not obliged to answer it; and if he thought that anything was communicated to him in confidence he was not bound to disclose it nor was he obliged to state anything which would criminate himself; but that

the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections'.

1170. In *United States v. Burr*, 25 Fed. Cas 187 (No. 14694) (Cir Ct Va 1807) Chief Justice Marshall ruled :

"that the President of the United States may be subpoenaed and examined as a witness and required to produce any paper in his possession, is not controverted..... The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the Court from enforcing its production. I can readily conceive that the President might receive a letter which would be improper to exhibit in public, because of the manifest inconvenience of its exposure. The occasion for demanding it ought, in such a case, be very strong, and to be fully shown to the Court before its production could be insisted on."

1171. According to Wigmore the scope of the privilege in America, beyond secrets in the military or international sense is by no means clearly defined. Paragraph 2379 in Volume VIII of Wigmore on 'Evidence' reads:—

"Same: Who determines the Necessity for Secrecy. So far as the privilege has legitimate scope, it raises the question how the existence of the facts which make it applicable is to be determined. If it extends only (as it just limits prescribe) to matters involving international negotiations or military precautions against a foreign enemy, the presence of such matters in the documents or communications sought to be disclosed must by some authority be predetermined, before the privilege can be deemed applicable. If it extends to the larger scope indicated by the English rulings, still the existence of a necessity for secrecy must be in each instance declared. Who shall make this determination?

Obviously, and by analogy with other privileges, the Court (ante, 2193, 2271, 2322; post, 2550). But the Judge (urges the learned incumbent of that office, in *Beatson v. Skene*) "would be unable to determine it without ascertaining what

the document was," — surely an unavoidable process; "which inquiry," however, it is added, "cannot take place in private," — a singular assumption. It would rather seem that the simple and natural process of determination was precisely such a private perusal by the Judge. Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret; and not the presiding officer of Justice? Cannot the constitutionally coordinate body of Government share the confidence? It is ludicrous to observe a Chief Magistrate, as in *Beatson v. Skene*, solemnly protesting his incompetence to share the knowledge of a fact which had never been secret at all and had for months been spread abroad by the hundred tongues of scandal.

The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court; and this has been insisted upon by the highest judicial personages both in England and the United States:

.....
Conclusion: The privilege, when recognised, should therefore be subjected to the following limitation:

(1) Any executive or administration regulation purporting in general terms to authorise refusal to disclose official records in a particular department when duly requested as evidence in a court of justice should be deemed void (on the logic of 1355, 2195, ante).

(2) Any statute declaring in general terms that official records are confidential (ante § 2378, n.7) should be liberally construed to have an implied exception for disclosure when needed in court of justice.

(3) The procedure in such cases should be: A letter of request (like a letter rogatory, ante, § 2195a) from the head of the Court to the head of the Department (accompanying the subpoena to the actual custodian), stating the circumstances of the litigation creating the need for the document, followed (in case of refusal)

by a reply from the Departmental head stating the circumstances deemed to justify the refusal; and then a ruling by the Court, this ruling to be appealable and determinative of the privilege."

1172. Writing about the immunity claimed by President Nixon against the demand for disclosure of certain types of documents, Raoul Berger writes in his book entitled 'Executive Privilege: A Constitutional Myth' (1974) at page 264 thus:

"Candid interchange" is yet another pretext for doubtful secrecy. It will not explain Mr. Nixon's claim of blanket immunity for members of his White House staff on the basis of mere membership without more; it will not justify Kleindienst's assertion of immunity from congressional inquiry for two and one-half million federal employees. It is merely another testimonial to the greedy expansiveness of power, the costs of which patently outweigh its benefits. As the latest branch in a line of illegitimate succession, it illustrates the excesses bred by the claim of executive privilege. And in practice it has realised Lord Pearce's pregnant observation: "What a complete lack of common sense a general blanket protection of wide class may yield". *Conway v. Rimmer* (1968) 1 All ER 874, 910. The problem will not be met by pruning a branch here and there; the axe must be put to the root of a claim that is altogether without constitutional warrant, leaving it to the good sense of Congress and the people — and, if need be, the courts — to work out an accommodation for such matters as confidential communications between the President and his immediate advisers, excluding any communications with respect to illegal acts. To leave it with the executive branch to decide is to court more of the "horrors" revealed by recent history".

1173. Professor Arthur Schlesinger Jr. states: "The secrecy system has become much less a means by which Government protects national security than a means by which the Government safeguards its reputation, dissembles its purposes, buries its mistakes, manipulates its citizens, maximizes its power and corrupts itself" (Quoted by Curt Mathews, *St. Lewis Post-Dispatch* Feb. 26, 1973, Sec. 1-12B p. 1).

1174. Now a few words about the legitimacy of the rule of 'official secrecy' may be mentioned. The tendency in all the democratic countries in recent times is

to liberalise the restrictions placed on the right of the citizens to know what is happening in the various public offices. The emphasis now is more on the right of a citizen to know than on his 'need to know' the contents of official documents. It is pertinent to refer to the practice prevailing in Sweden. In his article entitled 'Laws on Access to Official Documents', Donald C. Rowat writes:—

"When I visited Sweden in 1973 to study its unique system of openness, I was lucky enough to accompany a reporter who worked for the Swedish national press agency, as he made his daily rounds of three Government departments. To my amazement, all incoming and outgoing documents and mail were laid out in a special press room in each department for an hour every morning for reporters to examine. If any reporter wanted further information on a case, he simply walked down the hall to look at the department's files. No special permission was needed. Such a system of open access is so alien to the tradition of secrecy elsewhere as to be almost unbelievable..... Sweden's long experience with the principle of openness indicates that it changes the whole spirit in which public business is conducted. It causes a decline in public suspicion and distrust of officials, and this in turn gives them a greater feeling of confidence. More important, it provides a much more solid foundation for public debate, and gives citizens in a democracy a much firmer control over their Government."

(Vide Indian Journal of Public Administration, Vol. XXV, No. 4, October-December, 1979 at pages 990-991)

1175. The position in Sweden appears to represent an extreme case of openness of administrative process.

1176. Max Weber (1864-1920) who was very critical of the rule of official secrecy observed:

"Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions": in so far as it can, it hides its knowledge and actions from criticism. The treasury officials of the Persian Shah have made a secret doctrine of their budgetary art and even use secret script. The official statistic of Prussia, in general, make public only what cannot do any harm to the intentions of the power-wielding bureau-

cracy. The tendency towards secrecy in certain administrative fields follows their material nature everywhere that the power interests of the domination structure towards the outside are at stake, whether it is an economic competitor of a private enterprise or a foreign potentially hostile polity, we find secrecy. The pure interest of the bureaucracy in power, however, is efficacious far beyond those areas where purely functional interests make for secrecy. The concept of the "Official Secret" is the specific invention of the bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude, which cannot be substantially justified beyond these specifically qualified areas. In facing a Parliament, the bureaucracy, out of a sure power instinct, fights every attempt of the Parliament to gain knowledge by means of its own experts or from interest groups. The so-called right of parliamentary investigation is one of the means by which Parliament seeks such knowledge. Bureaucracy naturally welcomes a poorly informed and hence a powerless Parliament at least in so far as ignorance somehow agrees with the bureaucracy's interests'."

(H. H. Gerth and C. Wright Mills (trans.), from Max Weber, Essays in Sociology, London, Routledge and Kegan Paul, 1948, pp. 233-4) (By courtesy of Dr. S. R. Maheshwari).

1177. In India many intellectuals have always thought that as far as possible there should be openness in administration. Opposing the Official Secrets (Amendment) Bill which came up for discussion in the Imperial Legislative Assembly in March, 1903, Gopal Krishna Gokhale pleaded:

"The proper and only remedy worthy of the British Government is not to gag newspapers as proposed in this Bill but to discourage the issue of confidential circulars which seek to take away in the dark what has been promised again and again in Acts of Parliament, the Proclamations of Sovereigns and the responsible utterances of successive Viceroys. From the standpoint of the rulers, no less than of the ruled, it will be most unfortunate if Indian papers were thus debarred from writing about matters which agitate the Indian community most. What happened, for instance, last year when those circulars were published? For some time before their publication, the air was thick with the rumour that Government had issued orders to

shut out Indians from all posts in the Railways Department, carrying a salary of Rs. 30 and upwards a month. It was impossible to believe a statement of this kind, but it was not possible to contradict it effectively when it was practically on every tongue. The damage done to the prestige of the Government was considerable and it was only when the circulars were published that the exact position came to be understood. The circulars, as they stood, were bad enough in all conscience but they were not so bad as the public had believed them to be. What was laid down in them was not that Indians were to be shut out from all appointments higher than Rs. 30 a month but that Eurasians and Europeans were to have, so far as practicable, a preference in making appointments to such posts. The fear that such lamentable departures from the avowed policy of Government might be dragged into the light of day, acts at present as an effective check on the adoption of unjust measures, and I think it will have a disastrous effect on the course of administration; if this check were to be done away with and nothing better substituted in its place." (Abstract of the Proceedings of the Council of the Governor General of India Assembled for the purpose of Making Laws and Regulations, Vol. XLII, 1903, pages 280-281).

1178. Saiyad Muhammad and Asutosh Mukherjee also opposed the Bill. Those speeches gave ample support to the movement which stood for the freedom of the press in India. Few persons have the vision of these great leaders. The need for making access to information about the activities of Government more liberal has been explained by Dr. S. R. Maheshwari in his book entitled "Open Government in India" (1981) at pp. 95-96 thus:—

"Administrative India puts the greatest weight on keeping happenings within its corridors secret, thereby denying the citizens access to information about them.

Such orientations produce deep contradictions in the larger socio-political system of the land which itself is in a state requiring nourishment and care. As the latter is still relatively new and in its infancy, its growth processes inevitably get retarded for want of information about the Government, which means from the Government. Over-concealment of governmental information creates a communication gap between the govern-

nors and the governed, and its persistence beyond a point is apt to create an alienated citizenry. This makes democracy itself weak and insecure. Besides, secrecy renders administrative accountability unenforceable in an effective way and thus induces administrative behaviour which is apt to degenerate into arbitrariness and absolutism. This is not all.

The Government, today, is called upon to make policies on an ever increasing range of subjects, and many of these policies must necessarily impinge on the lives of the citizens. It may sometimes happen that the data made available to the policy makers is of a selective nature, and even the policy-makers and their advisors may deliberately suppress certain viewpoints and favour others. Such bureaucratic habits get encouragement in an environment of secrecy; and openness in governmental work is possibly the only effective corrective to it, also raising, in the process, the quality of decision-making. Besides, openness has an educational role inasmuch as citizens are enabled to acquire a fuller view of the pros and cons of matters of major importance, which naturally helps in building informed public opinion, no less than goodwill for the Government."

1179. It may be necessary to deal with the question of official secrecy in greater detail in a case where the constitutionality of the claim for official secrecy, independently of the power of the Court to order discovery of official documents in judicial proceedings, arises for consideration. We are concerned in this case with the power of the Court to direct the disclosure of official documents in judicial proceedings.

1180. We shall now turn to the Indian law. In the State of Punjab v. Sodhi Sukhdev Singh, (1961) 2 SCR 371: (AIR 1961 SC 493), a Constitution Bench of this Court had occasion to examine the limits of the privilege of the Government in the light of Ss. 123 and 162 of the Indian Evidence Act, 1872. Section 123 reads:

"123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

Section 162 reads:

"162. A witness summoned to produce a document shall, if it is in his possession

or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court."

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the interpreter disobeys such direction, he shall be held to have committed an offence under Section 166 of the Indian Penal Code, 1860 (45 of 1860)."

1181. The decision in *Sodhi Sukhdev Singh's case* (AIR 1961 SC 493) (supra) was rendered in the light of the development of the law on the above question in England up to the year 1960. Gajendra-gadkar, J. (as he then was) speaking for the majority observed in that case at pages 393-395 (of SCR): (at pp. 505, 506 of AIR) thus:

"Thus our conclusion is that reading Ss. 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under S. 123 or not."

1182. In this enquiry the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the department to decide whether he should permit its production or not. We are not impressed by Mr. Seervai's argument that the Act could not have intended that the head of the department would permit the production of a document which belongs to the noxious class. In our opinion, it is quite conceivable that even in regard to a document falling within the class of documents relating to affairs of State the

head of the department may legitimately take the view that its disclosure would not cause injury to public interest. Take for instance the case of a document which came into existence quite some time before its production is called for in litigation; it is not unlikely that the head of the department may feel that though the character of the document may theoretically justify his refusing to permit its production, at the time when its production is claimed no public injury is likely to be caused. It is also possible that the head of the department may feel that the injury to public interest which the disclosure of the document may cause is minor or insignificant, indirect or remote; and having regard to the wider extent of the direct injury to the cause of justice which may result from its non-production he may decide to permit its production. In exercising his discretion under S. 123 in many cases the head of the department may have to weigh the pros and cons of the problem and objectively determine the nature and extent of the injury to public interest as against the injury to the administration of justice. That is why we think it is not unreasonable to hold that Section 123 gives discretion to the head of the department to permit the production of a document even though its production may theoretically lead to some kind of injury to public interest. While construing Ss. 123 and 162, it would be irrelevant to consider why the enquiry as to injury to public interest should not be within the jurisdiction of the Court, for that clearly is a matter of policy on which the Court does not and should not generally express any opinion.

1183. In this connection it is necessary to and that the nature and scope of the enquiry which, in our opinion, it is competent to the court to hold under S. 162 would remain substantially the same whether we accept the wider or the narrower interpretation of the expression "affairs of State". In the former case the Court will decide whether the document falls in the class of innocuous or noxious documents; if it finds that the document belongs to the innocuous class it will direct its production; if it finds that the document belongs to the noxious class it will leave it to the discretion of the head of the department whether to permit its production or not. Even on the narrow construction of the expression "affairs of State" the Court will determine its character in the first instance; if it holds that it does not fall within the noxious class

which alone is included in the relevant expression on this view an order for its production will follow; if the finding is that it belongs to the noxious class the question about its production will be left to the discretion of the head of the department. We have already stated how three views are possible on this point. In our opinion, Mr. Seervai's contention which adopts one extreme position ignores the effect of S. 162, whereas the contrary position which is also extreme in character ignores the provisions of S. 123. The view, which we are disposed to take about the authority and jurisdiction of the Court in such matters is based on a harmonious construction of S. 123 and S. 162 read together; it recognises the power conferred on the Court by cl. (1) of S. 162, and also gives due effect to the discretion vested in the head of the department by S. 123."

1184. A similar question arose again before this Court in *State of U. P. v. Raj Narain*, (1975) 3 SCR 333: (AIR 1975 SC 865), Ray, C. J. speaking for himself and Alagiriswamy, Sarkaria and Untwalia, JJ. observed at pages 348-349 (of SCR): (at p. 375 of AIR) thus:

"The several decisions to which reference has already been made establish that the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. (See *Rogers v. Home Secretary* (1973) AC 388 at p. 405). To illustrate the class of documents would em-

brace Cabinet papers, Foreign Office dispatches, papers regarding the security to the State and high level inter-departmental minutes. In the ultimate analysis the contents of the document are so described that it could be seen at once that in the public interest the documents are to be withheld. (See *Merricks v. Nott Bower*, (1964) 1 All ER 717).

It is now the well settled practice in our country that an objection is raised by an affidavit affirmed by the head of the department. The Court may also require a Minister to affirm an affidavit. That will arise in the course of the enquiry by the Court as to whether the document should be withheld from disclosure. If the Court is satisfied with the affidavit evidence that the document should be protected in public interest from production the matter ends there. If the Court would yet like to satisfy itself the Court may see the document. This will be the inspection of the document by the Court. Objection as to production as well as admissibility contemplated in Section 162 of the Evidence Act is decided by the Court in the enquiry as explained by this Court in *Sukhdev Singh's case* (1961) 2 SCR 371: (AIR 1961 SC 493)."

In his concurring judgment, Mathew, J. said at pages 359 and 361 (of 1975-3 SCR): (at pp. 883, 884 of AIR 1975 SC) thus:

"When a question of national security is involved, the court may not be the proper forum to weigh the matter and that is the reason why a Minister's certificate is taken as conclusive. "Those who are responsible for the national security must be the sole Judges of what national security requires."

As the executive is solely responsible for national security including foreign relations, no other organ could judge so well of such matters. Therefore, documents in relation to these matters might fall into a class which per se might require protection. But the executive is not the organ solely responsible for public interest. It represents only an important element in it; but there are other elements. One such element is the administration of justice. The claim of the executive to have exclusive and conclusive power to determine what is in public interest is a claim based on the assumption that the executive alone knows what is best for the citizen. The claim of the executive to exclude evidence is more likely to op-

erate to subserve a partial interest, viewed exclusively from a narrow departmental angle. It is impossible for it to see or give equal weight to another matter, namely, that justice should be done and seen to be done. When there are more aspects of public interest to be considered, the court will, with reference to the pending litigation, be in a better position to decide where the weight of public interest predominates.

The power reserved to the court is a power to order production even though public interest is to some extent prejudicially affected. This amounts to a recognition that more than one aspect of public interest will have to be surveyed. The interests of Government for which the Minister speaks do not exhaust the whole public interest. Another aspect of that interest is seen in the need for impartial administration of justice. It seems reasonable to assume that a court is better qualified than the Minister to measure the importance of the public interest in the case before it. The court has to make an assessment of the relative claims of these different aspects of public interest. While there are overwhelming arguments for giving to the executive the power to determine what matters may prejudice public security, those arguments give no sanction to giving the executive an exclusive power to determine what matters may affect public interest. Once considerations of national security are left out, there are few matters of public interest which cannot safely be discussed in public. The administration itself knows of many classes of security documents ranging from those merely reserved for official use to those which can be seen only by a handful of Ministers of officials bound by oath of secrecy.

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There was some controversy as to whether the Court can inspect the document for the purpose of coming to the conclusion whether the document relates to affairs of State. In *Sodhi Sukhdev Singh's case* ((1961) 2 SCR 371) this court has said that the court has no power to inspect the document. In the subsequent case (*Amar Chand Butail v. Union of India* (AIR 1964 SC 1658)) this Court held that the normal method of claiming privilege was by an affidavit sworn by the head of the department and that, if no proper affidavit was filed the claim for privilege

was liable to be rejected. But, this Court inspected the document to see whether it related to affairs of State. It might be that the court wanted to make sure that public interest is protected, but whatever be the reason, the court did exercise the power to inspect the document.

In England, it is now settled by the decision in *Conway v. Rimmer* ((1968) 1 All ER 874) that there is residual power in court to decide whether the disclosure of a document is in the interest of the public and for that purpose, if necessary, to inspect the document, and that the statement of the head of the department that the disclosure would injure public interest is not final."

1185. It seems that by this decision the law in India was brought in line with the decision of the House of Lords in *Conway's case* ((1968) 1 All ER 874) (*supra*).

1186. After hearing the arguments on the question of privilege, this Court directed the Government to submit the documents in respect of which privilege was claimed for its inspection. Those documents included the correspondence between the Chief Justice of the High Court of Delhi, the Chief Justice of India and the Minister of Law & Justice and some official notings relating to the question of reappointment of Shri S. N. Kumar as a Judge of the High Court of Delhi.

1187. The above order was made as the documents in question had no concern with either the security of the State or with the diplomatic relations between our country and any foreign country. They no doubt related to a 'high level' appointment, but it was felt by us that that fact by itself was not sufficient in the circumstances of the case to prevent the Court from directing the Government to produce the documents for its inspection before deciding the question of discovery.

1188. The question whether these documents should be allowed to be disclosed as prayed for by the parties concerned, depended upon our view on the question whether such disclosure would subserve the public interests. It is accepted on all hands that the documents in question were 'high level' documents relating to the appointment of a Judge of a High Court and any order to be made on the question of disclosure had to be

made after considering the pros and cons of all relevant matters. Having inspected the documents the Court had to consider whether their disclosure would create or fan ill-informed or captious, public or political criticism or whether the business of the Government would be exposed to the gaze of those ready to criticise without adequate knowledge of the background or perhaps some axe to grind, as observed by Lord Reid in *Conway v. Rimmer* ((1968) 1 All ER 874) (supra). The wise words of Lord Keith in *Burmah Oil Co.'s case* ((1979) 3 All ER 700) (supra) that the public interest might 'demand, though no doubt only in a very limited number of cases, that the inner working of government should be exposed to public gaze, and there may be some, who would regard this as likely to lead, not to captious or ill-informed criticism, but to criticism calculated to improve the nature of that working as affecting the individual citizen' also had to be kept in view by the Court while dealing with this case. The Court had to strike a balance between the public interest in the proper functioning of the public service and the public interest in the administration of justice. The Court also considered whether the disclosure would lead to any other further consequence of anybody taking any further action on the basis of these documents. The ruling in *Riddick v. Thames Board Mills Ltd.*, (1977) 3 WLR 63, was also examined. In that case, Lord Denning has observed (at page 75) thus:

"In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J., *Bray on Discovery*, 1st Edn. (1885), p. 238:

"A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: nor to use them or copies of them for any collateral object.....If necessary an undertaking to that effect will be made a condition of granting an order....."

Since that time such an undertaking has always been implied, as Jenkins J. said

in *Alterskye v. Scott* (1948) 1 All ER 469, 471. A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose. The modern authorities are well discussed by Talbot, J. in *Distillery Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*, (1975) QB 613, 621 and I would accept all he says, particularly as to the weighing of the public interests involved: see p. 625".

1189. Ours is an open society which has a government of the people, which has to be run according to the Constitution and the laws. The expression 'affairs of State' should, therefore, receive a very narrow meaning. Any claim for interpreting it with a wider connotation may expose Section 123 of the Evidence Act to be challenged as being unconstitutional.

1190. In this case the questions involved are: (1) whether there was divergence of opinion between the opinion of the Chief Justice of the Delhi High Court and the opinion of the Chief Justice of India? (2) Whether the opinions expressed by them were relevant for deciding the question of fitness of Shri S. N. Kumar for appointment as additional Judge or permanent Judge of the High Court of Delhi? (3) Whether the consultations made under Art. 217 (1) were proper? and (4) Whether the decision of the President not to appoint Shri S. N. Kumar as an additional Judge or permanent Judge could be characterised as perverse? The pleadings in the case naturally could not give us a complete picture in view of the secrecy involved in the process of recommendation and the claim of privilege made on behalf of the Government. The standing of the parties concerned to question the decision of the President was also raised apart from the question of non-justiciability of the issue itself. Since Shri S. N. Kumar himself took active interest in the litigation and asked for relief, the absence of locus standi of Shri V. M. Tarkunde (the petitioner) did not matter much. On the question of justiciability, we felt that an additional Judge who was not reappointed could move the Court for a direction to the Government to consider the question of his reappointment in a fair way for the reasons recorded elsewhere in this judgment. We felt that the issue involved the performance of a duty which was judicially identified and its breach was capable of judicial determination and that it was possible to grant

relief, though in a limited way, if circumstances warranted it. When we considered the contentions of the parties against the background of the facts and the important questions of constitutional law and their application involved in this case, we felt that a decision not to direct disclosure of the documents would result in graver public prejudice than the decision to direct such disclosure and that the public interest involved in the administration of justice should prevail over the public interest of the public service in the peculiar circumstances of the case. We also felt that in the circumstances of this case if disclosure was not ordered, there would be room for many undesirable conjectures and surmises about the entire process of consultation under Art. 217 (1). Accordingly by our order made earlier in the course of these proceedings we directed the disclosure of the documents after carefully considering all aspects of the case including the weighty reasons of our learned brother Fazal Ali, J. to the contrary.

PART IX

1191. The next important and delicate question for consideration is whether the non-appointment of Shri S. N. Kumar as an additional Judge even though the arrears of work in the High Court of Delhi justified the appointment of more number of Judges is legal and proper. Article 217 (1) of the Constitution which empowers the President to appoint Judges of High Courts does not make any distinction between the tests that should be applied in the case of appointment of a permanent Judge and the tests to be applied in the case of the appointment of an additional Judge, as to the fitness of the person to be appointed. The same tests have to be applied even when a person who has already been appointed as an additional Judge is to be considered for appointment as a permanent Judge or for appointment as an additional Judge for another period although as already mentioned an additional Judge has two factors in his favour which have to be taken into consideration by the appointing authority in the context of the manner in which Art. 224 of the Constitution has been operated all these days. Since the appointment in question is to the post of a Judge, questions of integrity and of character of the person proposed for the post do assume large importance in taking a decision. The appointing authority cannot merely act

on mere absence of evidence of lack of integrity or character of the person concerned. The appointing authority should on the other hand feel positively assured about the integrity and good character of such person. Having regard to the importance of the office of a Judge of a High Court, the constitutional and legal immunities that a Judge enjoys and the need for infusing confidence in the mind of the people who approach courts seeking impartial justice, the appointing authority has to take sometimes hard decisions and it is likely that in that process some person who is really honest may not be appointed on account of some doubt expressed by one or the other amongst the functionaries who have to be consulted under Article 217 (1) of the Constitution or on account of some other relevant material that may be available to the appointing authority. Hence if a person is not appointed as a Judge after the usual process of consultation is over it does not necessarily mean that in fact he lacks integrity or character. If the matter had been placed in the above light in this case perhaps the task of the Court would have been less onerous. But in the course of the arguments, serious allegations of political vendetta, conspiracy, malice, fraud etc. were made against the Prime Minister, Law Minister and the Chief Justice of the Delhi High Court. A deeper probe into the case has, therefore, become necessary.

1192. The first submission was that as there was an uncontradicted news item appearing in a newspaper according to which the Prime Minister had expressed dissatisfaction with the Judges appointed by the Government which was in office prior to her becoming the Prime Minister in Jan., 1980, the action taken in respect of Shri S. N. Kumar who had been appointed by the previous Government was traceable to the said reaction of the Prime Minister. It is difficult to accept this submission because there were about sixty such additional Judges appointed by the previous Government and out of them it is seen that only four — one of the Allahabad High Court, one of the Rajasthan High Court and two of the Delhi High Court including the petitioner have not been reappointed as additional Judges. If the policy was not to appoint such Judges, as a matter of policy, in the case of others also a similar decision would have been taken. But that has not been the case. As can be seen from the list of Judges of the High Courts as on

January 1, 1980, there were 12 additional Judges in the Delhi High Court. Of them one died in 1980 and nine (including Mr. Justice Wad) had been either made permanent or continued as additional Judges by the present Government. Only two i.e. Shri S. N. Kumar and Shri O. N. Vohra have not been continued. Hence it is difficult to draw an inference that it is on account of any political ground that Shri S. N. Kumar has not been continued. This argument that the Prime Minister took a hostile attitude towards Shri S. N. Kumar on account of political ground is inconsistent with another argument urged before us, namely, that the Law Minister had tried to mislead the Prime Minister when he wrote on March 3, 1981 that "the letter of the Chief Justice of Delhi High Court makes a serious complaint against the integrity of Shri S. N. Kumar and I deliberately avoid going into the merits or the details at this stage as I am proposing a short extension in his tenure presently". The argument is that even though the Chief Justice of the Delhi High Court had not made any serious complaint, the Minister for Law had stated so in order to mislead the Prime Minister. Whether factually he had tried to mislead her or not will be dealt with later. But the statement that he was misleading the Prime Minister who, according to the learned counsel for Shri S. N. Kumar, had made up her mind to take some action prejudicial to Shri S. N. Kumar appears to be incongruous. Perhaps it would have been acceptable if the case was that the Prime Minister was favourably disposed towards Shri S. N. Kumar but the Law Minister had tried to mislead her.

1193. The next allegation is that the Chief Justice of the Delhi High Court and the Minister for Law had entered into a conspiracy to do harm to Shri S. N. Kumar. This aspect of the matter also will be discussed later on. But this contention is, however, inconsistent with another argument that the Law Minister had tried to put undue pressure on the Chief Justice of the Delhi High Court to furnish some particulars which were against Shri S. N. Kumar and secured the letter of May 7, 1981. Conspiracy presupposes the existence of a voluntary combination of two or more persons to achieve some unlawful object or to bring about some result injurious to some other person or persons. If there were only two in a given case and one of them had exerted pressure on the other to secure

some information it would not be a case of conspiracy but a case of extortion of some information by one from the other. The preceding discussion shows that there is inherent inconsistency in some of the contentions which are urged before us.

1194. In the instant case, we are concerned with the Chief Justice of India, the Chief Justice of the Delhi High Court and the Law Minister each of whom is holding a very high office and each of whom is entrusted with high responsibilities. Each one of them has to express his candid opinion on the matter in issue. It is not unknown that on the same matter any two honest persons may have two different opinions. There is no allegation in the case that either the Chief Justice of the Delhi High Court or the Law Minister had any personal ill-will against Shri S. N. Kumar. There is no allegation also to the effect that the Chief Justice of the Delhi High Court had anything to gain by colluding with the Law Minister. He had been appointed as the Chief Justice of the Delhi High Court before Feb. 19, 1981 on which date he wrote the first letter expressing his opinion against the re-appointment of Shri S. N. Kumar. Further the Chief Justice of the Delhi High Court is not impleaded as a respondent in the case. It is wholly improper and opposed to all canons of judicial process to make any comment against him without giving an opportunity to defend himself. Under the Constitution, he is under a duty to express his opinion on the question of appointment of a Judge in the High Court of Delhi. Such opinion should be about all relevant aspects including the reputation and integrity of the person concerned. In discharge of his constitutional obligation, the Chief Justice of the Delhi High Court wrote to the Law Minister on Feb. 19, 1981 as follows:—

"SECRET & CONFIDENTIAL

CHIEF JUSTICE

HIGH COURT OF DELHI
D.O. No. 275-HCJ/PPS

New Delhi, the 19th February, 1981
My dear Shiv Shankerji,

Mr. Justice S. N. Kumar was appointed an Additional Judge of this Court for a period of two years vide Notification No. 50/8/78-Jus., dated 6-3-1979, issued

by the Government of India, Ministry of Law, Justice & Company Affairs (Department of Justice). He assumed the charge of his office in the afternoon of March 7, 1979.

Normally extension of the tenure of an Additional Judge is recommended keeping in view the pendency in Court. The pendency in this Court still justifies the appointment of Additional Judges. There have, however, been serious complaints against Mr. Justice S. N. Kumar, both oral and in writing. These complaints have been received by me direct as well as through you. I have examined these complaints and find that some of the complaints are not without basis. Responsible members of the Bar and some of my colleagues, whom I would rather not name, have also complained about Mr. Justice Kumar. I have no investigating agency to conclusively find out whether the complaints are genuine or not. All the same the complaints have been persistent.

There is one other factor which has been brought to my notice. It is rather unfortunate that Mr. Justice Kumar has also not been very helpful in disposing of cases. Some responsible members of the Bar and some of my colleagues have also expressed doubts about Justice Kumar's integrity.

In the above circumstances, it is my very painful duty not to recommend an extension for Justice Kumar. You may, however, examine the matter at your end and take such steps as you think proper.

With regards,

Yours sincerely,

Sd/-

(PRAKASH NARAIN)

Shri P. Shiv Shanker,
Minister of Law, Justice
And Company Affairs,
Government of India,
Shastri Bhavan, New Delhi."

1195. A reading of the aforesaid letter shows that it was being written in anguish and with a feeling of sincerity. It is not shown that the Chief Justice of the Delhi High Court had made any statement which was false to his knowledge, or which he did not believe to be true or which he believed to be untrue. A Chief Justice of a High Court has no machinery to investigate into complaints but he has got to state about the fitness

of the person to be appointed as a Judge. It is seen that he has relied on the statements of some of his colleagues and some of the members of the Bar. He has no doubt not given their names. It is not also possible to expect him to give out their names having regard to the constraints of law which applies to persons who make such statements. It is significant that even the Chief Justice of India has not given the names of Judges and of lawyers who were consulted by him as stated in his letter dated May 22, 1981. There is no reason to disbelieve the statement of the Chief Justice of the Delhi High Court that he had heard some statements which suggested that the integrity of Shri S. N. Kumar was in doubt. The said statement may be in fact not true. We cannot go into the correctness or otherwise of those statements in proceedings of this character. It is enough to state that it is not shown that the Chief Justice of the Delhi High Court had not heard such statements at all. In this situation if the Chief Justice of the Delhi High Court had conveyed whatever he had heard and had not recommended continuance of Shri S. N. Kumar, he cannot be considered as having committed any act of impropriety even though Shri Kumar had not in fact done anything which was improper as a Judge. If Shri Kumar is a victim of false rumour he deserves sympathy but it is not open to condemn the action of the Chief Justice of the Delhi High Court which he had to discharge in the public interest and true to his oath of office.

1196. The next aspect of this part of the case relates to the question whether there was full and proper consultation with the functionaries mentioned in Article 217 (1) of the Constitution. In the case of the High Court of Delhi which is situated in the Union Territory of Delhi, consultation with the Governor does not arise (vide S. 4 of the Delhi High Court Act, 1966). The only two authorities who have to be consulted by the President are the Chief Justice of the Delhi High Court and the Chief Justice of India. The process of consultation referred to in Article 217 (1) requires that the authorities concerned should be given sufficient information and also sufficient opportunity to furnish their opinion. The question whether such information was furnished and whether such opportunity was given depends upon the facts of each case. In the instant case the letter dated Feb. 19, 1981 written by the Chief Justice of the Delhi

High Court was made available to the Chief Justice of India. On that the Chief Justice of India observed on March 3, 1981: "I would like to look carefully into the charges against Shri S. N. Kumar. The letter of the Delhi Chief Justice dated Feb. 19, 1981 seems to me too vague to accept that Shri Kumar lacks integrity." The Chief Justice of India, however, recommended that Shri S. N. Kumar may be appointed for a period of six months so that he could enquire into the matter in the meanwhile. On the same date i.e. March 3, 1981, the Law Minister put up a note for the consideration of the Prime Minister suggesting that Shri S. N. Kumar may be appointed as an additional Judge for three months so that a final decision could be taken within that period. It is true that the Law Minister has stated in this note that the Chief Justice of the Delhi High Court had made 'serious complaint' against the integrity of Shri S. N. Kumar. The word 'serious' according to the Shorter Oxford Dictionary means 'requiring earnest thought, consideration or application'. Any remark against the reputation or integrity of a person to be appointed as a Judge of a High Court is a matter which requires earnest consideration. It is, therefore, difficult to hold that the Law Minister had made any misrepresentation to the Prime Minister in recording the aforesaid note.

1197. After Shri S. N. Kumar was re-appointed as an additional Judge with effect from March 7, 1981, the Law Minister wrote on Mar. 9, 1981 to the Chief Justice of the Delhi High Court bringing to his notice the note of the Chief Justice of India made on Mar. 3, 1981 that the letter of the Delhi Chief Justice dated Feb., 19, 1981 seemed to him too vague to accept that Shri Kumar lacked integrity and added:

"2. In the light of these observations of the Chief Justice of India, I shall be grateful for your further comments on the question of continuance or otherwise of Shri Justice S. N. Kumar. His term expires on 6-6-1981 and I would be grateful if your comments reach me by 15-4-1981."

1198. It is seen from the letter dated Mar. 28, 1981 written by the Delhi Chief Justice to the Chief Justice of India that the Chief Justice of India had also written a letter dated Mar. 14, 1981 (which is not placed before us) to the Delhi Chief Justice about the same subject and that the

Chief Justice of the Delhi High Court had met the Chief Justice of India on Mar. 26, 1981 (this date is mentioned in the letter of the Chief Justice of India dated May 22, 1981 which will be referred to later on). After that meeting the Chief Justice of the Delhi High Court wrote to the Chief Justice of India the letter dated March 28, 1981 referred to above. It reads:

"SECRET

CHIEF JUSTICE
HIGH COURT OF DELHI
NEW DELHI

D. O. No. 292-HCJ/PPS
March 28, 1981

My dear Chief Justice,

I am in receipt of your letter dated 14th March, 1981 with regard to Mr. Justice S. N. Kumar. Since then I have also had an opportunity to discuss this delicate matter with you.

There were three points mentioned in my D. O. No. 275-HCJ/PPS dated 19th February, 1981 addressed to the Law Minister, a copy of which was forwarded to you. I had also mentioned in that letter that I have no investigating agency to conclusively find out whether the complaints are genuine or not. Understandably there will be some who would support the allegations and there will be some who would refute them. Therefore, it is natural that there may be variance between the views that may be expressed by different people. Indeed, my experience is that people are hesitant in speaking out frankly.

With regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us. About Justice Kumar not being very helpful in disposing of cases, I enclose a statement of disposal by Justice Kumar in 1980. Just by way of comparison I have also included the figure of disposal in the same period of my other two colleagues whose cases for re-appointment are under consideration.

With warm regards,

Yours sincerely,

Sd/-

(PRAKASH NARAIN)

Encl: 1

Hon'ble.

Mr. Justice Y. V. Chandrachud,
Chief Justice of India,
5, Krishna Menon Marg,
New Delhi."

1199. Along with this letter, a statement of cases was sent as stated in its last paragraph. On the same date i. e. Mar. 28, 1981 the Delhi Chief Justice wrote to the Law Minister enclosing a copy of the letter written by him to the Chief Justice of India. That letter runs as under:—

" SECRET

CHIEF JUSTICE

HIGH COURT OF DELHI
NEW DELHI

D. O. No. 293-HCJ/PPS

March 28, 1981

My dear Shiv Shankerji,

I am in receipt of your D. O. No. 50/2/81-Jus, dated 19th March 1981.

I have received a letter from the Chief Justice of India with regard to my observations and recommendations made in my D. O. No. 275-HCJ/PPS dated 19th Feb., 1981, addressed to you, a copy of which was sent to the Chief Justice of India, asking me to furnish him with "details and concrete facts in regard to the allegations against Justice Kumar." I have since had an opportunity to discuss the entire matter in detail with the Chief Justice of India. After the discussion I have addressed a letter to the Chief Justice, a copy of which is enclosed. Perhaps you will consider this to be sufficient 'comments' on my part as desired by you in your letter under reply about the observations of the Chief Justice of India which you have quoted in your letter.

With regards,

Yours sincerely,

Sd/-

(PRAKASH NARAIN)

Encl: 1

Shri P. Shiv Shanker,

Minister of Law, Justice
And Company Affairs,
Government of India,
Shastri Bhavan,
New Delhi,"

1200. On April 15, 1981, the Law Minister wrote to the Chief Justice of the Delhi High Court asking for any material which provided the basis for his recommendation. It reads:

"Confidential

D. O. No. 50/2/81-Jus

April 15, 1981

My dear Chief Justice,

I am to hand your d. o. letter No. 293-HCJ/PPS dated 28th Mar., 1981 and a copy of your letter to the Chief Justice of India bearing the same date, regarding Shri Justice S. N. Kumar, Additional Judge, Delhi High Court. The Chief Justice of India had felt that the reasons given in your earlier letter were vague and wanted more concrete particulars. It is true that you have no investigating agency to conclusively establish the truth of complaints. Nevertheless, you must have had some material which provided the basis on which you concluded that Justice Kumar's reputation for integrity was not above board and recommended that he may not be continued. In view of the observations of the Chief Justice of India asking for concrete material, it would be necessary for us to have it with your comments. I would, therefore, be grateful, if it be furnished to me at the earliest.

2. I would also request you to send me your comments promised in your letter No. 268-HCJ/PPS dated 12th November, 1980 on the complaints of Shri Sabir Hussain.

3. From the statement of disposal of cases sent by you, it is observed that it is really in the second half of 1980 that there has been a sharp drop in the disposals of Justice Kumar. Could there be any special reason for this? I may please be informed whether the nature of cases assigned to Justice Kumar, in the terms of time normally required for their disposal, was roughly similar to the nature of cases disposed of by Justice Vohra and Justice Wad.

4. I shall be grateful for an early reply.

With regards,

Yours sincerely,

Sd/-

(P. Shiv Shanker)

Shri Justice Prakash Narain,

Chief Justice,
Delhi High Court,
New Delhi."

1201. In reply to this letter the Chief Justice of the Delhi High Court wrote on May 7, 1981 a letter by way of reply which has given rise to some serious controversy in this case. That letter reads:

"SECRET

(For Personal Attention Only)

CHIEF JUSTICE

HIGH COURT OF DELHI

NEW DELHI

D. O. No. 296-HCJ/PPS

New Delhi, the 7th May, 1981

Dear Mr. Minister,

I am in receipt of your D. O. No. 50/2/81-Jus., dated 15th April, 1981.

Hon'ble the Chief Justice of India had made certain observations with regard to my recommendation about Mr. Justice S. N. Kumar and the same were communicated to me by you for my comments in your D. O. No. 50/2/81-Jus., dated 19th March, 1981. The Chief Justice had also written to me a letter dated 14th March, 1981, asking for "details and concrete facts in regard to the allegations against Justice Kumar." As I wrote to you in my D. O. No. 293-HCJ/PPS, dated 28th March, 1981, I discussed the matter with Hon'ble the Chief Justice and as desired by him, in reply to his letter, wrote my D. O. No. 292-HCJ/PPS dated March 28, 1981, a copy of which was forwarded to you. Accordingly, it is not only embarrassing but painful for me to write this letter. As you, however, desire to know what material provided the basis for me to conclude that Justice Kumar's integrity was not above board, I give below some facts.

In the first half of 1980, Justice Kumar was sitting singly and was doing mostly Original Side matters but also some Appellate Side matters. Chance remarks came to my knowledge about his conduct in Court as well as about his integrity. Somewhere early in May, 1980, one of my colleagues met me and said that he was rather perturbed about information with him to the effect that if a substantial amount was paid to Justice Kumar, suits brought by a particular party against an insurance company would be decided in favour of that party. I had not paid much attention to the earlier reports but when this was brought to my notice, and I was at that time not the Chief Justice, I thought to myself that after the summer vacations, to save Justice Kumar from any embarrassment, he should be put on a jurisdiction other than original jurisdiction. Therefore, when as Acting Chief Justice I constituted the Benches for second half of 1980 I put Justice Kumar

in a Division Bench to sit on the Appellate Side and Writ Jurisdiction. In my view this was a safe way to finish the rumours if the same were incorrect and thus safeguard the reputation of a Judge. Surprisingly enough, Justice Kumar did not release the original suits, regarding which allegations had been made, from his board and continued to deal with these suits even in the second half of 1980. These suits were Suit No. 1489 of 1979, Suit No. 1417 of 1978 and Suit No. 1408 of 1979 filed by Jain Sudh Vanaspati Ltd. and Jain Export Pvt. Ltd. against the New India Assurance Co. Ltd. In August, 1980, the same colleague of mine who talked to me earlier and another colleague mentioned that doubts were being expressed about the integrity of Justice Kumar vis-a-vis the aforesaid cases and some others. Since I was only acting as Chief Justice at that time, I did not want to take any precipitate action. I, however, made discreet inquiries from some of the leading counsel and they in strict confidence supported the allegations. This made me look into the matter more carefully when to my astonishment I found that it was not only the three suits mentioned above but that there were other Single Bench matters also which had been retained by Justice Kumar on his Board despite being put in the Division Bench. There is fairly a long list of these cases. In some of these the parties involved were rich and influential including some former princes. After I was appointed Chief Justice early in January, 1981, I looked into this matter a little more deeply and made further inquiries. Some of the lawyers were non-committal and understandably so. Others, however, asserted with some force that Justice Kumar's reputation was not above board. I talked to some of my other colleagues besides the two who had earlier spoken to me. They also said that unconfirmed reports have been circulating in the Bar which were not very complimentary to Justice Kumar. This made me conclude that the reputation for integrity of Justice Kumar was not what should be for a Judge of the High Court. To my mind, reputation of integrity is just as important as a person actually being above-board.

With regard to the complaint of Mr. Sabir Hussain, Advocate, I had looked into the relevant files besides showing the complaint to Justice Kumar. My colleague had, of course, no comments to make

nor could I ask him for the same. The litigation referred to in Mr. Sabir Hussain's complaint ended by the suit being decided in his favour as is apparent from the judgment and decree in Suit No. 550 of 1975. The learned Judge did not, however, give his decision on all the prayers or with regard to all the parties to the suit. From the record I could not find any evidence of alleged partiality. It is correct that the learned Judge took over six months in pronouncing judgment after the case was closed. I would not like to comment further on the merits of the decision because that is a judicial matter. But it is correct that the judgment does not deal with all the matters raised in the suit or regarding which evidence was adduced. It is also correct that all the evidence adduced has not been discussed in the judgment. The inferences made by Mr. Sabir Hussain from such a judgment are possible but it is a matter which should only be commented upon judicially.

With regard to the disposal statement for the second half of 1980, I may mention that no special type of work was allocated to the Bench of which Mr. Justice Kumar was a member. The Bench disposed of eleven main cases and 7 Misc. petitions. Normally when matters are heard by a Division Bench, alternate judgments are written by the two members of the Bench. Credit, however, is given to both the Judges for the total disposal by the Bench. To clarify, if 18 matters were disposed of by the Bench, 9 judgments would normally be written by each Judge in regular matters but each Judge will get credit of 18. So far as motion matters are concerned, short orders admitting or dismissing a case are dictated in open Court by the senior of the two Judges. No credit is given for disposal of motion matters.

Except for the Division Bench doing Tax matters or Criminal Appeals, other Division Benches have writ matters, L. P. As, and other types of civil matters listed before them. There is no special type of work assigned to any particular Judge or Bench in our High Court. Normally the distribution of work is in the broad categories of criminal work, tax work and civil matters. Sometimes, depending upon the special aptitude of a Judge, one particular type of cases are listed before that Judge in greater number.

There was no special distinction between the work that was being done by

the Bench of which Justice Kumar was a member and the Benches of which Justice Vohra and Justice Wad were the members. This would be evident from a reading of the classification of cases disposed of by the various Benches which are all broadly mentioned as Main Cases in the statement of disposal sent by me to Hon'ble the Chief Justice. I enclose for your ready reference the break up of the Main Cases. You will notice that the Division Bench of which Justice Wad was a member heard and disposed of 11 Writ Petitions, 79 Letters Patent Appeals, 11 Sales Tax References, 1 Civil Misc. (Main), 2 Criminal Contempt Petitions and 5 Income-tax References besides 7 Misc. Petitions. The Bench of which Justice Vohra was a member disposed of 8 Regular First Appeals, 55 First Appeals from Orders, 3 Company Appeals, 10 Civil Writ Petitions, 7 Criminal Appeals, 18 Letters Patent Appeals, 3 Civil Revisions etc. etc. The Bench of which Justice Kumar was a member disposed of 1 Letters Patent Appeal, 9 Civil Writ Petitions and 1 First Appeal from Order besides 7 Misc. Petitions.

In my original letter to you I had mentioned about other complaints regarding Justice Kumar besides the complaints about integrity. These pertain to his conduct with counsel in Court. Generally speaking an incident in Court is nothing more than exchange of, at the worst, hot words. Unfortunately incidents in Justice Kumar's Court have been occurring more frequently than in others. In some cases I am told, and in one I have verified, a senior counsel had to go to the extent of recording the incident and making his comments about unfair conduct of the Judge on affidavit which was placed on the record of the case. It created an unhappy situation.

In view of what I have written above and my talks with you, it is now for the Government to see whether it would like Justice Kumar to continue as a Judge of the Delhi High Court. As far as I am concerned, my views have already been expressed in my letters dated 19th February, 1981.

With regards,

Yours sincerely,

Sd/-

(PRAKASH NARAIN)

Encl: 3

Shri P. Shiv Shanker,

Minister of Law, Justice & Co. Affairs,
Government of India, New Delhi,"

1202. Three statements are enclosed to this letter showing the number of cases disposed of by Shri S. B. Wad, Shri O. N. Vohra and Shri S. N. Kumar. After the above letter of May 7, 1981 was received, the Law Minister recorded a note on May 19, 1981 asking for the opinion of the Secretary (Justice) which reads as follows:

"Last evening I spoke to the Chief Justice of Delhi High Court for an early reply to my letter dated in view of the fact that the time left for the decision of cases of S/Shri Justice Vohra, S. N. Kumar and S. B. Wad was very short. He assured me that he would send his reply within a day or two and said that the matter necessarily involved a little time as he had to wade through the proceedings of the "Kissa Kursi Ka" case and make a few enquiries. He requested me that his reply may be kept secret for personal attention only, as he desired in his earlier letter dated 7th May, 1981. In fact, I recall that before issuance of the letter dated 7th May, 1981, he informed me to treat it secret though at that moment I did not try to probe the implications and details of his request. When he made the request now, for keeping the letter secret. I asked him as to what exactly he meant by 'secret for personal attention only' as indicated in the 7th May, 1981 letter. In the context during the discussions he requested that his letter may be avoided from being brought to the notice of CJI for the following reasons:—

1. For reasons stated in the opening portion of his letter dated 7th May, 1981.

2. He felt highly embarrassed and perplexed after he addressed the original letter dated 19-2-1981 about Shri S. N. Kumar as the contents of that letter came clearly to be known to Shri S. N. Kumar and certain of his colleagues on the bench as a result of which it embarrassed him in discharge of his duties and functions. He felt that the contents of his letter dated 7th May, 1981 would also get into the hands of Shri S. N. Kumar and certain of his other colleagues and he would thereby be put to greater embarrassment which might create problems for him in

future in the discharge of his duties as Chief Justice.

3. He felt that the Chief Justice of India had already started wrongfully denigrating him for his letter of February '81 as some of his friends conveyed to him the feelings of the C. J. I.

He categorically informed me that he could not afford to spoil his relations with the CJI on the one hand and on the other could not desist from expressing without fear or favour what he felt of certain matters and if he is going to be suspect for discharging his functions fairly and conscientiously, then his functioning as the Chief Justice would never be smooth vis-a-vis CJI.

In view of the above, Secretary (J) may examine immediately as to whether it is inevitable to furnish the letters of the Chief Justice of Delhi to the CJI for his comments or would it be sufficient if on the basis of his previous endorsements, we address a letter to the CJI for his advice, making him available, if need be the material available with us including the purport of the IB report. In the latter case drafts may be put up.

Sd/-

(P. Shiv Shankar)
19-5-81

Secretary (Justice)"

1203. Thereafter on May 21, 1981, the Law Minister wrote to the Chief Justice of India requesting him to give his opinion on the continuance of Shri S. N. Kumar. It has to be mentioned here that by then an interim order had been passed by this Court asking the Union Government to take a decision on the continuance of Shri S. N. Kumar ten days before the expiry of his tenure as Additional Judge which was to come to an end on June 6, 1981 i. e. on or before May 27, 1981. It is admitted that the letter of May 7, 1981 written by the Delhi Chief Justice to the Law Minister was not sent to the Chief Justice of India along with the letter of May 21, 1981. The letter of Feb. 19, 1981 referred to above was, however, sent. But the letter of May 21, 1981 contained a reference to the meeting which had taken place between the Delhi Chief Justice and the Chief Justice of India in para 3 thereof. The letter of May 21, 1981 reads:

"D. O. No. 50/2/81-Jus May 21, 1981
My

In his letter dated 19th February, 1981 the Chief Justice of the Delhi High Court

(copy enclosed) had recommended that Justice Kumar may not be given any extension. By another letter of the same date he had recommended an extension of two years for Justice Wad.

2. You had advised on 3rd March, 1981 as below:

"I have recommended, for reasons mentioned in the concerned file, that Shri O. N. Vohra's term should be extended by six months. Shri Vohra is senior to Shri S. N. Kumar and Shri S. B. Wad. In the interests of propriety, the term of these two Judges should also be extended by six months.

I would like to look carefully into the charges against Shri S. N. Kumar. The letters of the Delhi Chief Justice dated February 19, 1981 seem to be too vague to accept that Shri Kumar lacks integrity.

True, that there are no complaints against Shri Wad. But, since he is junior to the other two Judges, his term ought not to be extended, longer than that of the other two. That is to say, Shri O. N. Vohra, Shri S. N. Kumar and Shri S. B. Wad should all be extended by six months".

3. In regard to complaints regarding Justice Kumar's integrity and general conduct, the Chief Justice of the High Court discussed the matter with you as mentioned in his d. o. letter No. 292-HCJ dated 28th March, 1981, to you, a copy of which he had sent to me. In that letter he had also mentioned the disposals of Justice Kumar.

4. When you had tendered your advice dated 3rd Mar., 1981 the following I. B. report regarding Shri S. N. Kumar had been brought to your notice: —

(Extract from I. B. report omitted)

An extract of a further report received is enclosed.

5. You will please see that in your advice dated 3rd Mar., 1981 you desired to look carefully into the charges against Shri S. N. Kumar. In terms thereof if you were pleased to make any inquiries, I shall be grateful to have the details.

6. I would be grateful for your urgent advice in regard to the continuance or

otherwise of the terms of Justice S. N. Kumar and Justice S. B. Wad.

With regards,

Yours
Sd/-

(P. Shiv Shanker)

Shri Y. V. Chandrachud,
Chief Justice of India,
Supreme Court,
New Delhi.

Encls: As above"

1204. The Chief Justice of India was camping at Simla then. The Government of India had to take a decision as per the interim order of this Court on or before May 27, 1981. In view of the urgency involved, the Chief Justice of India sent his reply as per letter of May 22, 1981 through a special messenger from Simla to the Law Minister which reads as follows:—

"CHIEF JUSTICE OF INDIA

SUPREME COURT OF INDIA
NEW DELHI
CAMP: SIMLA
MAY, 22 1981

CONFIDENTIAL

By Special Messenger

My dear Shiv Shanker,

I am in receipt of your letter (D. O. No. 50/2/81-Jus) dated May 21, 1981 seeking my advice in regard to the continuance or otherwise of the terms of Justice S. N. Kumar and Justice S. B. Wad who are at present functioning as additional Judges of the Delhi High Court and whose terms were extended by a period of three months with effect from March 6, 1981.

Shri Prakash Narain, Chief Justice of the Delhi High Court, had written a letter dated February 19, 1981 to you, a copy of which was sent to me. The Chief Justice had recommended in that letter that Justice Kumar's appointment should not be extended further for three reasons: (1) that serious complaints were received against Justice Kumar orally as well as in writing; (2) that Justice Kumar was not very helpful in disposing of cases; and (3) that some responsible members of the Bar and Bench had expressed doubts about Justice Kumar's integrity. By my letter dated March 14, 1981 to the Delhi Chief Justice I requested him to furnish further details and concrete facts in regard to the allegations against Justice Kumar since the result of the enquiries made by me was quite at

variance with what the Chief Justice had stated in his letter of March 19.

The Chief Justice met me on March 26, 1981 when he told me that Justice Kumar was very slow in his disposals and that he doubted his integrity because even after Justice Kumar's allocation was changed from the original side to the appellate side, he still continued to hear the part-heard cases on the original side. The Chief Justice did not mention any thing adverse in regard to Justice Kumar's political leanings or affiliations. By my request, the Chief Justice promised to send a statement showing the disposals of Justice Kumar.

I have made the most careful and extensive enquiries in regard to both of these matters and I am satisfied that there is no substance in any one of them. I have with me a detailed statement of the disposals of Justice Kumar from which it would appear that no charge can be made against him that he is slow in his disposals. Justice Kumar was sitting with Justice T. P. S. Chawla for quite some time during the period under consideration and it is a matter of wide knowledge that Justice Chawla takes an enormously long time over the cases which come before him. Sitting with Justice Chawla as a junior Judge, Justice Kumar could have done precious little to hasten the disposal of cases which came before the Bench.

As regards the complaint of the Chief Justice that Justice Kumar's integrity was doubtful since he continued to take old part-heard matters even after the allocation of his work was changed, I have made enquiries not only from members of the Bar but from the sitting Judges of the Delhi High Court which show that it is a common practice in the Delhi High Court that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases on which a substantial amount of time has been already spent. Justice Kumar therefore did nothing out of the way or unusual in taking up part-heard cases after the allocation of his work was changed.

I find it therefore difficult to agree that Justice Kumar's term should not be extended for the reasons mentioned by the Chief Justice of the Delhi High Court. I disagree with the learned Chief Justice, on enquiries made by me, that Jus-

tice Kumar is either slow in his disposals or that his integrity is doubtful.

I must mention that I also made independent enquiries in regard to Justice Kumar's integrity generally and apart from the reason for which the learned Chief Justice thought that Justice Kumar lacked integrity. Not one member of the Bar or of the Bench doubted the integrity of Justice Kumar. On the other hand several of them stated that he is a man of unquestioned integrity.

You have annexed to your letter an extract of a further report from the I. B. which says that :

(Portion relating to I. B. report omitted)

On my return on May 26, 1981 I will get into touch with Justice Kumar and make enquiries from him as also from other persons who are likely to be in the know of the matter. Until then it is impossible for me to tender any opinion one way or the other.

I would therefore propose that Justice Kumar's term, and consequently Justice Wad's term, should be extended by a further period of three months.

With regards,

Yours sincerely,

Sd/-

(Y. V. Chandrachud)

Shri P. Shiv Shanker,
Minister for Law, Justice
and Company Affairs,
New Delhi."

1205. This letter recommends a further extension by three months to Shri S. N. Kumar pending further enquiry by the Chief Justice of India on the contents of some I. B. report. But the Chief Justice of India is categorical that the three reasons viz. "(1) that serious complaints were received against Justice S. N. Kumar orally as well as in writing; (2) that Justice Kumar was not very helpful in disposing of cases; (3) that some responsible members of the Bar and the Bench had expressed doubts about Justice Kumar's integrity" given by the Chief Justice of the Delhi High Court were unsustainable. The letter refers to the meeting of Mar., 26, 1981 between the Chief Justice of India and the Chief Justice of the Delhi High Court. The rest of the contents are self-explanatory. This letter is followed by the letter of May 29, 1981 by the

Chief Justice of India to the Law Minister which runs as under :—

"Chief Justice of India

Supreme Court of India

New Delhi

May 29, 1981

Confidential

My dear Shiv Shanker,

While in Simla, I received your letter dated May 21, 1981 in connection with the extension of the term of Justice S. N. Kumar and Justice S. B. Wad whose term as Additional Judges of the Delhi High Court is due to expire on June 6, 1981. Immediately on receipt of your letter I sent a reply to you dated May 22, 1981, recommending, for the time being, that the term of the two Judges be extended by a further period of three months. In so far as Justice Wad is concerned, there was no difficulty in recommending the extension of his term for the normal period of two years or until the occurrence of a permanent vacancy, but that could not be done since he is junior in appointment to Justice S. N. Kumar and a further report from the I. B. was enclosed along with your aforesaid letter in regard to Justice Kumar. I had stated in my reply that after my return to Delhi I will make enquiries into the allegations contained in the I. B. report against Justice Kumar and shall thereafter tender my advice on the question regarding the further extension of his term.

The report of the I. B. contains the following information in regard to Justice Kumar :

(Portion relating to I. B. report omitted)

I have already stated in my reply of 22nd that I do not agree that Justice Kumar's term should not be extended as an additional Judge for the reason either that he is slow in his disposals or that he lacks integrity.

I, therefore, recommend that the term of Justice S. N. Kumar as an Additional Judge should be extended by a further period of two years.

As a consequence, the term of Justice S. B. Wad should also be extended by a further period of two years.

With regards,

Yours sincerely,

-Sd/-

(Y. V. Chandrachud)

Shri P. Shiv Shanker,
Minister of Law, Justice
and Company Affairs,
New Delhi."

1206. This letter recommends an extension of two years to Shri S. N. Kumar instead of three months' extension recommended in the letter of May 22, 1981. But by the time the letter of May 29, 1981 was received, the Law Minister had recorded his note on May 27, 1981, the relevant part of which reads :

"In my letter to the C. J. I. dated 21-5-1981, I categorically requested to have the details of inquiries that he might have made in terms of his advice dated 3-3-1981. I desired the details consciously as I did so with the Chief Justice of Delhi High Court since the C.J.I. termed the letter of C. J. Delhi dated 19-2-81, addressed to me as too vague to accept that Shri Kumar lacks integrity. I regret that notwithstanding my specific request as to details, the C. J. I. did not furnish me the same and on the contrary reading his letter dated 22-5-81 would reveal that he became a victim of his own charge of vagueness made by him against the Chief Justice of Delhi. C.J.I. does mention that C. J. Delhi met him on 26-3-1981. He also refers about the common practice in the Delhi High Court that even after the allocation of a Judge is changed from the original side to the appellate side and vice versa, he continues to take up part-heard cases on which a substantial amount of time has been already spent. I presume that when C. J. Delhi and the C. J. of the Supreme Court met, the former must have informed the latter about the details that he had mentioned to me in his letter dated 7-5-81. This presumption is raised on the basis of the letters from the Chief Justice, Delhi. Even assuming that there is a prevalent practice as referred to by the C. J. I. the C. J. I. himself says that such cases should be those on which substantial amount of time has been already spent. The C. J. I. surprisingly has left the matter there, without further probing as to whether the part-heard matters which Justice Kumar chose to handle as a single Judge notwithstanding his having been allocated to the Division Bench were such on which substantial amount of time had already been spent by him. The C. J. I. in his advice proceeds from the premises that taking up part-heard cases after the allocation of work is changed does not amount to lacking in integrity. If it were that simple I would not have joined issue, but

the details furnished by the C. J. Delhi in his latter dated 7-5-81 go further.

The C. J. I. also observes that he made inquiries in regard to Justice Kumar's integrity generally. The C. J. I. states that in his general inquiries no member of the Bar or the Bench doubted the integrity of Justice Kumar. I regret that the letter of C. J. I. is not only lacking in details as desired by me but too vague. The premises on which he does not doubt the integrity of Shri Justice Kumar is wholly different.

In the matter of assessment of integrity, I prefer that the views of C. J. Delhi be given credence as it is in his association that the Judge concerned discharges his duties and that he has a better occasion and opportunity to watch his working and conduct. The correspondence from the C. J. of Delhi addressed to me furnishes clear details which cannot easily be brushed aside.

I therefore agree with the observations contained in the note of the Secretary (Justice) and opine that Shri Justice S. N. Kumar may not be continued any further as Additional Judge of the Delhi High Court after the expiry of the present tenure on 7-6-1981 and thus recommend accordingly".

1207. In the earlier part of the aforesaid note, the Law Minister has stated that he "would avoid going to the I. B. Reports or Shri Kumar's disposals or even the behaviour in the Court and prefer to confine to the question of reputation and integrity" of Shri S. N. Kumar. The consultation process thus came to an end.

1208. The two questions to be considered here are whether the Union Government committed an error amounting to an unfair act in not sending the letter of May 7, 1981 of the Chief Justice of the Delhi High Court to the Chief Justice of India and whether on account of not sending that letter, the consultation process is vitiated. The note of May 19, 1981 of the Law Minister containing the reasons given by the Delhi Chief Justice for requesting the Law Minister not to send the letter of May 7, 1981 to anybody else is confirmed by the following letter dated May 29, 1981 written by the Law Minister to the Delhi Chief Justice :

"D. O. No. 50/2W/81/-Jus. Part

May 29, 1981

My dear Chief Justice,

When you spoke to me on 18th May, 1981, you had requested me that the letter that you were proposing to send to me regarding Justice O. N. Vohra should be kept secret for personal attention only. You had made a similar request about letter dated 7th May, 1981 regarding Justice S. N. Kumar. On my request you elucidated that when you marked your letter dated 7th May, 1981, "secret for Personal Attention only" what you were particular about was that the letter may not be brought to the notice of Chief Justice of India for the following reasons :—

1. For the reasons stated in the opening portion of your letter dated 7th May, 1981.

2. You felt highly embarrassed as the contents of your letter dated 19th Feb., 1981 about Shri Kumar came clearly to be known to Shri S. N. Kumar and some of his colleagues on the Bench. You felt that the contents of your letter dated 7th May, 1981 might also get known to them and cause you further embarrassment.

3. You felt that the Chief Justice of India had already started wrongfully denigrating you for your letter of Feb, 19, 1981.

2. You mentioned that you could not desist from expressing without fear or favour what you felt about certain matter but at the same time you were particular that your relations with the Chief Justice of India should not be spoiled.

3. For similar reasons you were particular that your letter regarding Shri O. N. Vohra should not be sent to him as also for the additional reason that a senior counsel whose name figured therein had enjoined secrecy. Your letter regarding Shri O. N. Vohra dated 22nd May, 1981 has since been received by us.

4. In view of the emphasis laid by you on keeping these letters confidential from the Chief Justice of India we have not shown these to him. This is for favour of your information.

With regards,

Yours sincerely,

Sd/-

(P. Shiv Shanker)

Shri Prakash Narain,
Chief Justice,
Delhi High Court,
New Delhi."

1209. The note of the Law Minister D/- 19-5-1981 and the letter of May 29, 1981 written by the Law Minister to the Delhi Chief Justice which refer to the request of the Delhi Chief Justice clearly establish that the letter of May 7, 1981 was not sent to the Chief Justice of India not as part of any conspiracy or pact between the Law Minister and the Delhi Chief Justice but at the request of the Delhi Chief Justice. It is not also shown as to what advantage the Law Minister was deriving by withholding the said letter from the knowledge of the Chief Justice of India unless we start with the assumption that for some undisclosed reason the Law Minister was bent upon treating Shri S. N. Kumar with an 'evil eye and an uneven hand' and for that reason he kept back the letter from the knowledge of the Chief Justice of India. The Delhi Chief Justice has given three reasons for requesting the Law Minister not to send the letter outside his office. The first reason is, according to the Delhi Chief Justice, contained in the first para of the letter of May 7, 1981. That para refers to the meeting which had taken place between the Chief Justice of India and himself on Mar. 26, 1981 on all relevant points relating to the proposal of reappointment of Shri S. N. Kumar and the fact that he had written the letter of Mar., 28, 1981 to the Law Minister 'as desired' by the Chief Justice of India. That there was full and frank discussion between the Chief Justice of India and the Delhi Chief Justice with reference to the very particulars referred to in the letter of May 7, 1981 is clear by the following facts: (i) The statement "with regard to the complaints about Justice Kumar's integrity and general conduct, the matter has already been discussed between us" which is found in the letter of March 28, 1981 written by the Delhi Chief Justice to the Chief Justice of India, (ii) the reference to the meeting in the letter of the same date addressed by the Delhi Chief Justice to the Law Minister enclosing a copy of the above said letter dated Mar. 28, 1981, (iii) the reference to the meeting in the letter of the Law Minister to the Chief Justice of India dated May 21, 1981 and (iv) the reference to the meeting in the letter of the Chief Justice of India dated May 22, 1981 written from Simla. This is further supported by the affidavit dated July 17, 1981 of Shri S. N. Kumar himself which had been filed long before the date on

which documents in question were directed to be disclosed by the Court i. e. in Oct., 1981. The relevant part of the aforesaid affidavit of Shri S. N. Kumar reads :

"Hon'ble the Chief Justice of India, on the other hand discussed the matter with me at length about my work and other general matters. I gave him full and true information and supplied him relevant papers for his consideration. Since the Government has not disclosed the reasons for its action I have no other course open but to apprise this Court briefly of what is in my knowledge. It was alleged that I was slow and that it was improper for me to continue to deal with original work while sitting on the appellate side. A comparative assessment of work disposed of by eight Judges who sat on the original side with me showed that the work disposed of by me was nearly maximum. I disposed of 827 matters during 256 sittings out of which 385 were civil suits and 442 miscellaneous matters.

Regarding the second allegation, I say that on the contrary it would be improper for a Judge not to finish a part-heard matter. I acted in accordance with the well established practice of Court. I know that two Judges of this Court threatened issuing of contempt notice to the officer concerned who removed a part-heard matter from their lists. The practice is so well understood that the Registry of the Court itself fixes cases accordingly in routine. Furthermore a perusal of the proceedings in the part-heard matters would reveal the ridiculous nature of the allegations".

1210. Then Shri S. N. Kumar refers to the proceedings in Suit No. 5/1980, Suit No. 87/1975, Suit Nos. 1408, 1409 and 1417/1979, Suit No. 304/1974, Suit No. 327/1979, Ex. No. 11/1978, C. C. P. No. 13/1979 and Suit No. 73/1979. Thereafter he says :

"20. As stated above I informed the Chief Justice of India that the old established practice in Delhi High Court is that a part-heard matter goes with the Judges and is heard by him whether he goes over from the appellate side to the original side or vice versa. A bunch of over 30 part-heard Regular Division Bench matters were heard during January and Feb., 1981 on Fridays by me sitting with Chawla, J. while I was holding Court singly on the Original Side

w. e. f. 5-1-1981, L. P. A. 32 of 1980 was heard during February, 81 by me while sitting with Mr. Chawla, J. Even on 24th April, 1981 (Friday) when the aforesaid material was sent to the Chief Justice of India by me the following part-heard matters were posted in the Division Bench of which I was a member :

(1) Civil Writ No. 557/79 and Civil Writ No. 1231 of 1979

(2) Civil Writ No. 61/80 with C. Ms.

Practically every week once from Jan., 81 till the end of May, 81, I was sitting in the Division Bench with Chawla, J. to finish part-heard matters".

1211. When a question was put by the Court as to who gave the particulars of the cases referred to above the learned counsel mentioned that they were given by the Chief Justice of India. That means that the Chief Justice of India had been furnished all the particulars by the Delhi Chief Justice earlier at the meeting which took place on Mar., 26, 1981 and the Chief Justice of India had also the explanation of Shri S. N. Kumar. It is not necessary for us here to assess correctness or otherwise of the conflicting versions of the Chief Justice of the Delhi High Court and of Shri S. N. Kumar bearing on the matters referred to above but the aforesaid particulars are sufficient to hold that sufficient information was available with the Chief Justice of India to record his opinion on the question of appointment of Shri S. N. Kumar and no material of any substantial importance had been kept back from the knowledge of the Chief Justice of India. The letter of May 7, 1981 written by the Chief Justice of the Delhi High Court to the Law Minister which is quoted above more or less contained the same particulars. There would have some reason to complain if the material contained in the letter of May 7, 1981 was favourable to Shri S. N. Kumar and the Chief Justice of India had recommended that Shri S. N. Kumar should not be appointed in ignorance of the contents of the letter of May 7, 1981. On the other hand, on the basis of the material which had been made available to him, the Chief Justice of India had made a report favourable to Shri S. N. Kumar. There appears to be not much substance in the submission that Shri S. N. Kumar was denied the benefit of a further refutation by the Chief Justice of India of the allegations in the letter of May 7, 1981 and that he had suffered thereby.

Such reiteration would not have added any further strength to his case. It cannot, therefore, be said that the process of consultation had become defective or that Shri S. N. Kumar had been prejudiced by reason of the Government keeping back the letter dated May 7, 1981 from the knowledge of the Chief Justice of India out of respect to the wishes of the Chief Justice of the Delhi High Court.

1212. One of the arguments urged on the basis of the Law Minister's note dated May 19, 1981 may be disposed of here. That argument is that since the Chief Justice of the Delhi High Court had stated that he was looking into the file of the 'Kissa Kursi Ka' case in which Shri O. N. Vohra had convicted late Shri Sanjay Gandhi (son of the Prime Minister) who was later on acquitted by the Supreme Court, the Chief Justice of the Delhi High Court was looking into irrelevant papers at the instance of the Law Minister or the Prime Minister to find out some material against Shri O. N. Vohra who was also not continued as additional Judge and hence his opinion given against Shri S. N. Kumar also was a motivated one. Apart from the above reference to his looking into the file of 'Kissa Kursi Ka' case, we do not have any other material to draw the above conclusion except the fact that Shri Vohra also had not been continued. It is not known what opinion was expressed by the Delhi Chief Justice on that material. Shri Vohra himself has not questioned the decision taken in his behalf. The Court cannot go outside the record. Prejudice and passion cannot be allowed to overtake reason. It is not open to the Court to draw an adverse inference against the Chief Justice of the Delhi High Court who is not before the Court. Any attempt to do so would be an unjudicial act. There is, therefore, no merit in this contention.

1213. It is, however, contended that the Law Minister had tried to 'pre-empt' the decision on the issue by making up his mind on May 27, 1981 not to reappoint Shri S. N. Kumar even before the Chief Justice of India wrote his final letter dated May 29, 1981 recommending reappointment of Shri Kumar for a period of two years instead of three months as stated in the letter dated May 22, 1981. There does not appear to be any undue haste or impropriety on the part

of the Law Minister in making his recommendation not to appoint Shri Kumar on May 27, 1981 for two reasons: (1) that the Government had to take a decision on that question on or before May 27, 1981 as directed by the interim order referred to above and (2) that the Law Minister had expressly kept out of consideration the I. B. reports while taking his decision, as can be seen from the note of May 27, 1981 on which alone the Chief Justice of India had reserved his opinion in his letter dated May 22, 1981 which showed that on the other questions he had finally expressed his opinion. Another point which may be noticed here is that the granting of extension to a Judge pending enquiry into a material aspect of the case may not strictly be in consonance with the Constitution. It may be irregular to issue a warrant of appointment pending inquiry into the fitness of the person to be appointed as a Judge. Hence it cannot be said that there was any transgression of ordinary rules of official conduct on the part of the Government in finally processing the file by May 27, 1981.

1214. The President has taken his decision on a consideration of the material before him and in doing so he is not shown to have relied on any irrelevant ground. The President, as observed earlier, is entitled to arrive at his own decision on the question of appointment of a Judge after consultation with the dignitaries mentioned in Art. 217 (1) of the Constitution. He is not, however, bound by the opinion of any of them although he is expected to give due regard to the opinions expressed by them. The President in the instant case has, as stated by the learned Attorney General, out of prudence decided not to reappoint Shri S. N. Kumar as the opinions of the two constitutional dignitaries were conflicting on the question of integrity, a question vital to the appointment of a Judge. There appears to be no constitutional impropriety in the decision of the President. The reason for not reappointing Shri Kumar is not an irrelevant one. Moreover there is a distinction between the appointment of a Judge without proper and effective consultation as required by Art. 217 (1) and a non-appointment of a person as a Judge preceded by defective consultation. In the former case the validity of the appointment may be open to

question but in the latter case ordinarily no petition will lie except under an extraordinary case like the one here where the scope of Art. 224 of the Constitution was not correctly understood by the authorities. Every one of the authorities viz. the Law Minister, the Chief Justice of India and the Chief Justice of the Delhi High Court has discharged his duties in this case with a sense of responsibility. But it is unfortunate that they could not arrive at a unanimous opinion. If the reasons had been irrelevant, probably the Court could have asked the Government to reconsider the matter. But that is not the case here.

1215. Shri R. K. Garg, learned counsel for Shri Kumar strenuously urged before us that Shri S. N. Kumar was ready to establish his innocence and an opportunity should be given to him to do so. His anxiety in making that submission is quite understandable. But unfortunately the Court cannot undertake this function in view of the restricted scope of the jurisdiction of this Court in this case. In spite of the limitations which appeared to exist at the earlier stages of this case, this case has turned out to be remarkable for two reasons. First the Court directed for the purpose of deciding this case the disclosure of the documents relating to the appointment to a high constitutional office which may not have been possible in any other Commonwealth country even now and secondly the Court has come to the conclusion that it is open to the Court to determine whether the decision not to reappoint Shri S. N. Kumar was due to cogent reasons or not in the peculiar circumstances of this case even when the relevant constitutional provisions are silent about it. In these two respects, this case should be considered as an important milestone in the development of administrative law in our country. The Court, however, cannot proceed further in this case and try to find out the truth or otherwise of the complaints said to have been made against Shri S. N. Kumar. It is true that if the complaints are really untrue, then Shri Kumar has paid the penalty for no fault committed by him. But it should be a matter of some consolation that the Chief Justice of India has exonerated him fully. It is also made clear that the Court has declined to grant the prayer of Shri S. N. Kumar

without expressing any opinion one way or the other on his integrity or efficiency. The result of this case should demonstrate to all those who are today holding the posts of Judges and to those who aspire after judgeships how difficult it is to maintain the fair image of a Judge. The decision of the President not to appoint Shri S. N. Kumar as an additional Judge of the High Court of Delhi cannot, therefore, be interfered with.

PART X

1216. The validity of the circular letter dated Mar., 18, 1981 sent by the Law Minister to all the Chief Ministers is seriously assailed before us by the petitioners. It is contended by them that the letter amounts to a threat to all the additional Judges whose consent for being appointed as permanent Judges in High Courts other than the one in which they were working is sought. The Government contends that the letter does not contain any such threat and that it had been sent in order to implement the policy of the Government to have some Judges in every High Court who belong to other States. By the letter in question, the Law Minister has requested the Chief Ministers of States (except North-Eastern States) and the Governor of Punjab to ascertain the wishes of all additional Judges working in their High Courts and persons whose names have been recommended for appointment as Judges of High Courts whether they are willing to work in High Court outside their States. The circular letter reads:

"D. O. No. 66/10/81-Jus.

Minister of Law Justice
and Company Affairs, India
New Delhi-10001
March 18, 1981

My dear,

It has repeatedly been suggested to Government over the years by several bodies and forums including the States Re-organisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction. The feeling is strong, growing and justified that some effective

steps should be taken very early in this direction.

2. In this context, I would request you to—

(a) obtain from all the Additional Judges working in the High Court of your State their consent to be appointed as Permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of preference, to which they would prefer to be appointed as Permanent Judges; and

(b) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in paragraph 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of Government either in regard to their appointment or in regard to accommodation in accordance with the preference given.

4. I would be grateful if action is initiated very early by you and the written consent and preferences of all Additional Judges as well as of persons recommended by you for initial appointment are sent to me within a fortnight of the receipt of this letter.

5. I am also sending a copy of this letter to the Chief Justice of your High Court.

With regards,

Yours sincerely,

Sd/-

(P. Shiv Shanker)

To

1. Governor of Punjab
2. Chief Ministers (by name) (except North-Eastern States)

1217. In its Fourteenth Report, the Law Commission suggested that the whole country should be treated as a single unit for the purpose of selection of Judges of the High Court. The relevant part of the report reads:

"59. Further, the whole country must be treated as a single unit for the purpose of selection as it is vitally important that the best available talent

which the country is capable of providing be mobilized for the task of meeting a situation which has undoubtedly assumed the proportions of an emergency. If suitable persons of the necessary merit and character are in the opinion of the appointing authority not available in the State, the authority should not hesitate to draw upon persons available in other States. Selections from the Bar must necessarily be of persons of outstanding merit commanding a large practice who may well be willing to make a pecuniary sacrifice and render public service by accepting these judgeships. An effort should be made to persuade suitable senior practitioners to accept these judgeships at least for a short period as a public duty. Their position at the Bar must be of such eminence that it could not be suggested that acceptance by them of judgeships was likely to increase their earnings on their reverting to the Bar". (Vide Para 59 in Chapter 6 of the 14th Report of the Law Commission of India, Vol. I)

1218. The advantages gained by having persons from other States as Judges of High Court were stated by the Law Commission presided over by Justice H. R. Khanna, in its 80th Report thus:

"6.21. We may next deal with the question of having in each High Court about one-third of judges from outside the State. Recommendation for this purpose was made by the States Reorganisation Commission. The Law Commission presided over by Mr. Setalvad in its fourteenth Report observed in this connection:

"The recent creation of various zones in the country and the efforts to treat the States forming part of these zones as one unit for various purposes would, we hope, lead to the States forming part of each zone to be recruiting ground for appointments to the High Courts from the members of the Bar in these States. It is hoped that in this manner the expectation of the States Reorganisation Commission that at least one-third of the High Court judges would be persons drawn from outside the State will be realised".

Likewise, the Study Team on Centre-State Relations appointed by the Administrative Reforms Commission also suggested that so far as practicable one-third of the number of judges of a High Court should be from outside.

We have given the matter our earnest consideration and are in substantial agreement with the recommendations mentioned above. In our opinion, there should be a convention, according to which one-third of Judges in each High Court should be from another State. This would normally have to be done through the process of initial appointments and not by transfer. It would also in the very nature of things be a slow and gradual process and take some years before we reach the proportion.

6.22. Evolving such a convention would, in our opinion, not only help in the process of national integration but would also improve the functioning of various High Courts. It would secure on the Bench of each High Court the presence of a number of judges who would not be swayed by local considerations or affected by issues which may rouse local passions and emotions. As observed by us in one of our earlier Reports, one of the essential things for the due administration of justice is not only the capacity of the Judges to bring a dispassionate approach to cases handled by them, but also to inspire a feeling in all concerned that a dispassionate approach would underlie their decision. Quite often, cases which arouse strong emotional sentiments and regional feelings come up before courts of law. To handle such cases, we need Judges who not only remain unaffected by local sentiments and regional feelings, but also appear to be so. None would be better suited for this purpose than Judges hailing from other States. It is a common feeling amongst old lawyers that apart from cases with political overtones, the English Judges showed a sense of great fairness and brought a dispassionate approach in the disposal of judicial cases handled by them. We in India are in the fortunate position of having a vast country. There can, therefore, be no difficulty in having a certain percentage of Judges who hail from other States. The advantages gained by having persons from other States as Judges would be much greater compared with any disadvantage which might result therefrom".

1219. While rejecting the contention that the transfers of High Court Judges during the emergency in the year 1976 had been made in the interests of national integration, Chandrachud, J. (as he then was) observed in *Sankalchand Sheth's*

case ((1978) 1 SCR 423 at p. 450): (AIR 1977 SC 2328 at p. 2344) (supra) thus:

"As regard the first, no one can deny that whatever measures are required to be taken in order to achieve national integration would be in public interest. Whether it is necessary to transfer Judges from one High Court to another in the interest of national integration is a moot point. But that is a policy matter with which courts are not concerned directly.

One may, however, venture the observation that there are numerous other ways of achieving national integration more effectively than by transferring High Court Judges from one High Court to another. Considering the great inconvenience, hardship and possibly a slur, which a transfer from one High Court to another involves, the better view would be to leave the Judges untouched and take other measures to achieve that purpose. If at all, on mature and objective appraisal of the situation it is still felt that there should be a fair sprinkling in the High Court judiciary of persons belonging to other States, that object can be more easily and effectively attained by making appointments of outsiders initially. I would only like to add that the record of this case does not bear out the claim that any one of the 16 High Court Judges was transferred in order to further the cause of national integration". (emphasis added)

1220. Untwalia, J. observed in that very case at page 507 (of (1978) 1 SCR) : (at p. 2388 of AIR 1977 SC) thus:

"The purpose of national integration, if otherwise it is a good thing to be achieved, or the need of particular High Court for a Judge possessing a particular type of proficiency or some such grounds of public interest can well be achieved at the time of the initial appointments; as for example, a member of the Bar practising in a particular High Court may be appointed at the very threshold, if he so agrees to be appointed, a Judge of another High Court so that after retirement he may come back and resume his practice in the High Court where he was so doing. I shall, perhaps, be crossing my permissible limits if I embark to write an essay or a thesis on the various aspects of the needs of such public interest highlighting the minus points also in them, nor will it serve any useful purpose.

These are matters of policy decision entirely within the realm of the governmental power". (emphasis added)

1221. These two extracts from the decision in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra) clearly state that if as a matter of policy the Government propose to appoint some Judges in every High Court from outside the State, it is a matter within the realm of the Government. They have not stated that it is constitutionally impermissible to do so.

1222. The objections raised by the petitioners to the opinions of the Law Commission referred to above are that they could not be relied on as the said opinions had not been tested by the 'purifying process' of an argument at the Bar and secondly the recruitment of members of the Bar or of the subordinate judiciary functioning outside the State would be unconstitutional as there would be no possibility of an effective consultation with the Chief Justice of the High Court and the Governor of the concerned State as they would have no opportunity of personally assessing the qualities of members of the Bar and the subordinate judiciary working outside their jurisdiction.

1223. The Report of the Committees of the Law Commission are entitled to great respect as they are prepared by experienced persons after taking into consideration all relevant aspects and sometimes the evidence collected by them from several sources. If they are to be excluded many opinions expressed in many of the books relied on by the petitioners themselves have to be excluded. Reports of the Law Commission can be looked into to understand the history of the legislation, the object with which certain legal provisions are enacted and what advantages may be derived by adopting a particular policy. Reports of the Law Commission have been made use of by this Court earlier to understand the history of the legislation which was under consideration and the object with which it was passed. (Vide Balchand Jain v. State of Madhya Pradesh (1977) 2 SCR 52: (AIR 1977 SC 366)). The second limb of this argument overlooks the fact that the Constitution does not state that the Chief Justice of the High Court and the Governor of the State should personally know the persons recommended under Art. 217 of the Constitution and that they

cannot collect information about them by any other source such as the Chief Justice of the High Court having jurisdiction over the area where they are working or the Governor of the other State. In the true nature of things such personal knowledge cannot be insisted upon. If that is insisted upon, the consultation with the Chief Justice of India itself may turn out to be ineffective for the very same reason for he cannot be expected to have personal knowledge about many persons whose names are recommended by the Chief Justices of the various High Courts and Governors. In the context of Art. 217, it has to be held that the functionaries who have to express opinion under that Article can ascertain all relevant information about a person proposed for the appointment by any other reasonable means and they need not know them personally. Any other view would result in the exclusion of a large body of lawyers who are not practising before the High Courts from consideration for appointment as High Court Judges, which certainly could not have been the intention of the Constitution makers.

1224. The next contention urged in this connection is that this is an indirect attempt to transfer some additional Judges from one High Court to another. It cannot be so for the reason that the transfer of an additional Judge (appointed under Art. 224 (1)) unless the arrears have been cleared off and the transfer of an acting Judge (appointed under Art. 224 (2)) in any event would not be possible at all. An additional Judge is appointed for a term not exceeding two years only with a view to clearing off the arrears in a High Court. If that is the sole object of appointing him, how can he be transferred as an additional Judge in the public interest from that Court to another Court unless the purpose for which he is appointed is achieved namely, clearing off the arrears? Moreover when his stay as an additional Judge is very short it would not subserve the interest of efficiency of public service if he is made to work in more than one High Court during that short period unless there is not sufficient work to be assigned to him in the High Court in which he is initially appointed as an additional Judge. The case of an acting Judge appointed under Art. 224 (2) of the Constitution is a self-evident one. An acting Judge is appointed to act as a Judge until the permanent Judge in whose place he is appointed has resumed

his office. He cannot, therefore, be transferred under Art. 222 contrary to the express terms of Art. 224 (2). In view of this declaration the petitioners cannot entertain any suspicion that the circular letter has been issued to achieve the object of transferring additional Judges, during their tenure fixed under Art. 224 (1). This, however, does not come in the way of an additional Judge or an acting Judge being appointed as a permanent Judge either in his own High Court or in any other High Court before the tenure specified under Art. 224 (1) or Art. 224 (2), as the case may be, comes to an end.

1225. I also do not find any substance in the submission made on behalf of some of the petitioners that the circular letter of the Law Minister suggests that the additional Judges who have not given their consent would be under a disadvantage in the matter of their continuance as additional Judges or of their appointment as permanent Judges in their own Court. The learned Attorney-General has stated before the Court that 'beyond any inherent or incidental advantage that the implementation of the policy of appointing outside Judges may confer, no other advantage or disadvantage is to be visited on any person by reason of his having given consent or his refusal in response to the inquiry stated in the impugned letter of 18th March, 1981'. In view of the above statement, I take it that the portion in paragraph 3 of the letter, namely, 'it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of Government either in regard to their appointment or in regard to accommodation in accordance with the preference given' does not carry with it any sinister design. It is submitted on behalf of the Government that such a statement had to be made because the necessary consultations under Art. 217 (1) of the Constitution had yet to be made. This explanation is accepted reserving liberty to any additional Judge, who is prejudiced by his not giving consent, to approach the Court for appropriate relief if an occasion arises to do so.

1226. There is also no merit in the contention that since the circular letter had been addressed without the previous consultation of the Chief Justice of India, Art. 217 (1) and Art. 222 of the Constitution had been violated. The letter as can be seen from its tenor is intended to find

out whether any additional Judge is willing to be appointed as a Judge in any other High Court. Such appointment has to be made only in accordance with Article 217 (1) of the Constitution. Before making such appointment, the President has to consult all the functionaries mentioned in Art. 217 (1) including the Chief Justice of India. Art. 222 of the Constitution does not come into picture at all as no transfer is contemplated under the letter. The letter relates to initial appointments only. In the circumstances there is no error committed by the Law Minister in writing the impugned letter to the Chief Ministers.

1227. All the contentions of the petitioners regarding the circular letter of the Law Minister dated March 18, 1981, therefore fail.

PART XI

1228. We are concerned in the case of Shri K. B. N. Singh with the question whether the order of his transfer as the Chief Justice of the High Court of Madras is valid or not. Earlier it has been held that the consent of the Judge to be transferred is not necessary under Article 222 of the Constitution and that such transfer can be made in the public interest as laid down by the majority in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra). The order in question is an administrative order which is passed by the President in accordance with the opinion expressed by the Chief Justice of India, who is the sole authority to be consulted under Art. 222. In this case also as per directions of this Court, the relevant papers have been produced by the Union Government. It is urged that the manner in which consultation is made in this case is not in accordance with law as the President had not initially asked the Chief Justice of India to give his opinion on the question of transfer of Shri K. B. N. Singh but the Chief Justice of India had on his own accord advised the Union Government to transfer him first to the High Court of Rajasthan and later on to the High Court of Madras. Art. 222 does not lay down the procedure to be followed for effecting a transfer. Even granting that the proceedings for transfer of a Judge are initiated by the Chief Justice of India the order of transfer would not be bad as under Art. 217 (1) of the Constitution which is couched in almost the same language, an appointment of a Judge would not be bad only because the Chief Justice of a High Court

who is one of the authorities to be consulted initiates the proposal. In fact the practice has been that the Chief Justice of the High Court invariably initiates it. This contention is not therefore one of substance. The crux of the question is whether the authority exercising the power of transfer has brought to the knowledge of the authority to be consulted all the relevant material with it and has given sufficient opportunity to tender his opinion. There is no allegation that the Government had kept back any relevant information from the Chief Justice of India. The Chief Justice of India himself says in his counter-affidavit that there was full and effective consultation with him. A fair reading of the letter of the Chief Justice of India dated December 7, 1980 shows that there was prior discussion about the question of transfers of Chief Justices of High Courts and that there was a suggestion by the Government that there should be a transfer of all Chief Justices of High Courts so that in every High Court there was a Chief Justice who hailed from outside the State. This suggestion stems from the proposed policy of the Government which is clear from the statement of the Law Minister in the Lok Sabha on July 24, 1980, the relevant part of which reads: ".....Policy is whether we should have the Chief Justice from outside. This is the policy. How we should have is a matter of mechanism." There are similar references to it in some other speeches of the Law Minister both in the Lok Sabha and in the Rajya Sabha. Even though it appears from some of the speeches of the Law Minister that such a policy had not taken a final shape, the Chief Justice of India had been told that the Government had an idea to bring into force such a policy before the middle of 1980. From certain notings on the file relating to the appointment of Chief Justice of the Delhi High Court which were disclosed by the Union Government as per orders of the Court dated November 18, 1981 it is evident that there was discussion between the Central Government and the Chief Justice of India about the policy of appointing the Chief Justice of every High Court from outside the State. The first note of the Law Minister dated May 15, 1980 where he specifically refers to the said policy refers to the discussion he had with the Chief Justice of India on it. The next note in that file is of the Chief Justice of India. It is dated June 5, 1980 and the relevant part of it reads:

"It would become necessary in the very near future to evolve an All India policy for appointments of Chief Justices in the various High Courts. The difficulties in taking any ad hoc decision on that question are of such grave magnitude that it would be impossible at this stage to appoint an outsider as a Chief Justice either of the Delhi High Court or of the Andhra Pradesh High Court..."

1229. This note is followed by the note of the Law Minister dated July 21, 1980. In that it is stated:

"The Chief Justice of India and I had a detailed discussion yesterday morning on the question of appointment and transfer of Chief Justices of the High Courts so that the position of the Chief Justice of a High Court is held by an outsider as a matter of policy. This would avoid discriminatory treatment which would have otherwise invited undue criticism....."

In view of the discussion with the C.J.I., it appears desirable to appoint Shri Justice Prakash Narain as the Permanent Chief Justice of the Delhi High Court and Shri Justice Kuppaswami as Permanent Chief Justice of Andhra Pradesh High Court, subject to the general policy decision on having the Chief Justice from outside that High Court. It is clearly understood that subject to the general policy decision and the mechanism that would be evolved to give effect to that policy, Shri Justice Prakash Narain and Shri Justice Kuppaswami would be transferred to different High Courts....."

1230. Then there is a long note dated July 31, 1980 of the Chief Justice of India in which he has observed thus:

"..... The heart of the matter however is whether as a general All India policy, a Judge of a High Court ought never to be appointed as the Chief Justice of that High Court. I am prepared to keep an open mind on this question because the pros and cons of the issue has still to be thrashed out. But the better view may be that transfers of sitting Chief Justices may be made only in appropriate cases, that is to say, when a strong case for the transfer has been made out. Similarly, appointments of Chief Justices may be made from outside, whenever the circumstances warrant. This involves the assessment of each individual situation as and when it arises....."

At this stage it is unnecessary to say anything more on the subject except to

clarify that though I recognise the need to evolve an All India policy for appointments of Chief Justices in the various High Courts, I do not think that it will be either feasible or proper to transfer each and every sitting Chief Justice of the High Court to another High Court or to appoint an outside Judge as the Chief Justice whenever a vacancy of a Chief Justice arises. Such a course will introduce numerous complications the general nature of which I have discussed with the Law Minister. The question is so replete with practical difficulties and involves a question of such high principle that a very careful thought shall have to be given to it before a final decision is taken.

I, therefore, reiterate my earlier recommendation that Mr. Justice Prakash Narain should be appointed as the permanent Chief Justice of the Delhi High Court and Shri Justice Kuppaswami as the permanent Chief Justice of the Andhra Pradesh High Court. I consider it unnecessary to add that these appointments should be "subject to the general policy" of appointing Chief Justices from outside, because if, eventually, a decision is taken that every Chief Justice must come from outside, it will naturally become necessary to consider the transfer of Mr. Justice Prakash Narain and Mr. Justice Kuppaswami."

1231. The above notings show that the Chief Justice of India who had been apprised of the proposed policy of the Government had not opposed the transfer of Chief Justices of High Courts as a matter of policy but only had expressed certain points which needed to be considered before taking a final decision on the question.

1232. In this letter dated December 7, 1980 however the Chief Justice of India says "though I am firmly opposed to wholesale transfers of the Chief Justices of the High Courts, I take the view, which I have expressed from time to time that such transfers may be made in appropriate cases for strictly objective reasons." It is true, the Chief Justice of India stated that he was opposed to 'wholesale transfers' but he does not appear to have opposed the policy of having the Chief Justice of every High Court from outside the State. This statement may mean that at the same time the transfers or appointments of all the Chief Justices of all the eighteen High Courts in accordance with the policy may not be advisable. There may be a Chief Jus-

tice who has only three or four months of service before his superannuation. There may be a Chief Justice who is ailing and who cannot, therefore, be moved to another High Court immediately. Moreover the Chief Justice of India has to get into touch with each one of the Chief Justices before an order of transfer is made in his case to ascertain from him his problems. There may be some difficulty in finding out a suitable High Court for a Chief Justice because the question of adjustment of seniority between him and the other Judges of that Court may pose a problem. It is probably on account of these difficulties the Chief Justice of India stated that he was opposed to a 'wholesale transfer' of the Chief Justices. This statement cannot be read as conveying the meaning that the Chief Justice of India wanted that only some particular Chief Justices should be transferred or that the policy should be implemented in the case of particular High Courts. There is no doubt that a policy decision should ultimately be applicable to all High Courts. But it can be applied by stages. A policy or for that matter a law may have to be applied by stages in different areas and in the case of different institutions or bodies by reason of administrative compulsions and such application cannot be considered as either arbitrary or capricious or unconstitutional. Sometimes the application of a policy or a law in all areas or in respect of all institutions to which it is ultimately intended to apply simultaneously may defeat the very policy or law, even though it may be otherwise beneficial. The difficulties involved in such 'wholesale' application might have given rise to the difficulty expressed by the Chief Justice. This appears to be a reasonable construction to be placed on the said statement of the Chief Justice of India. One should remember that the said statement is in a letter and not in a statute and is one made in the context of previous correspondence and discussions which have gone on for some time in an informal way. Moreover a policy is not something which should take the form of a formal statute or a written code. It can be gathered from a course of action or conduct and it can take its birth when the first step is taken in its direction.

1233. The question of policy is a matter entirely for the President to decide. Even though the Chief Justice of India is consulted in that behalf by the President since the policy relates to the

High Courts, his opinion is not binding on the President. It is open to the President to adopt any policy which is subject only to the judicial review by the Court. Under Art. 222 of the Constitution the Chief Justice of India has to be consulted on the question whether a particular Judge should be transferred and where he should be transferred while implementing the said policy. If the Government requests the Chief Justice of India to give his opinion on a transfer to implement the said policy which is really in the public interest he cannot decline to do so. Even though the Chief Justice was opposed to the 'wholesale transfers' of Judges there is no bar for the Government treating the recommendation for transfers made by the Chief Justice of India as a part of the implementation of its policy. That the transfer of Shri K. B. N. Singh was on account of the policy of the Govt. can be gathered from the following statements in the affidavit filed before this Court: In paragraph 8 of the affidavit dated September 16, 1981 of Shri K. B. N. Singh. It is stated: "When the deponent wanted to know why he might be transferred to Madras, the Hon'ble Chief Justice of India merely said that it was the Government policy, but gave no clue as to what necessitated his transfer from Patna to Madras." In para 2 (g) of the affidavit of the Chief Justice of India he has stated: "I deny that when Shri K. B. N. Singh wanted to know over the telephone on January 5, 1981, I stated merely that it was the 'Government policy'....." In paragraph 8 of the rejoinder affidavit dated October 16, 1981 of Shri K. B. N. Singh, it is stated "at one point he also said that it was Government policy to effect transfer in batches of two or three."

1234. It is seen that the two Chief Justices — Shri M. N. Ismail and Shri K. B. N. Singh were transferred at the first instance. Some other transfers probably would have followed but for the filing of these petitions. It is already held that the policy of having the Chief Justice in every High Court from outside the State is not unconstitutional and that it could be achieved by resorting to Art. 222 of the Constitution. The transfer ordered pursuant to that policy cannot therefore be considered as either discriminatory or not being in the public interest. In fact such transfers are in the public interest, for reasons already stated.

1235. It is seen from the counter-affidavit of the Chief Justice of India that

the transfer of Shri K. B. N. Singh had not been recommended by him on the basis of any allegation of misbehaviour or of incapacity which can form a basis for action under Art. 218 read with Article 124 (4) and (5) of the Constitution. The relevant part of that counter-affidavit reads:

"It is true that he (Shri K. B. N. Singh) said that it was possible that some baseless complaints may have been made to me and that he would like to remove any wrong impression which those complaints may have created. I told him that I do not go by baseless complaints, that I did not believe that his conduct was blameworthy but that if he wanted to explain any matter, which according to him had created dissatisfaction about the working of the High Court, he was free to do so. Thereupon Shri K. B. N. Singh told me how certain persons connected with the High Court were influenced by communal considerations and how he, on his own part, did not permit communal or any other extraneous considerations to influence him administratively or judicially. I assured him that I did not hold that he himself was to blame but that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction."

1236. The foregoing clearly shows that the Chief Justice of India had never formed an opinion that there was any error committed by Shri K. B. N. Singh. Hence there can be no basis for the apprehension in the mind of Shri K. B. N. Singh that the transfer was being used as a measure of punishment in his case. If it had been a selective transfer ordered without regard to the public interest it would have been unconstitutional. But this is not such a transfer. The order does not attach any stigma to Shri K. B. N. Singh. It is a bona fide one made in implementation of a perfectly valid policy which may be implemented in instalments.

1237. It is true that earlier the Chief Justice of India had recommended that Shri K. B. N. Singh should be transferred to the Rajasthan High Court. That was a part of the chain of transfers then proposed. It had not taken a final shape since Shri K. B. N. Singh had not yet been informed about it and his views had not yet been ascertained. But when it was decided to transfer Shri M. M. Ismail

to the Kerala High Court, the Chief Justice of India felt that the services of Shri K. B. N. Singh being a senior Chief Justice were required by the High Court of Madras. There is nothing unusual about this alteration but on the other hand shows that the Chief Justice of India had an open mind on the question of transfer until he made his final recommendation.

1238. The next submission made in this case is that the procedure followed in connection with the impugned order of transfer is not fair. Chandrachud, J. (as he then was) has dealt with the question of procedure to be followed before ordering the transfer of a Judge under Art. 222 of the Constitution in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra) at page 456 (of (1978) 1 SCR): (at p. 2349 of AIR 1978 SC) thus:

"Article 222 (1) postulates fair play and contains built-in safeguards in the interests of reasonableness. In the first place, the power to transfer a High Court Judge can be exercised in public interest only. Secondly, the President is under an obligation to consult the Chief Justice of India which means and requires that all the relevant facts must be placed before the Chief Justice. Thirdly, the Chief Justice owes a corresponding duty, both to the President and to the Judge who is proposed to be transferred, that he shall consider every relevant fact before he tenders his opinion to the President. In the discharge of this constitutional obligation, the Chief Justice would be within his rights, and indeed it is his duty whenever necessary, to elicit and ascertain further facts either directly from the Judge concerned or from other reliable sources. The executive cannot and ought not to establish rapport with the Judges which is the function and privilege of the Chief Justice. In substance and effect, therefore, the Judge concerned cannot have reason to complain of arbitrariness or unfair play, if the due procedure is followed."

1239. It is evident from the above passage that the duty of considering every relevant fact pertaining to a Judge is of the Chief Justice of India on the question of his transfer under Art. 222 of the Constitution. In his counter-affidavit the Chief Justice of India has given the particulars of the enquiry he had made before recommending that Shri K. B. N. Singh should be transferred to Madras.

He first talked to Shri K. B. N. Singh over the telephone on January 5, 1981 and informed him about the proposal to transfer him to Madras. Again on January 8, 1981 Shri K. B. N. Singh met the Chief Justice of India at New Delhi and the question of transfer was again discussed. The relevant part of the counter-affidavit of the Chief Justice of India reads:—

"2 (f). It is true, as stated by Shri K. B. N. Singh in paragraph 8 of his affidavit, that I conveyed to him on the evening of January 5, 1981 over the telephone that it was proposed to transfer Shri Justice M. M. Ismail to Kerala and that he, Shri K. B. N. Singh, may have to go to Madras. I telephoned Shri K. B. N. Singh on January 5, 1981 in order to apprise him of the likelihood of his transfer to Madras and to ask him if he had anything to say on the question of his proposed transfer.

(g) I deny that when Shri K. B. N. Singh wanted to know over the telephone on January 5 why he may be transferred to Madras, I stated merely that it was the "government policy" and gave no clue as to what necessitated his transfer from Patna to Madras. I conveyed to him specifically that it was proposed to transfer Shri Justice M. M. Ismail from Madras and it was necessary to appoint an experienced and senior Chief Justice in his place.

(h) It is true that Shri K. B. N. Singh told me over the telephone that his mother was bed-ridden and was not in a position to go with him to Madras. I deny that he told me of any other personal circumstance by reason of which it would be difficult for him to go on transfer to Madras. The only difficulty which he mentioned then or at any other time was that his mother was old and bed-ridden and would not therefore be able to go to Madras. He told me that if his transfer was insisted upon, he would prefer to resign. I requested him not to act in haste and to give the matter a close thought. I added that I was making a note of the difficulty mentioned by him and that it will have to be taken into consideration before a final decision was taken. I requested him to come to Delhi to discuss the question of his transfer.

(3) Shri K. B. N. Singh has stated in paragraph 9 of his affidavit that he met

me in Delhi three or four days later, told me of his acute and insurmountable personal difficulties in the event of his transfer to Madras, that he was with me for about 10-15 minutes and that I was non-committal in the matter of his transfer. Shri K. B. N. Singh saw me at my residence on January 8, 1981 at 7-30 p.m. He was with me for quite some time much longer than 10 or 15 minutes. I discussed with him the question of his mother's advanced age and illness, which was the only personal difficulty which he mentioned in the matter of his proposed transfer to Madras. I told him that I was unable to agree with him since there were other dependable persons in his family who could look after his mother and that, in any case, his brother Shri S. B. N. Singh who was practising in the High Court was quite capable of looking after the mother. He replied that his mother had a special attachment to him and he could not leave her to the care of his brother or other members of the family. It is true that he said that it was possible that some baseless complaints may have been made to me and that he would like to remove any wrong impression which those complaints may have created. I told him that I do not go by baseless complaints, that I did not believe that his conduct was blameworthy, but that if he wanted to explain any matter, which according to him had created dissatisfaction about the working of the High Court, he was free to do so. Thereupon Shri K. B. N. Singh told me how certain persons connected with the High Court were influenced by communal considerations and how he, on his own part, did not permit communal or any other extraneous considerations to influence him administratively or judicially. I assured him that I did not hold that he himself was to blame but that certain persons were exploiting their proximity to him which had created needless misunderstanding and dissatisfaction. There are many more matters which he mentioned on the evening of January 8, 1981 but they do not directly bear upon the matters in issue herein and I will, therefore, not refer to them.

(4) The statement contained in paragraph 10 of the affidavit of Shri K. B. N. Singh that he had not conveyed to me his consent to the proposed transfer is true. I however deny that he was not consulted regarding his transfer to Madras. I had discussed the matter with him

threadbare on more than two or three occasions. I deny that no reason, ground etc. necessitating or justifying his transfer was disclosed to him or discussed with him by me. On my part, I conveyed to him that his transfer was made in public interest, that it was not made by way of punishment and that it was also necessitated by the transfer of Shri Justice Ismail from Madras to Kerala."

1240. Although Sri K. B. N. Singh has not fully accepted the facts narrated in the passage extracted above, there is no reason for not accepting in its entirety the statement made by the Chief Justice of India. The above passage clearly shows that the Chief Justice of India had acted strictly in accordance with the procedure indicated by him in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra). There is, therefore, no ground to hold that the case of Shri K. B. N. Singh's transfer was not considered by the Chief Justice of India in a fair and reasonable way.

1241. The next submission made on behalf of Shri K. B. N. Singh is that all aspects of the case were not placed before the President by the Chief Justice of India. This again is met by the statement of the Chief Justice of India in his counter-affidavit that "there was full and effective consultation between me and the President of India on the question of Shri K. B. N. Singh's transfer from Patna to Madras as the Chief Justice of the Madras High Court. Every relevant aspect of that question was discussed by me fully with the President both before and after I proposed the transfer". At the hearing the Court was informed that the President had not discussed the matter personally with the Chief Justice of India. The expression "President" should be understood here in the constitutional sense. The discussion must have taken place with the Minister concerned. It is not possible to accept the submission that no such discussion could have taken place at all after Shri K. B. N. Singh met the Chief Justice of India on the evening of January 8, 1981 because the Prime Minister had taken the decision on January 9, 1981 and there was no written record in support of it. From the records produced before us it is seen that discussion has gone on between the authorities concerned sometimes over telephone and sometimes at a meeting. No minutes are kept of many such discus-

sions. It cannot, therefore, be said that either there was no time to discuss or no such discussion had taken place at all. It has to be borne in mind that the Chief Justice of India asked Shri K. B. N. Singh to meet him at New Delhi to discuss the matter further and accordingly Shri K. B. N. Singh met him on January 8, 1981. If the Chief Justice of India had felt that any representation to be made by Shri K. B. N. Singh was irrelevant he would not have called him for discussion at New Delhi. After discussing the matter with him he must have discussed the matter before the decision was taken on January 9, 1981 with the other authority concerned.

1242. In the course of the discussion referred to above all matters which had come to the knowledge of the Chief Justice of India must have been placed before the person with whom the discussion had taken place. All official acts must be deemed to have been done in accordance with law. There is, therefore, no merit in this contention also.

1243. The last submission on the above question was that whereas the Chief Justice of India had recommended that Shri K. B. N. Singh should be transferred as a part of selective transfers, the President had treated them as part of the policy of having a Chief Justice in every High Court from outside the State which had not taken a final shape and therefore there was no consensus on the object to be achieved by the transfer. As already observed, the question of policy is within the realm of the Government. Therefore, even if the Chief Justice of India considered that the recommendation made by him was one of six or seven transfers suggested by him, which would mean for the time being a partial implementation of the policy, it cannot be said that the transfer of Shri K. B. N. Singh is bad, for all aspects relating to Shri K. B. N. Singh were considered by the appropriate authority before ordering the transfer. The transfer in question is not a stray case of transfer. A few other transfers were in contemplation at the relevant time and they necessitated consideration of individual cases separately. The transfers of Shri M. M. Ismail and Shri K. B. N. Singh were ordered. In all probability but for these petitions some more transfers would have materialised by now. We have to note that Art. 222 of the Constitution is not confined only to

policy transfers involving all Judges. Even individual Judges may be transferred for administrative reasons in the public interest. In the circumstances of the case, it is difficult to hold that the transfer was an act of victimisation. One other contention raised in this case is that the Chief Ministers of Tamil Nadu and Bihar had not been consulted in accordance with a memorandum issued by the Government. The question whether there can be any memorandum supplementing the provisions of Article 222 is a matter of doubt. But since the Court is informed that both the Chief Ministers had been consulted about the transfer of Shri K. B. N. Singh, there is no need to probe into this point any further.

1244. The decision to transfer a Judge under Article 222 of the Constitution, as already stated, is an administrative one. It is not alleged that any of the functionaries participating in that decision had any ill will against Shri K. B. N. Singh. The existence of mala fides may have been a ground to set aside the impugned order of transfer provided it had been alleged and established. In *E. P. Royappa v. State of Tamil Nadu*, (1974) 2 SCR 348 at p. 390: (AIR 1974 SC 555 at p. 586), while rejecting a contention against an order of transfer which had been impugned in that case, Bhagwati, J. has observed thus:

"Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility."

1245. In this case, no such allegation of mala fides is made against any authority. On the other hand the material available in the case clearly establishes that due procedure had been followed and all facts that justify the transfer have been affirmatively proved. It is shown that the authorities concerned felt satisfied about the need for the transfer. In view of the above finding, Shri K. B. N. Singh cannot derive much assistance from the observations made in the *Barium Chemicals Ltd. v. Company Law Board*, (1966) Suppl. SCR 311: (AIR 1967 SC 295), and in *Rohtas Industries Ltd. v. S. D. Agarwal*, (1969) 3 SCR 108: (AIR 1969 SC 707). On the facts and in the cir-

cumstances of the case it is not possible to hold that the order of transfer of Shri K. B. N. Singh as the Chief Justice of the High Court of Madras is illegal and void.

PART XII

1246. Now the question is what relief can be granted in these cases. In the earlier part of this judgment there is a detailed discussion about the continued neglect on the part of the Government in not making a proper review from time to time of the number of permanent Judges necessary for each High Court and the irregular exercise of power under Article 224 (1) of the Constitution in appointing additional Judges even though it was necessary to appoint permanent Judges. Even according to the Government there is need to appoint at least 150 Judges to clear off the arrears within two years. Article 216 of the Constitution, as observed earlier, confers power on the President to appoint adequate number of Judges in every High Court. In the United States of America the conditions in which a writ of mandamus may be issued to a Governor or the President are set out in paragraphs 140, 141 and 153 in Vol. 52 of the *American Jurisprudence 2d.* under the title 'Mandamus' thus:

"140. Governor.

The question of how far the governor of a State is subject to the supervisory control of courts through the writ of mandamus is one of gravity and importance, which the courts regard as extremely delicate, and the solution of which they undertake with great reluctance. In some jurisdictions the courts refuse to issue the writ against a governor under any circumstances, whether the act sought to be enforced is regarded as ministerial or otherwise, on the theory that interference with his action constitutes a violation of the doctrine of separation of powers, or upon the ground that issuance of a writ is inexpedient because of possible difficulty in enforcing it. Under this view, a writ is not issuable against an executive for the purpose of compelling him to perform a duty, even though it is imposed upon him by statute. This reasoning has been rejected in many jurisdictions, which allow the maintenance of mandamus proceedings against a governor under certain circumstances. All courts agree that the remedy is not available to control the performance by a

governor of political functions or functions requiring the exercise of discretion, but some will issue the writ to require the performance of ministerial duties, or to restrain an act in violation of law. Needless to say, mandamus will not issue to compel the performance by a governor of an act which does not fall within his prescribed duties, or which has already been performed.

141.— Political and discretionary functions.

State governors are invested by law with important governmental or political powers and duties belonging to the executive branch of the government, and the due performance thereof is entrusted to their official honesty, judgment and discretion. As to these purely executive or political functions devolving upon the chief executive officer of the State, and as to any other duties necessarily involving the exercise of official judgment and discretion, the doctrine is uncontroverted that mandamus will not lie to control or compel his action. Applying the foregoing rule, the courts have denied the writ when sought to compel the governor to call an election; count or reject votes cast at an election; issue a commission or certificate of election to office; make an appointment to office; rescind an order removing or suspending an officer; recommend the passage of a particular law; sign or veto bills; institute a proceeding for the transfer of a federal prisoner to the State court; grant a pardon; approve a parole; borrow funds; sign or approve a warrant; issue bonds; subscribe to stock as required by statute; appoint a commission to appraise property which is sought to be condemned; allot or pay over money received from the Federal Government; approve a contract; or perform other like duties.

If it is the constitutional or statutory duty of a governor to exercise his discretion with respect to a certain matter, he may be required by mandamus to do so, but, of course, the writ does not lie to direct the manner in which his discretion shall be exercised

153. President of United States.

As is also true in the case of a State governor, which in most respects is a similar office, mandamus does not lie to control the administrative or executive

discretion of the President of the United States, and if the President delegates one of his functions to another officer, an order by the latter is an administrative order of the President, which cannot be vacated by mandamus. The celebrated case of *Marbury v. Madison*, 5 US 137 is generally considered as authority for the view that the courts have no jurisdiction to issue a writ of mandamus against the President to compel him to perform any act incidental to his office, whether purely ministerial in its character or not, although the writ may issue against the heads of departments of the Federal Government when the act to be performed is purely ministerial, not involving judgment or discretion. On the other hand, in a later case in the Federal Supreme Court, although the case did not involve the President, the Attorney-General of the United States in his argument, although appearing in behalf of the officer to whom the writ of mandamus was prayed, conceded that such a writ might be issued against the President of the United States to compel him to perform a merely ministerial duty....."

1247. Para 28 of Halsbury's Laws of England, (4th Edn.), Vol. I, page 32 reads:

"28. Duty and discretion. The repository of a statutory power may be endowed with a discretion whether to act, and, if so, how to act. A discretionary power is typically conferred by words and phrases such as "may", "it shall be lawful", "if it thinks fit" or "as it thinks fit". A statutory discretion is not, however, necessarily or, indeed, usually absolute; it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken whether to act and how to act. Moreover, there may be a discretion whether to exercise a power, but no discretion as to the mode of its exercise; or a duty to act when certain conditions are present, but a discretion how to act. Discretion may thus be coupled with duties. On the other hand, duty unaccompanied by any discretion requires action in a prescribed manner and form to be taken when the conditions precedent exist; performance of such a duty is a mere ministerial act."

1248. It is true that the words in Article 216 of the Constitution are undoubtedly empowering, but it has been so often decided as to have become an axiom that in public statutes words only

directory, permissive or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice'. (Vide *R. v. Tithe Commissioners* (1849) 14 QB 459 at p. 474. Earl Cairns said in *Julius v. Bishop of Oxford* (1880) 5 AC 214 at pp. 222-223), construing the words (it) 'shall be lawful' thus:

"But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

1249. In *Padfield v. Minister of Agriculture, Fisheries and Food*, (1968) 1 All ER 694, the House of Lords had to construe the provisions of the Agriculture Marketing Act, 1958 which provided for a committee of investigation to be constituted, which was to consider and report on certain kinds of complaint "if the Minister in any case so directs". The complaint of the appellants who were members of the south east regional committee of the Milk Marketing Board was that the board's terms and prices for the sale of milk to the board did not take fully into account the variations between the producers and the cost of bringing milk to a liquid market. In effect the complaint was that the price differential worked unfairly against the producers in the popular south-east region where milk was more valuable, the cost of transport was less and the price of land was higher. There had been many previous requests to the board but these had failed to get the board in which the south-east producers were in a minority to do anything about the matter. The Minister declined to refer the matter to the committee. Thereafter the appellants applied to the Court for an order of mandamus commanding the Minister to refer the complaint to the Committee for investigation. The Divisional Court made an order against the Minister. But the Court of Appeal by a majority (Diplock and Russell L JJ. Lord Denning M. R. dissenting) set aside the order of the Divisional Court. On further appeal to the House of Lords, the appeal was allowed and the case was remitted. The House of Lords held that the complaint was a substantial

and a genuine complaint, neither frivolous, repetitive nor vexatious, the reasons of the Minister for not referring the matter to the Committee of investigation namely that the complaint raised wide issues, that his reasons were unfettered so that in effect it was sufficient that he should bona fide have considered the matter, were not good reasons in law, and indeed left out of account the merits of the complaint and showed that he was not exercising his discretion in accordance with the intention of Section 19 of the Act of 1958. The matter was remitted to the Queen's Bench Division to require the Minister to consider the application of the appellants in accordance with law. Lord Upjohn in his concurring judgment observed that even if the words in a statute conferred an unfettered discretion on the Minister, it ought not to make any difference in this case. He said at pages 718-719 thus:

"My Lords, I believe that the introduction of the adjective "unfettered" and its reliance thereon as an answer to the appellants' claim is one of the fundamental matters confounding the Minister's attitude, bona fide though it be. First, the adjective nowhere appears in S. 19, it is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective, I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely, that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully, and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion on the Minister rather than by the use of adjective."

1250. The importance of the decision in *Padfield's* case ((1968) 1 All ER 694) (supra) was underscored by Lord Denning M.R. in *Breen v. Amalgamated Engineering Union*, (1971) 2 QB 175 at p. 190 thus:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is

influenced by extraneous considerations, which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith nevertheless the decision will be set aside. That is established by *Padfield v. Minister of Agriculture Fisheries and Food* (1968) AC 997 which is a landmark in modern administrative law."

1251. Notwithstanding the principle of separation of powers found entrenched in the Constitution of the United States of America, as can be seen from the last part of para 141 of Vol. 52 of the American Jurisprudence 2d. under the title 'Mandamus' if it is the constitutional or statutory duty of a governor or the President to exercise his discretion with respect to a certain matter he may be required by mandamus to do so but the manner in which he has to discharge that duty cannot be directed by the courts. As observed in the English decisions referred to above it is manifest that a statutory discretion is not necessarily or indeed usually absolute, it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken, whether to act and how to act. I am of the view that the power conferred on the President by Art. 216 of the Constitution to appoint sufficient number of Judges is a power coupled with a duty and is not merely a political function. In the instant case ordinarily the court would have been reluctant to issue any mandamus to the Government to comply with the duty of determination of the strength of Judges of High Courts. But having regard to the undisputed total inadequacy of the strength of Judges in many High Courts, it appears to be inevitable that the Union Government should be directed to determine within a reasonable time the strength of permanent Judges required for the disposal of cases instituted in them and to take steps to fill up the vacancies after making such determination.

1252. At this stage it should be mentioned that Shri P. R. Mridul made a statement on behalf of the Minister of Law, Union of India in the course of his arguments as follows:

"The Union Government has decided to increase the number of posts of permanent Judges in the various High Courts keeping in view the load of work, the guidelines prescribed and other relevant

considerations. In fact in 1980 itself, on the basis of institution, disposal and arrears of cases and the guidelines prescribed, the Governments of seven States where the problem was more acute, had been addressed to consider augmentation of the Judge strengths of their High Courts. It has been decided that where necessary the guidelines prescribed will be suitably relaxed by taking into account local circumstances, the trend of litigation and any other special or relevant factors that may need consideration. The Union Government will take up the matter with the various State Governments so that after consulting the Chief Justices of the High Courts, they expeditiously send proposals for the conversion of a substantial number of posts of Additional Judges into those of permanent Judges.

The Union Government has also decided that ordinarily further appointments of Additional Judges will not be made for periods of less than one year."

PART XIII

1253. For the reasons given above, I am of the view that the Union Government, which has the responsibility of appointing sufficient number of Judges in every High Court should be directed to review the strength of permanent Judges in every High Court, to fix the number of permanent Judges that should be appointed in that High Court on the basis of the workload and to fill up the vacancies by appointing permanent Judges. While making these appointments, the Union Government should first consider the cases of the additional Judges who are now in office for appointment as permanent Judges in those vacancies. A writ in the above terms shall be issued to the Union Government. All the other reliefs prayed for in these petitions are refused. There shall be no order as to costs.

PART XIV

1254. In the course of the hearing of these cases several other questions of great importance touching the administration of Justice such as the conditions of service of judicial officers, particularly of the members of the subordinate judiciary, their salaries and allowances, housing conditions etc. which needed to be looked into very urgently came up for discussion. Similarly many facets of the conduct of Judges and of lawyers were also discussed. During the hearing many useful remarks came to be made both on the side of the Bar and on the

side of the Bench. All this exercise was done with a view to emphasising the importance of the independence of the judiciary and the independence of the Bar which are fundamental to a Republican Constitution whose main characteristic ought to be virtue. An observation of David Hume is worthy of note here. He said:

"To balance a large State of society whether Monarchical or Republican, on general laws, is a work of so great difficulty that no human genius however comprehensive, is able by the mere dint of reason and reflection, to effect it. The judgments of many should unite in this work; experience must guide their labour; time must bring it to perfection; and the feeling of inconvenience must correct the mistakes which they inevitably fall into in their first trials and experiments."

1255. We have come across in these cases many such mistakes, though committed honestly without realising the import or importance of some of the provisions of the Constitution. Perhaps there was no occasion to think about them so far. It is hoped that at least hereafter in any step that is taken in the matter of appointment of Judges, the clear implications of the Constitution are kept in view by all concerned.

1256. These cases have made us think about ourselves and our learned brothers in the superior judiciary of the country. We are made to realise that we are all mortals with all the human frailties and that only a few know in this world the truth behind the following statement of Michel De Montaigne: "Were I not to follow the straight road for its straightness, I should follow it for having found by experience that in the end it is commonly the happiest and the most useful track". It is true that the Judges of the High Courts and the Supreme Court hold their tenure not at the pleasure of the President but till they attain the prescribed age of retirement; that their removal is possible only after following an elaborate procedure; that their salaries and allowances and pension are charged on the consolidated funds of the States or of the Union; that no discussion can take place in the legislatures with respect to their conduct in the discharge of their duties except on a motion for their removal; that they have the power to punish a person for contempt of court and they are protected by a host of other

provisions of law which are intended to make them feel and to remain independent of any external agency such as the executive. These, as far as they go, are necessary for ensuring the independence of the judiciary. But if the judiciary should be really independent something more is necessary and that we have to seek in the Judge himself and not outside. A Judge should be independent of himself. A Judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and ill-will, hatred and contempt and fear and recklessness. In order to be a successful Judge these elements should be curbed and kept under restraint and that is possible only by education, training, continued practice and cultivation of a sense of humility and dedication to duty. These curbs can neither be bought in the market nor injected into human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the Constitution and the laws go the independence of the judiciary will not suffer. But with all these measures being there still a Judge may not be independent. It is the inner strength of Judges alone that can save the judiciary. The life of a Judge does not really call for great acts of self-sacrifice; but it does insist upon small acts of self-denial almost every day. The following sloka explains the true traits of men with discretion which all Judges should possess:

निन्दन्तु नीतिनिपुणा यदि वा स्तुवन्तु

लक्ष्मीः समाविशतु गच्छतु वा यथेष्टम् ।

अद्यैव वा मरणमस्तु युगान्तरे वा

न्याय्यात्पथः प्रविचलन्ति पदं न वीर्यः ॥

(Let men trained in ethics or morality, insult or praise; let lakshmi (wealth) accumulate or vanish as she likes; let death come today itself or at the end of a yuga (millennium), men with discretion will not deflect from the path of rectitude).

1257. This is only an ideal. It is difficult to attain it but every Judge should at least endeavour to set his eyes on that goal.

BY THE COURT

1258. In view of the majority decision all the transferred cases and writ petitions are dismissed with no order as to costs.

Order accordingly.

AIR 1982 SUPREME COURT 673

(From: 1979 Lab IC 1041 (Delhi))

V. D. TULZAPURKAR, BAHARUL ISLAM AND A. VARADARAJAN, JJ.

Civil Appeal No. 495 (L) of 1979, D/- 17-12-1981.

J. D. Jain, Appellant v. The Management of State Bank of India and another, Respondents.

Constitution of India, Arts. 226 and 227 — Industrial Disputes Act (1947), S. 11A Sch. 2, Items 3 and 6 — Discharge of bank employee — Domestic enquiry — Rules of evidence — Applicability — Hearsay evidence — What amounts to — Interference by High Court with award of Tribunal. (Evidence Act (1872), S. 60).

In an application for a Writ of Certiorari under Art. 226 of the Constitution for quashing an award of an Industrial Tribunal, the jurisdiction of the High Court is limited. It can quash the award, inter alia, when the Tribunal has committed an error of law apparent on the face of the record or when the finding of fact of the Tribunal is perverse.

(Para 7)

The appellant was working as a cashier in a branch of State Bank of India. The complainant had a Savings Bank account in that branch. When he received his pass book from the counter clerk he found that on an earlier occasion he had withdrawn only Rs. 500 but there was a debit entry of Rs. 1500 and he complained of the matter to the Ledger Clerk. The matter was taken to the supervisor before whom also the complaint was repeated. On scrutiny it was disclosed that the Complainant had given a letter of authority on the occasion to the appellant for withdrawal of Rs. 500 and the appellant had withdrawn Rs. 1500 by inserting the necessary figure. An enquiry officer was appointed and his finding was that the appellant had fraudulently altered the amount in the letter of authority. Order discharging him from service was passed. The matter was referred to the Central Govt. Industrial Tribunal. The Tribunal held that in the absence of evidence of complainant the evidence recorded was hearsay and therefore the appellant could not be held guilty. The High Court set aside the award of the Tribunal in writ petition:

LY/LY/G183/81/MVJ

1982 S.C./43 III G-1

Held that the award of the Industrial Tribunal had been vitiated by misconception of law and the High Court was justified in its jurisdiction in quashing the award. 1979 Lab IC 1041 (Delhi), Affirmed. (Paras 12, 14)

The Tribunal has committed an error in holding that the finding of the domestic enquiry was based on "hearsay" evidence. The law is well-settled that the strict rules of evidence are not applicable in a domestic enquiry. The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else. For the purpose of a departmental enquiry, complaint, certainly not frivolous, but substantiated by circumstantial evidence, is enough. What the Bank sought to establish in the domestic enquiry was that the complainant had made a verbal complaint with regard to the withdrawal of excess money by the appellant in presence of the four witnesses against his advice. On the complaint, the evidence of these four witnesses is direct as the complaint is said to have been made by the complainant in their presence and hearing; it is therefore, not hearsay. No rule of law enjoins that a complaint has to be in writing as insisted by the Tribunal.

(Paras 9, 10, 11)

Cases Referred: Chronological Paras
AIR 1977 SC 1512: 1977 Lab IC 845:
(1977) 2 SCJ 140 9

(1956) 1 WLR 965: 100 SJ 566, Subramaniam v. Public Prosecutor 10

BAHARUL ISLAM, J.:— This appeal by special leave is by the appellant, J. D. Jain, who was a workman and whose services have been terminated by the management of the State Bank of India (hereinafter called the respondent).

2. The material facts are these:

The appellant was working as a cashier in the Meerut City Branch of the State Bank of India. On June 21, 1971, one Dishan Prakash Kansal ('Kansal' for short) who had a Savings Bank Account with the said branch of the State Bank came to the Bank to receive his Pass Book. On receipt of the Pass Book from the counter clerk, Kansal complained to Wadhwa who was the Ledger-keeper, that on Feb. 8, 1971, he had withdrawn only Rs. 500.00 but a debit entry of Rs. 1,500.00 had been shown in the Pass Book. Wadhwa thereupon took Kansal

to the Supervisor, R. P. Gupta, before whom Kansal repeated his complaint. Necessary documents pertaining to the said withdrawal were then examined and it was found that Kansal had given a 'letter of authority' (which expression means we are told, the withdrawal application form) to the appellant on Feb. 8, 1971 authorising him to withdraw the amount from his account. The letter of authority showed that it was for withdrawal of Rs. 1,500.00 though there appeared to be some interpolation suggesting that the figure of Rs. 500.00 had been altered to the figure of Rs. 1,500.00. The matter was then brought to the notice of M. Ramzan, the Agent of the State Bank, before whom also Kansal is said to have repeated his complaint.

3. Eventually on Sept. 18, 1972 a memorandum of charges was served on the appellant by the respondent stating, inter alia that in the letter of authority, the appellant altered in his own handwriting with different ink the amount of Rs. 500.00 to Rs. 1,500.00 and thus received Rs. 1,000.00 in excess, passing only Rs. 500.00 to the pass book holder, and that he subsequently, on June 24, 1971, deposited Rs. 250.00 in the account of Kansal to liquidate a part of the amount misappropriated by him. The appellant replied to the charges. He denied the allegations. Thereupon, the respondent appointed one Rajendra Prasad as an Enquiry Officer and a formal disciplinary enquiry was held against the appellant. The Enquiry Officer submitted his report to the respondent on Feb. 13, 1973. The findings of the Enquiry Officer were that the appellant had fraudulently altered the amount in the letter of authority given to him by Kansal, withdrew Rs. 1,500.00 from Kansal's account and paid Rs. 500.00 only to Kansal and misappropriated Rs. 1,000.00. The disciplinary authority on receipt of the report of the Enquiry Officer passed the following order (material portion only):—

"2. Although the charges against you are of a serious nature which would, in normal course, warrant your dismissal from the service of the Bank, yet keeping in view your past record, I am inclined to take a lenient view in the matter. Upon consideration of the matter, I have tentatively come to the decision that your misconduct be condoned and you be merely discharged of in terms of paragraph 521 (5) (e) of the Sastry Award read with paragraph 18.28 of the Desai Award and paragraph 1.1 of the

Agreement dated the 31st March, 1967 entered into between the Bank and the State Bank of India Staff Federation. Before, however I take a final decision in the matter I would like to give you a hearing as to why the proposed punishment should not be imposed upon you. To enable you to do so, I enclose copies of the proceedings of the enquiry and findings of the Enquiry Officer.

3. You may ask for a hearing or if you so prefer show cause in writing within one week of receipt by you thereof. If you fail therein, I will conclude that you have no cause to show in this behalf." The appellant then submitted a representation to Shri V. B. Chadha, the Regional Manager of the State Bank of India on June 15, 1973. Shri Chadha after perusing the representation of the appellant and hearing him in person, recommended that the proposed punishment should not be imposed upon the appellant, on the grounds that Kansal had not been examined as a witness and that there had been no written complaint against the appellant. The respondent however, did not accept the recommendation, and, by its memorandum of December 7, 1973, discharged the appellant from service with effect from the close of the business on Dec. 22, 1973.

4. The appellant then having raised an industrial dispute, the Central Government, by its order dated Jan. 17 1975, referred the following issue to the Central Government Industrial Tribunal at Delhi for adjudication:

"Is the management of State Bank of India justified in discharging from service Shri J. D. Jain, Cashier of Meerut Branch, with effect from 22nd December, 1973? If not to what relief is he entitled?"

5. Before the Tribunal the appellant denied the charges. He, inter alia, pleaded that as Kansal was not examined in the enquiry, there was no legal evidence before the Enquiry Officer for a finding that he was guilty.

The Tribunal framed the following two issues:—

"1. Whether a proper and valid domestic enquiry was held by the Bank and its effect?

2. Is the management of State Bank of India justified in discharging from service Shri J. D. Jain, Cashier of Meerut Branch with effect from 22nd December, 1973? If not, to what relief is he entitled?"

Before the Tribunal, the Management examined no witnesses but produced cer-

tain documents and relied on them. The appellant also did not adduce any evidence.

On a perusal of the evidence recorded by the Enquiry Officer, the Tribunal held that on the evidence before it, the appellant could not be held guilty as, according to it, in the absence of the evidence of Kansal, the evidence recorded was hearsay, with the result that it directed reinstatement of the appellant with full back wages from 22nd December, 1973. The respondent moved the High Court under Arts. 226 and 227 of the Constitution of India for quashing the award of the Tribunal. The High Court held that the charges against the appellant had been established and quashed the award of the Tribunal. It is against this judgment of the High Court that the present appeal by special leave is directed.

6. Mr. R. K. Garg, learned counsel appearing for the appellant makes three submissions before us:—

(1) That the Tribunal exercised its powers under S. 11A of the Industrial Disputes Act and the High Court, exercising powers under Arts. 226/227 of the Constitution had no jurisdiction to interfere with the award of the Tribunal;

(2) The Tribunal in the perspective of the broad contours of the case rightly refused to rely on the evidence which was hearsay, Kansal not having been examined;

(3) Assuming the evidence could be relied on, the High Court committed error in not considering the receipt executed by Kansal showing payment of Rs. 1,000.00 to Kansal and its judgment is vitiated.

7. In an application for a Writ of Certiorari under Art. 226 of the Constitution for quashing an award of an Industrial Tribunal, the jurisdiction of the High Court is limited. It can quash the award, inter alia, when the Tribunal has committed an error of law apparent on the face of the record or when the finding of facts of the Tribunal is perverse. In the case before us, according to the Tribunal as Kansal was not examined, the evidence before it was hearsay and as such on the basis thereof the appellant could not be legally found guilty.

8. Before the Enquiry Officer, the respondent examined the following witnesses:—

Gupta (Witness 1), Vadhera, the Ledger-keeper (Witness 2), Mahesh Chan-

der, who was in charge of Savings Bank Account on 8-2-1971 (Witness 3), M. Ramzan, Agent of the Bank (Witness 4), Sarkar (Witness 5) and Bhardwaj (Witness 6).

Bhardwaj was a leader of the employees' union of the respondent. He did not support the case of the respondent. The other witnesses supported the case of the respondent. Witnesses Nos. 1, 2, 4 and 5 depose that a verbal complaint was made by Kansal in their presence to the effect that he had authorised the appellant to withdraw Rs. 500.00 which sum was paid to him, but the entries showed that Kansal had withdrawn Rs. 1500.00. Witnesses Vadhera, Ramzan and Sarkar also deposed that the appellant had confessed before them that he had made the alterations in the figure and in words of the sum. The Tribunal after having made detailed references to the evidence of the above witnesses in fact found, "All that this evidence thus, proves is that a complaint was made by Shri Kansal and that the workman confessed that he had altered the debit authority". (emphasis added). Curiously, however it held, "This evidence, by no means proved that the workman altered the debit authority to defraud or that he actually defrauded or that he misappropriated the amount of Rs. 1,000.00 after paying Rs. 500-00 only to Mr. Kansal from the amount of Rupees 1,500.00 withdrawn from the bank by him as it was not direct evidence but was in the nature of hearsay evidence since it was learnt through the medium of a third person and that person was not available." It further held, "There can be no hesitation, therefore, that the Enquiry Officer relied on hearsay evidence in arriving at his findings and it vitiated the enquiry." It went on "All this could be enough for raising a suspicion only. In order to be called 'proved' it needed evidence which was not there." It further observed, "But the question was whether it was done without the consent or knowledge of Mr. Kansal. There was no evidence on the record to prove it. The only person who could speak about it was Mr. Kansal. He did not appear before the inquiry officer, therefore, there was no direct evidence that the change that was admittedly made by the workman in the debit authority was without Mr. Kansal's consent or knowledge or that it was designed to defraud." (emphasis added).

The positive findings of the Tribunal are:

(i) Kansal made the complaint as alleged by the management,

(ii) The appellant confessed that he had made the alterations charged with, as alleged by the management,

(iii) By implication it has also found that Rs. 1,000.00 in excess of the original amount of Rs. 500.00 was received by the appellant as a result of the alterations. But it has held that as Kansal was not examined fraud and misappropriation on the part of the appellant cannot be held to be proved, as the evidence was 'hearsay'.

9. The learned Tribunal, it appears, was oblivious of the fact that it was examining the evidence in a domestic enquiry, and not the evidence in a criminal prosecution entailing conviction and sentence.

In a case like the one before us, three kinds of proceedings against the delinquent are possible:

(i) departmental proceedings and action,

(ii) criminal prosecution for forgery and misappropriation,

(iii) civil proceedings for recovery of the amount alleged to be misappropriated.

The respondent herein adopted course (i) and instituted the domestic enquiry in which the principle applied by the Tribunal is not applicable; in such an enquiry guilt need not be established beyond reasonable doubt; proof of misconduct may be sufficient.

The learned Tribunal has committed another error in holding that the finding of the domestic enquiry was based on "hearsay" evidence. The law is well-settled that the strict rules of evidence are not applicable in a domestic enquiry.

This Court in the case of *State of Haryana v. Rattan Singh* reported in AIR 1977 SC 1512 held (at p. 1513):—

"It is well-settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility.

10. The next question is, is the evidence in the domestic enquiry really hearsay, as held by the Tribunal?

The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else. (See Stephen on Law of Evidence).

The Privy Council in the case of *Subramaniam v. Public Prosecutor*, (1956) 1 WLR 965 observed: "Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other persons in whose presence these statements are made."

11. In the instant case, the alleged misconduct of the appellant was that he forged documents, withdrew Rs. 1,500.00 — Rs. 1,000.00 in excess of the amount he was authorised to do and misappropriated the excess amount of Rs. 1,000.00. With regard to the fact whether the appellant manipulated the documents withdrew excess amount and misappropriated it, there is, of course, no direct evidence of any eye-witness except the appellant's 'confession' referred to above. The evidence on which reliance has been taken by the respondent is the confession and circumstantial evidence, namely, the authority letter containing the admitted interpolations by the appellant in his own handwriting in different ink, and the addition of the digit "1" before 500. The evidence of Kansal would have been primary and material, if the fact in issue were whether Kansal authorised the appellant to make the alterations in the authority letter. But Kansal's complaint was to the contrary. For the purpose of a departmental enquiry complaint, certainly not frivolous, but substantiated by circumstantial evidence, is enough. What the respondent sought to establish in the domestic enquiry was that Kansal had made a verbal complaint with regard to the withdrawal of excess money by the

appellant in presence of the four witnesses, namely, Wadhera, Gupta, Ramzan and Sarkar, aforesaid against his advice. On the complaint of Kansal, the evidence of these four witnesses is direct as the complaint is said to have been made by Kansal in their presence and hearing; it is, therefore, not hearsay. As the respondent has succeeded in proving that a complaint was made by Kansal on the evidence of the above-named four witnesses, the respondent has succeeded. No rule of law enjoins that a complaint has to be in writing as insisted by the Tribunal.

12. The learned Tribunal has committed yet another grievous error, in failing to appreciate the confessions made by the appellant "in the presence of witnesses and to the higher officer who appeared as witness" (as found by itself) namely, Wadhera, Ramzan, Gupta and Sarkar, aforesaid. The confessions of the appellant before the said witnesses were to the effect that he had altered the amount in figure and words in his own hand.

The award of the Tribunal, therefore, has been vitiated by misconception of the law involved in the case.

13. The last submission of Mr. Garg that the judgment of the High Court had been vitiated as it had not taken into consideration the receipt executed by Kansal showing payment by the appellant of Rs. 1,000.00 to the former is destructive of the appellant's defence. In our opinion, this payment, on the contrary, proves the respondent's case and destroys the appellant's defence which was that he had withdrawn Rs. 1,500.00 as advised by Kansal and paid the full amount to Kansal.

14. In our opinion the High Court was fully (justified) in its jurisdiction in quashing the award of the Tribunal. This appeal has no merit and is dismissed. We however, leave the parties to bear their own costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 677

(From: Karnataka)

S. MURTAZA FAZAL ALI AND

A. P. SEN, JJ.

Criminal Appeal No. 575 of 1981 in S.L.P. (Crl.) No. 2158 of 1980, D/- 24-7-1981.

Dr. R. V. Murthy, Appellant v. State of Karnataka, Respondent.

Criminal P. C. (2 of 1974), Ss. 378, 482 — Appeal against acquittal — High Court while granting leave to appeal before itself also ordering issue of notice to accused to show cause why he should not be sent up for trial — Order issuing such notice, held, without jurisdiction. Decision of Karnataka High Court, Partly Reversed.

Where in an appeal against acquittal the High Court while granting leave to appeal to the State before itself also ordered issue of notice to the accused to show cause why he should not be sent up for trial even before hearing the appeal on merits, and before coming to a clear finding that offence has been made out against the accused, the order issuing notice to the accused was without jurisdiction. The order passed by the High Court at the initial stage amounted to a serious abuse of the process of the Court inasmuch as it compelled the accused to rebut a charge never made or an allegation never proved against him. Such a cause of action at this stage resulted in gross and substantial injustice to the accused and amounted to a gross misuse of power of the High Court under Section 482, Cr. P. C. Decision of Karnataka High Court, Partly Reversed. (Para 2)

JUDGMENT:— Special leave to appeal granted.

2. We have heard counsel for the parties. This appeal by special leave is directed against an order passed by the Karnataka High Court which while granting leave to appeal to the State against the order of acquittal passed by the trial Court in favour of accused 1 to 5 and 9, also passed an order issuing notice to accused Nos. 6 to 8, one of whom is the appellant in this appeal. The High Court directed the appellant to show cause why he should not be sent up for trial. Mr. Nettar, appearing for the State, frankly conceded that he was not in a position to support the order passed against the ap-

pellant. The High Court had no jurisdiction at this stage to pass any order against the appellant without hearing the appeal and coming to a clear finding that an offence has been made out against the appellant. If the High Court comes to such a finding after examining the materials then it may have exercised discretion under S. 482, Cr. P. C. in directing the trial of the appellant. In the instant case, however, the High Court had no jurisdiction to issue notice to the appellant even before hearing the appeal on merits. The order passed by the High Court at the initial stage amounts to a serious abuse of the process of the Court inasmuch as it compels the appellant to rebut a charge never made or an allegation never proved against him. Such a cause of action at this stage results in gross and substantial injustice to the appellant and amounts to a gross misuse of power of the High Court under S. 482, Cr. P. C. For these reasons, therefore, we allow the appeal, set aside that portion of the order of the High Court by which while granting leave to appeal to the State notice has been issued to the appellant to show cause why he should not be sent for trial.

Appeal allowed.

AIR 1982 SUPREME COURT 678

(From: Allahabad)

S. MURTAZA FAZAL ALI AND

R. B. MISRA, JJ.

Civil Appeal No. 1127 of 1981, D/- 27-3-1981.

Jitendra Pratap Singh and others, Appellants v. 10th Additional District Judge, Allahabad and others, Respondents.

Constitution of India, Art. 136 — Appeal under — Declaratory decree under S. 229 (b) of U. P. Act 1 of 1951 held collusive by lower Courts — Decree passed in 1966 i.e. much before amendment of Ceiling Act in 1972 — Appellant shown as co-tenure holder in mutation register — He was also found in possession of share allotted to him under declaratory decree, in spot inspection by Lekhapal — Neither Prescribed Authority nor District Judge considered all these circumstances — Case remitted back to Prescribed Authority to record findings as to cultivating possession of appellant and as to collusiveness of decree. Decision of Allahabad High Court, Reversed. (U. P. Zamindari

Abolition and Land Reforms Act (1 of 1951), S. 229 (b)); (U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5). (Para-2)

JUDGMENT:— The only point pressed in this appeal by special leave is that the courts below came to the conclusion that the declaratory decree was held to be collusive without there being any material to prove the same. The High Court was greatly influenced by the fact that in the remarks column possession of appellant Jitendra Pratap Singh was not shown. In our opinion, the Prescribed Authority ought to have gone into this question in detail in view of there being a declaratory decree under Sec. 229 (b) of the U. P. Zamindari Abolition and Land Reforms Act as to whether or not the decree was a collusive one. Normally, a decree passed by a competent court is presumed to be a valid decree unless it is shown to be collusive. In the instant case, however, there are two important considerations which seem to have been overlooked by the courts below: (1) that the decree was passed long before the amendment of 1972 in the Ceiling Act, and (2) that the declaratory decree was also passed on July 14, 1966 and in the mutation register Jitendra Pratap Singh under the decree was shown as a co-tenure holder with the main tenure holder. Another important circumstance which is ignored by the Prescribed Authority was that the Lekhapal who had made a spot inspection clearly found that Jitendra Pratap Singh was in possession of the share allotted to him under the declaratory decree. Neither the District Judge nor the Prescribed Authority appear to have considered the effect of this important circumstance.

2. In these circumstances therefore we remit the case to the Prescribed Authority and direct that he should, after hearing the parties and after taking such evidence as is offered by them, come to a clear finding whether or not the declaratory decree was collusive or meant merely to evade the provisions of the Ceiling Act and whether Jitendra Pratap Singh was in cultivating possession before the amendment of 1972. After giving his findings on these points, the Prescribed Authority shall submit a report to this Court within a month from today. The parties are directed to appear before the Prescribed Authority on April 9, 1981, failing which the Prescribed Authority will report the matter to this Court for necessary action. If the parties

appear on April 9, 1981; the Prescribed Authority will give only a week's time to the parties to produce evidence and send his report containing his opinion within the time indicated above.

3. After the report is received by this Court, the matter would be put up before us for final orders. In case the appellant Jitendra Pratap Singh, his lawyer or agent does not appear before the Prescribed Authority on the date fixed, namely, April 9, 1981, this appeal shall stand dismissed without further reference to this Court.

Order accordingly.

AIR 1982 SUPREME COURT 679

(From: Andhra Pradesh)*

V. BALAKRISHNA ERADI AND

R. B. MISRA, JJ.

Civil Appeal No. 854 of 1971, D/- 18-12-1981.

E. Mahboob Saheb, Appellant v. N. Sabbarayan Chowdhary and others, Respondents.

Civil P. C. (5 of 1908), Ss. 100 and 101 — Concurrent finding of fact — Finding as to effecting of partition between parties and allotment of particular property to one of them on a detailed consideration of legal evidence available on the record — It is not open to the High Court to reappreciate evidence and substitute its own conclusions in place of those entered by the lower courts. Second Appeals Nos. 719 and 826 of 1967 (Andh Pra), Reversed. (Para 13)

BALAKRISHNA ERADI, J.:— This appeal by special leave is directed against a judgment of the High Court of Andhra Pradesh in two connected Second Appeals — Second Appeals Nos. 719 and 826 of 1967. Those Second Appeals arose out of a suit filed by the appellant herein for setting aside the summary order passed in E. A. No. 90 of 1958 in E. P. 7 of 1956 in O. S. No. 26 of 1952 on the file of the Sub-Court, Anantapur, and for recovery of possession of plaint 'C' Schedule property or, in the alternative, for partition and recovery of one-half of the property described in the plaint 'B' Schedule. The plaint 'C' Schedule plot is a southern portion of the property described in the 'B' Schedule.

2. The plaint 'B' Schedule property consisting of 1 acre and 90 cents of land

*S. A. Nos. 719 and 826 of 1967 (Andh Pra)

together with two houses situated therein belonged to one Allabaksh. He was adjudged an insolvent and the Official Receiver sold a half right in the said property to one Moola Narayanaswamy under Exh. A-3 dated December 6, 1939. The remaining half interest in the property belonging to Allabaksh was also subsequently brought to sale by the Official Receiver and one J. Narasimhulu became the purchaser. Exh. A-27 dated January 5, 1945 is the sale certificate issued in his favour. The resultant position was that the 'B' Schedule property came to be owned in undivided half shares by Moola Narayanaswamy and J. Narasimhulu. Subsequently, Narasimhulu transferred his interest in the property in favour of the plaintiff for a consideration of Rs. 4,000 under Exh. A-1 dated May 10, 1948. The plaintiff is the daughter of Moola Narayanaswamy.

3. One Nagappa (first defendant) obtained a simple money decree against Moola Narayanaswamy in O. S. 26/62 on the file of the Subordinate Judge's Court Anantapur, and in execution thereof, he attached and brought to sale in Court auction the two houses described in the plaint 'B' Schedule property. In the said court auction, the first defendant purchased the plaint 'B' Schedule property for Rs. 2,050 and in enforcement of the sale certificate, he obtained delivery of possession of the two houses. Since the judgment-debtor, Narayanaswamy, was entitled to only a half interest in the property, the plaintiff filed E. A. No. 90/58 in the Executing Court under O. 21, R. 100, C.P.C., asserting her independent right to the southern half of the property and praying for redelivery of the said portion in her favour. That petition was dismissed by the Sub-Court, Anantapur, by order dated March 11, 1960, and hence, the plaintiff brought the suit out of which this appeal has arisen for setting aside the said summary order and for recovery of possession of the southern portion of the property which is described in the plaint 'C' Schedule.

4. During the pendency of the suit, the first defendant sold the northern half of the property in favour of the 7th defendant as per Exh. B-14 dated March 21, 1961. Later, the first defendant transferred the southern half of the property to the 8th defendant under the sale deed (Exh. B-15) dated June 19, 1961.

5. Reference has been made to the fact that the two sales effected by the Official Receiver in favour of Narayana-

swamy and Narasimhulu were in respect of unspecified half shares in the plaint 'B' Schedule property. The basis on which the plaintiff rested her claim for recovery of possession of the southern half of the property was that a partition had been effected between herself and the heirs of Narayanaswamy in 1952 and the 'C' Schedule property had been allotted to her share at the said partition. Defendants 2 to 6, who are the legal heirs of deceased Narayanaswamy, did not contest the suit. However, the first defendant, who was the main contesting defendant in the trial Court, denied that any such partition had taken place. He put forward the case that in effecting the purchase of the balance undivided half interest in the property, when it was brought to sale by the Official Receiver on November 28, 1944, Narasimhulu was acting as a benamidar for Moola Narayanaswamy and that the ownership in respect of the said half interest also became vested in Narayanaswamy himself. It was further contended that the transfer by Narasimhulu in favour of the plaintiff was also a benami transaction for the benefit of Narayanaswamy and hence, the entire property had been validly purchased by him at the court sale held in execution of the money decree obtained by him against Narayanaswamy in O. S. 26 of 1952 of the Subordinate Court, Anantapur.

6. The two main issues that arose for determination by the trial court (court of the Munsif Magistrate, Tadpatri) were (a) whether the transactions of purchase of the half share in the plaint 'B' Schedule property by Narasimhulu at the court auction sale and the subsequent transfer of the same by Narasimhulu to the plaintiff were benami for the benefit of Narayanaswamy and (b) whether there was a subsequent partition of the property at which the plaintiff was allotted the southern half (plaint 'C' Schedule property). On a consideration of the evidence adduced in the case, the trial court found that there was no foundation whatever for the plea of benami put forward by the first defendant, that the plaintiff was the owner of a half share in the plaint 'B' Schedule property and that her interest could in no way be affected by the court sale held in execution of the money decree obtained by the first defendant against Narayanaswamy. The learned Munsif further held that the plaintiff had not succeeded in establishing her case that there had been a partition of the property by metes and

bounds, at which the southern half of the property, namely, the plaint 'C' Schedule plot had been allotted to her share. In view of the aforesaid findings, the trial court set aside the summary order passed in E. A. 90/58 in E. P. 7/56 in O. S. 26/52 of the Subordinate Court, Anantapur, and passed a preliminary decree for partition of the plaint 'B' Schedule property by metes and bounds into two equal shares and for allotment and delivery of one such share to the plaintiff.

7. The first defendant carried the matter in appeal before the District Court, Anantapur (A. S. 173/66) reiterating his contention that the purchase of the half interest in the plaint 'B' Schedule property by Narasimhulu and the subsequent sale by him to the plaintiff were benami transactions. The plaintiff filed a memorandum of cross-objections questioning the correctness of the finding entered against by the Munsif that the plea of partition put forward by her had not been proved and praying that in place of decree for partition granted to her by the Munsif, she may be allowed to recover possession of the plaint 'C' Schedule property after upholding her prayer regarding the partition.

8. After a detailed consideration of the oral and documentary evidence adduced in the case, the learned Additional District Judge, who heard the appeal, upheld the finding of the trial court that the first defendant had totally failed to establish the case put forward by him that the auction-purchase effected by Narasimhulu and the subsequent transfer of the property by Narasimhulu to the plaintiff were both benami transactions intended for the benefit of Moola Narayanaswamy. It was further held by the learned Additional District Judge that subsequent to the purchase of the half interest in the 'B' Schedule property by the plaintiff there had been a partition between her and the other heirs of Narayanaswamy in 1952, as pleaded by the plaintiff, and the plaint 'C' Schedule property had been allotted to the plaintiff's share at that partition. In the light of the aforesaid findings, the appeal filed by the first defendant was dismissed by the learned Additional District Judge, the cross-objections filed by the plaintiff were allowed and in modification of the decree of the trial court, the plaintiff was granted a decree for recovery of possession of the plaint 'C' Schedule property.

9. Against the aforesaid judgment of the Addl. District Judge, Anantapur, the first defendant and the 8th defendant filed two separate Second Appeals before the High Court of Andhra Pradesh. The two questions raised in those appeals were (a) whether the purchase of the property by the plaintiff was benami for Narayanaswamy and (b) whether a partition of the plaint 'B' Schedule property had taken place as between the plaintiff and the heirs of Narayanaswamy, at which the plaintiff got the southern half thereof.

10. A learned single Judge of the High Court disposed of the two Second Appeals by a common judgment, wherein he has discussed at great length the oral and documentary evidence and entered findings of his own on the two questions aforementioned. The learned Judge found that there was no force in the contention put forward by the first defendant that the half interest in plaint 'B' Schedule property was purchased at the court auction sale by Narasimhulu benami for Narayanaswamy. He also rejected the further plea put forward by the first defendant that the subsequent transfer of the property by Narasimhulu to the plaintiff was also a benami transaction. In consequence, the Second Appeal filed by the first defendant was dismissed.

11. On the second question aforesaid, the learned Judge differed from the finding of the Additional District Judge and held that the plaintiff had failed to establish that a partition of the property had been effected as between herself and the legal heirs of Narayanaswamy at which the 'C' Schedule property had been allotted to her share. The learned Judge then proceeded to hold that the fact that the first defendant sold to the 7th defendant a specified portion in the north did not necessarily create any right in the 7th defendant to the particular property and hence this was a case where a partition of the property should be effected between the plaintiff on the one hand and the defendants 7th and 8th on the other. In view of the said findings, the Second Appeal filed by the 8th defendant was allowed by the learned Judge and the suit was remanded to the trial court for effecting a partition of the plaint 'B' Schedule property between the plaintiff, the 7th defendant and the 8th defendant. It is against the said decision of the High Court that the 7th defendant

has filed this appeal after obtaining special leave from this Court.

12. Two main contentions were advanced by the learned counsel on behalf of the appellant. Firstly, it was urged that the High Court has acted illegally and in clear violation of the limitations imposed by Section 100, C.P.C. in interfering with the finding entered by the Additional District Judge on the question as to whether or not there had been a partition between certain parties which is a pure question of fact. The second contention advanced on behalf of the appellant is that the High Court has committed a grievous error in omitting to notice that the 7th defendant had not been even impleaded as a party in the Second Appeal (S. A. 826/67) filed by the 8th defendant, and that while showing the plaintiff as the sole respondent in that Second Appeal a categorical statement had been made in the memorandum of Second Appeal that "the other parties in the courts below are not necessary parties to this appeal." It was, therefore, contended by the appellant that the High Court has acted wholly illegally in recording a finding adverse to the 7th defendant and directing a partition of the entire 'B' Schedule property in spite of the fact that the northern plot had been sold to the 7th defendant by deceased Narayanaswamy.

13. After hearing counsel appearing on both sides, we have unhesitatingly come to the conclusion that both the aforesaid contentions advanced on behalf of the appellant have to be upheld. The finding entered by the Additional District Judge that a partition had taken place between the plaintiff and the other legal heirs of Narayanaswamy in 1952, and as a result thereof the southern portion of the 'B' Schedule property (plaint 'C' Schedule property) had been allotted to the plaintiff's share was based on a detailed consideration of the legal evidence available on the record. It was not open to the High Court to reappraise the said evidence and substitute its own conclusions in place of those entered by the lower courts, while exercising the jurisdiction conferred by S. 100, C.P.C. The learned counsel appearing on both sides have taken us through the relevant portions of the evidence having a bearing on the plea of partition, and we are satisfied that the finding entered by the Additional District Judge cannot be said to be unreasonable or perverse. No question of law whatever was agitated before

the High Court. In the circumstances, there was no justification at all for the High Court to interfere with the finding of fact entered by the Additional District Judge that there had been a partition between the plaintiff and the legal heirs of Narayanaswamy in 1952 at which the plaint 'C' Schedule property had been allotted to the share of the plaintiff.

14. In this view, it is unnecessary for us to go into the merits of the second contention advanced on behalf of the appellant.

15. In the light of the foregoing discussion, we allow this appeal, set aside the decision of the High Court and restore the judgment and decree of the Additional District Judge, permitting the plaintiff to recover possession of the plaint 'C' Schedule property. We make it clear that we are expressing no opinion on the question relating to the rights inter se as between the defendants 7th and 8th in respect of the remaining portion of plaint 'B' Schedule property, and the said matter is left open. The parties will bear the respective costs in this appeal.

Appeal allowed.

AIR 1982 SUPREME COURT 682

A. D. KOSHAL, A. P. SEN AND
V. BALAKRISHNA ERADI, JJ.

Writ Petn. (Criminal) No. 7444 of 1981,
D/- 9-12-1981.

Harnek Singh, Petitioner v. State of Punjab and others, Respondents.

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 (1) — Prosecution for offences under Ss. 307, 411 and 414, I.P.C. already pending against detenu — Detenu on bail and attending Court regularly — Detention on same grounds after more than one year and a half — Illegal. (Penal Code (1860), Ss. 307, 411 and 414).

A case covering offences under Ss. 307, 411 and 414, I.P.C. was registered against a person on 27th Feb., 1980. For those offences he was ordered on 4-11-1980 to be detained under S. 3 (1) and was put behind bars on 10th July, 1981. Those acts were also the subject-matter of a prosecution launched against the detenu. During those proceedings the detenu was on bail and was appearing in Court on every hearing till he was put behind bars.

No reason was put forward for the detenu not being taken in custody in pursuance of the order of detention right from Jan. 2, 1981 till July 10, 1981 although he appeared in Court on all the dates of hearing fixed during that period.

Held, in these circumstances the detention took the character of punitive rather than preventive action and was, therefore, vitiated. Offences which were said to have been committed by the detenu as far back as on 27th Feb., 1980 could hardly form a ground for his detention on a date as late as 10th July, 1981, the gap between the two being well-nigh a year and a half. The charge was so stale in relation to the detention as not to have any real connection with it. (Para 1)

Mr. Harjinder Singh, Advocate, for Petitioner; M/s. O. P. Sharma and M. S. Dhillon and R. N. Poddar, Advocates, for Respondents.

KOSHAL, J.:— In this petition under Art. 32 of the Constitution of India seeking the issuance of a writ of habeas corpus, the prayer made by the petitioner is that his brother, Narinder Singh, who has been detained in pursuance of an order dated 4th Nov., 1980 passed under sub-sec. (1) of S. 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 be released from custody. The main ground urged in support of the petition is that there is no nexus between the unlawful activities attributed to the detenu and his incarceration. That ground we do not find to be without substance. A case covering offences under Ss. 307, 411 and 414 of the I.P.C., amongst others, was registered against the detenu at Police Station Lopeke in Amritsar district on 27th Feb., 1980 and those offences are the only acts which form the basis of the impugned order. Those acts are, also the subject-matter of a prosecution launched against the detenu, proceedings in relation to which have been going on in the Court of an Amritsar Magistrate. During those proceedings the detenu was on bail and was appearing in court on every hearing right from Jan. 2, 1981 till he was put behind the bars on 10th July, 1981 in pursuance of the impugned order. We are clearly of the opinion that offences which are said to have been committed by the detenu as far back as on 27th Feb., 1980 could hardly form a ground for his detention on a date as late as 10th July, 1981, the gap between the two being well-nigh a year and a

half. No explanation at all has been furnished on behalf of the State as to why action under the Act was not taken at the earliest possible after the alleged commission of the offences which are the foundation of the grounds for detention. In our opinion, the charge is so stale in relation to the detention as not to have any real connection with it. It is further noteworthy that no reason is put forward for the detenu not being taken in custody in pursuance of the impugned order (for which the detaining authority was moved in the first instance by the Senior Superintendent of Police, Amritsar) right from Jan. 2, 1981 till July 10, 1981 although he appeared in Court on all the dates of hearing fixed by the Magistrate during that period. In these circumstances the detention takes the character of punitive rather than preventive action and is therefore vitiated. Accordingly we strike down the impugned order and direct that the detenu be released from custody forthwith.

Order accordingly.

AIR 1982 SUPREME COURT 683

(From: Gujarat)*

A. P. SEN AND BAHARUL ISLAM, JJ.

Criminal Appeal No. 93 of 1981, D/- 23-10-1981.

State of Gujarat, Appellant v. Ismail Juma and others, Respondents.

(A) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 (1) — Detention under — Satisfaction of detaining authority is subjective — High Court quashing the order of detention on ground that detaining authority had not applied his mind to the facts of case — Documentary evidence not justifying finding of High Court — Finding based on a presumption which was unjustified — Order, held, was liable to be set aside. AIR 1981 SC 2005, Foll., Spl. Cri. Appln. No. 185 of 1979, D/- 16-1-1980 (Guj), Reversed. (Constitution of India, Art. 226).

(Paras 2, 4)

(B) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), Ss. 3 (1), 10 — Detention under S. 3 (1) — Order quashed by

*Spl. Criminal Appln. No. 185 of 1979 D/- 16-1-1980 (Guj.).

LY/LY/F98/81/LGC

High Court: — Appeal — Maximum period of detention mentioned in S. 10 expired — Supreme Court quashing order of High Court — Effect. (Constitution of India, Art. 136).

Once the order quashing the order of detention of the detenu is set aside by the Supreme Court, the order of the High Court rendering the order of detention non est itself becomes non est and the order of detention gets life. Therefore it cannot be said that once the maximum period prescribed by law was over, the order of detention was non est and there was no order by which the detenu could be put under fresh detention. AIR 1981 SC 2005, Foll. (Para 5)

(C) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 (1) — Detention under — Competent authority — State Government.

Where the order of detention has been taken in the name of the Governor of Gujarat and validly authenticated by the Deputy Secretary concerned, the order tantamounts to an order by the State Government of Gujarat. It, therefore, cannot be said that the order of detention was not passed by the competent authority. (Para 6)

Cases Referred: Chronological Paras AIR 1981 SC 2005: 1981 Cri LJ 1686 4, 5

Mr. J. L. Nain, Sr. Advocate, Mr. R. N. Poddar, Advocate with him for Appellant; Mr. O. P. Rana, Sr. Advocate, Amicus Curiae, for Respondents.

BAHARUL ISLAM, J.:— This appeal by special leave is by the State of Gujarat and is directed against the judgment and order of the Gujarat High Court quashing the order of detention passed by the appellant against respondent, Ismail Juma. The respondent was detained by the appellant in exercise of powers conferred on it by sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called 'the Act'). The grounds of detention inter alia were that the respondent, Hasan Malabari and Abdul Latif Fakirmohmed were the members of the crew of a vessel that was engaged in smuggling of wrist watches and some other contraband articles worth Rs. 33,70,819.00. The respondent moved the High Court of Gujarat. A Division Bench of the High Court by its impugned order dated Jan. 16, 1980

quashed the order of detention. The High Court found :

"..... the order of detention made against him (detenu) clearly shows that the detaining authority had not applied his mind to the facts of the case....."

The impugned order nowhere states that the detaining authority on having received a proposal from the customs authorities, had applied his mind to all materials on record and had reached satisfaction that the facts of the case warranted the detention of the petitioner. In absence of anything to show that the detaining authority was satisfied with the material on record so as to enable him to detain the petitioner, the impugned order cannot be sustained. It suffers from a fatal infirmity."

2. The impugned order of the High Court is liable to be set aside as factually the above observations are incorrect. Presumably the attention of the High Court was drawn only to the order of the appellant made under S. 5 of the Act by which the Government directed the detenu to be detained in Ahmedabad Central Prison. This order was dated Aug. 1, 1979 (Annexure 'B'). There was another order of the same date passed under sub-sec. (1) of S. 3 of the Act which in fact was the order of detention which ran as follows:—

"Whereas the Government of Gujarat is satisfied with respect to the person known as Shri Ismail Jumma Tangan alias Bando residung at Balapar, Beyt (Okha), Distt. Jamnagar that, with a view to preventing him from smuggling goods, it is necessary so to do;

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, the Government of Gujarat hereby directs that the said Shri Ismail Jumma Tangan alias Bando be detained.

By order and in the name of the Governor of Gujarat.

Sd/- P. M. Shah
Deputy Secretary to
the Government
(Annexure 'A')

3. Both these orders were taken in the name of the Governor of Gujarat and were authenticated by Shri P. M. Shah, Deputy Secretary to Government of Gujarat, Home Department (Special). These two orders were accompanied by the grounds of detention, which have

been filed before us as Annexure 'C'. Annexure 'C' is also dated Aug. 1, 1979 and was taken in the name of the Governor of Gujarat, and authenticated by the same Deputy Secretary to the Government of Gujarat, Shri Shah.

4. A perusal of these three documents do not justify the finding of the High Court that the detaining authority had not applied its mind to the materials before it and that it had not "reached satisfaction that the facts of the case warranted the detention of the petitioner." The finding of the High Court has been based on a presumption which is unjustified. This Court in Criminal Appeal No. 92 of 1981: (reported in AIR 1981 SC 2005) in the case of State of Gujarat v. Adam Kasam Bhaya held (at p. 2007): "The High Court in its writ jurisdiction under Art. 226 of the Constitution is to see whether the order of detention has been passed on the materials before it. If it is found that the order has been based by the detaining authority on materials on record, then the court cannot go further and examine whether the material was adequate or not which is the function of an appellate authority or Court. It can examine the material on record only for the purpose of seeing whether the order of detention has been based on no material. The satisfaction mentioned in S. 3 of the Act is the satisfaction of the detaining authority and not of the Court." The reason is that the satisfaction of the detaining authority is subjective.

Additionally it appears from the affidavit filed by the Deputy Secretary (referred to in greater detail herein below) that the entire record was carefully considered by the Home Minister concerned before the order of detention was passed.

5. Mr. Rana appearing as Amicus Curiae for the respondent raised a preliminary objection before us. The same preliminary objection was raised in Criminal Appeal No. 92 of 1981: (reported in AIR 1981 SC 2005)—State of Gujarat v. Adam Kasam Bhaya (supra), namely, that in view of the fact that the maximum period of detention mentioned in S. 10 of the Act had expired, the appeal had become infructuous. The objection is covered by our aforesaid judgment.

The additional argument advanced by Mr. Rana in this behalf was that once the maximum period prescribed by law was over, the order of detention was non est and there was no order by which

the detenu could be put under fresh detention. The answer is, once the order quashing the order of detention of the detenu is set aside by this Court, the order of the High Court rendering the order of detention non est itself becomes non est and the order of detention gets life. We do not find any valid reason to differ from our earlier judgment (supra) on this point.

6. The only other submission made by Mr. Rana in this appeal was that the order of detention was not passed by a competent authority mentioned in the Act. This point is new and does not appear to have been urged before the High Court. Even so we heard Mr. Rana on the point and proceed to give our decision. The relevant authorities that can pass order of detention are mentioned in sub-sec. (1) of S. 3 of the Act. The authorities are the Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government. The argument was that the order was signed by the Deputy Secretary (Shri P. M. Shah) and he was not one of the authorities mentioned in sub-sec. (1) of S. 3 of the Act. This appeal came up for hearing on an earlier occasion but after being heard in part was adjourned to enable the counsel of the appellant to satisfy the Court as to who actually passed the order of detention. In pursuance of that order of this Court, an affidavit has been filed by Shri P. M. Shah aforesaid. It has been stated in the affidavit that the entire record was placed before the Home Minister who "after careful consideration of the entire record has passed the impugned order of detention" and that he (Mr. Shah) "only authenticated the impugned order of detention in accordance with sub-cl. (2) of Art. 166 of the Constitution of India." As the order has been taken in the name of the Governor of Gujarat and validly authenticated by the Deputy Secretary concerned, the order tantamounts to an order by the State Government of Gujarat. It, therefore, cannot be said that the order of detention was not passed by the competent authority.

7. In the result, this appeal succeeds and is allowed. The impugned order of the High Court is set aside.

Appeal allowed.

AIR 1982 SUPREME COURT 685

(From: Allahabad)

Y. V. CHANDRACHUD, C. J. AND
E. S. VENKATARAMIAH, J.

Criminal Appeal No. 551 of 1981, D/-24-7-1981.

Jayendra and another, Appellants v. State of Uttar Pradesh, Respondent.

U. P. Children Act (1 of 1952), Ss. 2, 27 — Accused sentenced to imprisonment for offence committed during his childhood — Accused 23 years old when his appeal was heard by Supreme Court — Held, accused should be released forthwith as he neither could be imprisoned in view of S. 2 nor could be sent to approved school, being more than 18 years. Decision of Allahabad High Court, Reversed. (Paras 3, 4)

JUDGMENT:— Heard counsel. Special leave to appeal is granted to Appellant 1 Jayendra.

2. We had called for a report from the Doctor in charge of the jail hospital as regards the age of appellant No. 1, Jayendra. The report of the Chief Medical Officer, Bareilly, Dr. P. D. P. Mathur, dated Feb. 17, 1981 shows that by general appearance, physical examination and radiological findings, the appellant Jayendra was about 23 years of age on the date of the report. That would mean that on June 17, 1974 which is the date of the offence, the appellant was about 16 years and 4 months old. The estimate given by the Chief Medical Officer, Bareilly is a rough estimate by approximation but we have on the record the statement of the appellant himself which is uncontradicted that he was above 15 years of age on the date of the offence.

3. Section 2 (4) of the Uttar Pradesh Children Act, 1951 (U. P. Act No. 1 of 1952) defines a child to mean a person under the age of 16 years. Taking into account the various circumstances on the record of the case we are of the opinion that the appellant Jayendra was a child within the meaning of this provision on the date of the offence. S. 27 of the aforesaid Act says that notwithstanding any-

thing to the contrary in any law, no court shall sentence a child to imprisonment for life or to any term of imprisonment. S. 2 provides, in so far as it is material, that if a child is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age of 18 years. In the normal course, we would have directed that the appellant Jayendra should be sent to an approved school but in view of the fact that he is now nearly 23 years of age, we cannot do so.

4. For these reasons, though the conviction of the appellant Jayendra has to be upheld, we quash the sentence imposed upon him and direct that he shall be released forthwith. In so far as the other appellant is concerned, his special leave petition has already been dismissed.

Order accordingly.

AIR 1982 SUPREME COURT 686

(From: AIR 1972 All 273)

S. MURTAZA FAZAL ALI AND

A. P. SEN, JJ.

C. M. P. No. 17574 of 1981 (In Civil Appeal 1802/1971), D/- 7-9-1981.

Krishna Singh, Petitioner v. Mathura Ahir and others, Respondents.

Civil P. C. (5 of 1908), O. 21, R. 29 — Court which has passed decree alone has power to stay its execution — Suit for recovery of possession of property belonging to Math decreed by Munsif — Decree finally affirmed by Supreme Court — Order of Civil Judge allowing defendant's application for stay of execution, held, was nullity and violative of Art. 141. (Constitution of India, Art. 141).

Where a suit for recovery of possession of property belonging to Math was decreed by Munsif and the same was finally affirmed by Supreme Court holding that the plaintiff was in de facto management of property though his title as Mahant was left open and further holding that the defendant in the suit was a trespasser;

Held, that the plaintiff as de facto manager could recover property for benefit of Math from trespasser and therefore an order of Civil Judge allowing defendant's application for stay of execution filed under O. 21, R. 29 was nullity

and violative of Art. 141. Notice issued to defendant to show cause as to why he should not be punished for contempt of court. Civil Judge also directed to send explanation as to why he did not proceed to deliver possession to plaintiff as also circumstances under which he passed wrong order under O. 21, R. 29.

(Paras 18, 20, 24, 25)

Cases Referred: Chronological Paras

AIR 1973 SC 528: (1973) 1 SCR 1022 17

AIR 1935 PC 44: 62 Ind App 47: 39 Cal WN 433 6

AIR 1933 PC 75: 60 Ind App 124: 37 Cal WN 541 6

ORDER:— In order to dispose of the CMP in question, it may be necessary to give a brief re'sume' of the facts leading to this petition.

2. The dispute relates to the property in question which is house No. C-27/33 situate in Mohalla Jagatganj, Varanasi and has now been found by all the courts, including this Court, to belong to Garwaghat Math being constituted an endowment to the Math itself by its owner, Guru Atma Vivekanand. In fact, Guru Atma Vivekanand was the father of Sri Krishna Singh and in the suit which was filed, Sri Krishna Singh admitted the fact that his father had become a Sanyasi. Sri Krishna Singh therefore knew very well that his father having taken Sanyas, he died a civil death and the question of inheriting his property or laying any semblance of any title over it did not arise and yet he chose to resist the suit filed by the plaintiff. It appears that in view of the fact that Sri Krishna Singh refused to deliver possession to the Math, Mathura Ahir (later known as Harswanand and who was duly installed as Mahant according to the tenets of Sant Mat) brought a suit for recovery of possession of the house in question from the possession of Sri Krishna Singh who was a trespasser and was asserting rights adverse to the Math. This suit for declaration of title and recovery of possession was decreed by the trial court of learned Munsif, Varanasi. The defence taken by Sri Krishna Singh was rejected. In appeal, the Civil Judge modified the decree of the Munsif, but on further appeal to the High Court, the decree of the Munsif was restored as a result of which the plaintiff's suit for possession was decreed.

3. Sri Krishna Singh then filed an appeal by special leave to this Court and that appeal, which was numbered as

C.A. 1802/1971 was decided by us on Dec. 21, 1979: (reported in AIR 1980 SC 707) and we affirmed the findings of the High Court and clearly held that the property in question belonged to the Math and that Sri Krishna Singh was a rank trespasser. In fact, this Court referred to the evidence of Sri Krishna Singh himself where he admitted that his father had become a Sadhu and had taken Sanyas. Thus, on his own showing Sri Krishna Singh's father had become a Sadhu and in the eye of law he died a civil death and therefore Sri Krishna Singh could not put forward any title to this property. In this connection, this Court while rejecting the finding of the Civil Judge observed as follows:

"The learned Civil Judge in his judgment observes: 'The fact of Harsewanand being a Sanyasi remains undoubted'..... The underlying fallacy lies in his overlooking that the question had to be determined not according to the orthodox view, but according to the usage or custom of the particular sect or fraternity... .. We must accordingly hold that the plaintiff was the validly initiated Chela of Swami Atma Vivekanand and upon his demise was duly installed as the Mahant of Garwaghat Math according to the tenets of his 'Sant Mat' Sampradaya."

4. Secondly, this Court while agreeing with the learned Munsiff upheld the plaintiff's claim and clearly held that Sri Krishna Singh and others were rank trespassers. The observations in this regard may be extracted thus:

"The defendants have been held to be rank trespassers. The decree under appeal crystallizes the rights of the parties. The cause of action did not die with the plaintiff. In the circumstances, the respondent No. 1, Harshankaranand, who now claims to be the Mahant, has the right to contest the appeal as representing the Math, being the de facto Mahant, for preservation of its properties," (Emphasis supplied).

5. While the appeal was pending, the plaintiff died and this Court rejected the argument of Sri Krishna Singh that the suit itself had abated and held that when the suit for possession is brought by a Mahant of Asthal and the defendant is adjudged to be a trespasser, no question of abatement can ever arise. The decreeholder Harshankaranand was alleged to have been duly installed as Mahant of Garwaghat Math. This was, however,

challenged by Sri Krishna Singh and others, but this Court clearly held that Harshankaranand was undoubtedly in management and control of the property and being a de facto manager had the undoubted right to recover possession of property belonging to the Math. In this connection, this Court observed thus:

"The High Court agreeing with the learned Munsiff has upheld the plaintiff's claim. It was held that the house in suit was acquired by Swami Atma Vivekanand from out of the offerings (Bhent) made by his disciples and, therefore, was not his secular property, but was an accretion to the Garwaghat Math..... The cause of action did not die with the plaintiff. In the circumstances, the respondent No. 1, Harshankaranand, who now claims to be the Mahant, has the right to contest the appeal as representing the math, being the de facto mahant, for preservation of its properties.....

In the instant case, the appellant himself has, of course, without prejudice to his right to challenge the right of the original plaintiff, Harsewanand, to bring the suit, substituted respondent No. 1, Harshankaranand, as his heir and legal representative,..... In his reply, the respondent No. 1, Harshankaranand, alleges that after the demise of Mahant Harsewanand he was duly installed as the Mahant of Garwaghat Math by the 'Sant Mat' fraternity. He further asserts that he was in possession and enjoyment of the math and its properties. The fact that he is in management and control of the math properties is not in dispute." (Emphasis supplied).

6. Thus, the combined effect of the admitted findings of the final decision of this Court was as follows:

(1) That the property in question belonged to the Garwaghat Math.

(2) That Sri Krishna Singh and others were rank trespassers and were directed to be evicted from the property in question.

(3) That even though the title of Harshankaranand was left open, he had undoubtedly the right to intermeddle with the estate and evict the trespassers so as to protect the Math properties. Vide Section 2 (11), C.P.C., which defines the term "legal representative" as also the decision of the Privy Council in (1933) 60 Ind App 124: (AIR 1933 PC 75) and (1935) 62 Ind App 47: (AIR 1935 PC 44).

7. It is, therefore, manifest that as a logical conclusion of these findings, the executing Court had no option but to deliver possession of the property to Harshankaranand by evicting Sri Krishna Singh and others. The question of the title of Harshankaranand could only be raised by persons interested in the fraternity of the Math or the members of the Sant Mat Sampradaya.

8. Not content with his acrimonious defeat right up to the highest Court of the land Sri Krishna Singh in order to nullify the decision of the High Court and this Court, filed a civil suit in which he raised almost the same pleas which he had taken in defence of the previous suit. The suit was encouraged by the observations made by us that the title of Harshankaranand was left open. Sri Krishna Singh further contended that as Harshankaranand was not a duly installed Mahant, he had no right to evict him and others — a plea which had been clearly negatived by this Court.

9. Counsel for Sri Krishna Singh submitted before us that unless Harshankaranand had established his title, he was not entitled to evict Sri Krishna Singh or for that matter any trespasser. This argument has to be stated only to be rejected.

10. There is no doubt that this Court had decreed the plaintiff's suit for recovery of possession of property from trespassers. Execution of the decree, therefore, could be accomplished, in fact, only if the trespassers were evicted and property handed over either to the real owner or to the person who was in de facto management of the property. This Court has in clear terms held that Harshankaranand was undoubtedly in de facto management of the property and this fact was not disputed. In these circumstances, therefore, Harshankaranand was undoubtedly competent to execute the decree and take possession from the trespassers, namely, Sri Krishna Singh and others.

11. Thereafter, it appears that Sri Krishna Singh filed a suit before the Civil Judge, Varanasi mainly for a declaration that Harshankaranand had no title to the property and had no right to recover possession from the plaintiff. In the body of the plaint, however, Sri Krishna Singh had repeated the self-same allegations which he had made in plaint of the previous suit which was the subject-matter of the appeal arising from the suit decided by this Court. Perhaps, Sri

Krishna Singh may have mentioned this fact by way of narrating the history of the case because in the main relief he had only prayed for a declaration that Harshankaranand was not a duly installed Mahant of the Math.

12. We should have expected that after decree for possession was passed by this Court on Dec. 21, 1979 affirming the judgment of the High Court, the executing Court would at once deliver possession of the property to Harshankaranand.

13. As this was not done and the matter was delayed on one pretext or the other at the instance of Sri Krishna Singh, an application was filed in this Court for taking proceedings for contempt against Sri Krishna Singh.

14. In that petition, we issued notice to Sri Krishna Singh to show cause why he should not be committed for contempt and when the matter came up for final hearing before us, the Rule was discharged because certain concessions were made by Dr. Chitale and we felt that a clear direction to the executing court for delivering possession of the property in dispute to the plaintiff through police help would meet the ends of justice. We further clearly mentioned in our order that the act of Sri Krishna Singh in bringing the suit in the form in which it was brought was to be strongly deprecated and Dr. Chitale, then appearing on behalf of Sri Krishna Singh, gave an undertaking to this Court that the suit would be only confined to the title of Harshankaranand and all other questions adjudicated upon in the judgment of this Court relating to the title of the original plaintiff would not be re-agitated and would be taken as barred by res judicata. In view of these circumstances, we decided not to proceed against Sri Krishna Singh and discharged the rule for contempt. We further gave directions that all the averments in the plaint seeking to re-open final determination of the questions by this Court would have to be deleted. We do not know whether even this direction has been carried out by the plaintiff so far. This order was passed by us on Aug. 10, 1981. In case this direction has not been carried out, the trial Court would see to it that the portions referred to in the plaint relating to final determination of questions by this Court are deleted.

15. It appears that before our order dated Aug. 10, 1981 was passed, Sri Krishna Singh in the suit filed by him before the Additional Civil Judge, Varanasi filed

an application under O. XXI, R. 29 praying that, as the title of Harshankaranand was in dispute, the execution of the decree may be stayed. We regret to mention that this fact was concealed from us when we discharged the notice for contempt although this application was decided by the Civil Judge as far back as 31-1-1980 and was fully known to Sri Krishna Singh. Perhaps, if our attention had been drawn to this fact, we may not have discharged the notice for contempt and would have seen to it that our orders were complied with. Unfortunately, however, it now transpires that Sri Krishna Singh seems to have adopted a subterfuge in order to nullify the execution of the decree.

16. We are rather amazed to find that the totally unwarranted plea taken by Sri Krishna Singh seems to have found favour with the Civil Judge who readily accepted the prayer of Sri Krishna Singh of staying the execution of the decree without realising the scope and ambit of O. XXI, R. 29. Under this provision, jurisdiction has to be exercised with very great care and only under special cases. The Civil Judge also prima facie held that Harshankaranand was not a legal representative of late Mahant when this question was only left open and had to be decided by the Civil Judge. This shows the casual and perfunctory approach which was made by the Civil Judge. It is rather unfortunate that even the District Judge in revision affirmed the order of the Civil Judge.

17. There is yet a very formidable defect in the order passed by the Civil Judge. Under O. XXI, R. 29 jurisdiction is vested only in the Court which had passed the decree to stay its execution. In the instant case, the suit which was the subject matter of the appeal was decided by the Munsiff, Varanasi who had passed the decree. Therefore, an application for stay of execution, if any, could have been made before that Court and not before any other Court, including the Civil Judge. We are fortified in our view by a decision of this Court in *Shaukat Hus-sain v. Smt. Bhuneshwari Devi*, (1973) 1 SCR 1022: (AIR 1973 SC 528) where this Court observed as follows. (at p. 531 of AIR):

"Rule 29 clearly shows that the power of the Court to stay execution before it flows directly from the fact that the ex-

ecution is at the instance of the decree-holder whose decree had been passed by that court only. If the decree in execution was not passed by it, it had no jurisdiction to stay the execution." (Emphasis supplied).

18. It was contended by Mr. Asthana that O. XXI, R. 29 was amended by Section 72 of Act 104/1976 which introduced the following words:

"or of a decree which is being executed by such Court."

The amendment is of no avail to Sri Krishna Singh because the words "such Court" appear in the amendment also. Furthermore, the execution in the instant case was first filed before the City Munsiff who alone had the jurisdiction to proceed under O. XXI, R. 29. As the execution case was transferred to the Civil Judge, he ceased to have any jurisdiction in the matter. Thus, on this ground also, the order of the Civil Judge and as affirmed by the District Judge in revision is a nullity. Moreover, the judgment of the Civil Judge in view of the circumstances detailed above appeared to us to be an order passed in defiance of and in disobedience to the clear directions given by us and the decree passed by us in C.A. 1802/1971 and therefore would be non est and absolutely without jurisdiction and violative of Art. 141 of the Constitution of India.

19. It was submitted by Mr. Sorabji that even if the order of the Civil Judge, which was upheld in revision by the District Judge, was legally erroneous it had to be formally set aside by bringing the matter before this Court in special leave. Where an order is absolutely non est and non-existent, it need not be set aside but would have to be completely ignored as if no such order was ever passed or existed.

20. It was also contended that the decree-holder has filed a writ petition in the High Court. That, however, is of no consequence because in view of our finding, the writ petition would become infructuous. Thus, taking an overall picture of the situation, we are constrained to observe that despite the clear directions contained in the decree of the High Court as also of this Court, the Civil Judge made no attempt to comply with the decree passed by this Court but used his discretion to perpetuate injustice so as to continue and legalise an unlawful

and wrongful possession of a person who had been held to be a rank trespasser by the High Court as also by this Court. The execution was stayed at the instance of a person who had exhibited an adverse interest to the Math properties and was not at all concerned with the preservation of the Math properties. As a de facto manager Harshankaranand could recover the property for the benefit of the Math from the possession of the trespassers and there was no occasion for the Civil Judge to have resorted to the extraordinary discretion under O. XXI, R. 29, C.P.C. even if it was applicable.

21. It was contended by Mr. Asthana that Harshankaranand in his application for executing the decree did not clearly mention the fact that he was a de facto manager of the property. This fact need not have been mentioned because it is expressly indicated in the concluding portion of our judgment which has been extracted above.

22. So far as the suit filed by Sri Krishna Singh is concerned, we are extremely doubtful if Sri Krishna Singh having been found to be a rank trespasser has any locus to bring and maintain the present suit. However, we leave this question open to be decided by the Court concerned which shall frame a preliminary issue on this point and decide it after hearing the parties and after recording such evidence as may be adduced.

23. The next question that arises is what orders have to be passed on this application.

24. Having regard to the most reprehensible conduct of Sri Krishna Singh who has shown scant respect for and utter disregard of the order of this Court and tried to delay or defeat the delivery of possession by adopting ingenious devices and subterfuges, we find a prima facie case for taking proceedings for contempt of Court has been made out against Sri Krishna Singh. Let notice be issued to Sri Krishna Singh to appear in person on Sept. 25, 1981 to show cause why he should not be punished for contempt of Court.

25. We also direct the Civil Judge to send an explanation as to why despite our clear orders, he did not proceed to deliver possession of the property to Harshankaranand from Sri Krishna Singh as also the circumstances under which he passed the extraordinary and palpably wrong order under O. XXI, R. 29, C.P.C.

We further direct the Civil Judge to deliver possession of the property from Sri Krishna Singh and others to the decree-holder Harshankaranand and report compliance within a week from the receipt of this order. If necessary, the Civil Judge can take the aid of police. Let a copy of this order be sent to the Civil Judge so as to enable him to give his explanation.

26. Our order dated Aug. 10, 1981 stands, except regarding discharge of notice for contempt.

Order accordingly.

AIR 1982 SUPREME COURT 690

(From: Punjab)

D. A. DESAI AND A. P. SEN, JJ.

Criminal Appeal No. 424 of 1981, D/-10-4-1981.

Suba Singh, Appellant v. State of Punjab, Respondent.

Penal Code (45 of 1860), S. 302 — Murder — Sentence — Extenuating circumstance — Altercation arising out of minor dispute — Only one blow given by accused that too by blunt side of weapon — Conviction under S. 302 and sentence of imprisonment for life altered to one under S. 304 Part II and sentence of seven years' R. I. Decision of Punjab High Court, Reversed. (Para 2)

JUDGMENT:— Special Leave granted limited to the question of nature of offence and sentence.

2. Having regard to the facts and circumstances of the case in which only one blow was given and that too by the blunt side of the (illegible), we are satisfied that the offence committed by the appellant would fall under S. 304 Part II, Indian Penal Code. Looking to the fact that the victim (accused) was aged about 13 years and altercation on a minor dispute took place and in this trivial dispute only one blow was given a sentence of rigorous imprisonment for seven years would meet the ends of justice. Accordingly this appeal is allowed and the conviction of the appellant under S. 302 and sentence of rigorous imprisonment for life are set aside and he is convicted under S. 304, Part II, Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years. To the extent of this modification, the appeal is allowed.

Appeal allowed.

KY/KY/F255/81/MVJ

AIR 1982 SUPREME COURT 691
= 1982 Cri. L. J. 187

(From : Goa)

A. P. SEN AND BAHARUL ISLAM, JJ.

Criminal Appeal No. 706 of 1980 and Special Leave Petitions (Crl.) Nos. 155-156 of 1981, D/- 10-12-81.

Union of India and others, etc., Appellants v. Mario Cabral e Sa, Respondent.

(A) Contempt of Courts Act (70 of 1971), Ss. 19, 17 — Initiation of proceedings for contempt — Issue of notice under S. 17 — Order initiating proceeding is not appealable. AIR 1978 SC 1014, Foll. (Para 6)

(B) Contempt of Courts Act (70 of 1971), Sec. 2 (b) and (c) — Contempt of Court — Writ petition against non-granting of accreditation — Order in writ petition based on assurance of Government Advocate — Held, there being no undertaking for grant of accreditation, failure of Government to do so would not amount to contempt of Court — Refusal to grant on ground other than the rule — No justification. Decision of Goa J. C., dated 17-10-1980, Reversed. (Rules for Accreditation of Press Correspondents and News Agencies, S. II R. 2 (ii).)

Where a writ petition is filed against the order of Government declining to grant accreditation under R. 2 (1) of S. II of the Rules for Accreditation of Press Correspondents and News Agencies and the operative part of the order therein was based on the assurance given by the Government advocate that he 'would advise the Government' that accreditation be issued to the petitioner on condition that he should be at the headquarters of the Government, as required by the said R. 2 (1), however, the Government advocate never intended or meant to convey that the Government would in all circumstances grant accreditation, there being no undertaking for the grant of accreditation, the failure of the Government to do so would not amount to contempt of the Court. It was, however, not permissible for the Government to offer a justification for refusal to grant accreditation on grounds other than the one that he did not fulfil the requirements of Rule 2 (1) of S. II of the Rules. Decision of

LY/LY/G196/81/SSG

Goa J. C. D/- 17-10-1980, Reversed.

(Paras 9A, 10, 11)

Cases Referred : Chronological Paras

AIR 1978 SC 1014 : (1978) 3 SCR 510 : 6

1978 Cri LJ 772

AIR 1952 SC 16 : 1952 SCR 135 11

A. P. SEN, J.:— This appeal under S. 19 (1) of the Contempt of Courts Act, 1971 (for short 'the Act'), and the connected special leave petitions are directed against two orders passed by the Addl. Judicial Commissioner, Goa, Daman and Diu, on October 10 and 17, 1980 by which he directed that the Government of Goa, Daman and Diu should issue accreditation to the respondent within 7 days, i. e., by October 17, 1980, later extended by a day and that the Administrator and the Acting Chief Secretary be impleaded to the contempt proceedings and they be issued notices to show cause for contempt. It is somewhat unfortunate that the case should have taken this turn. We feel that the learned Addl. Judicial Commissioner should have acted with greater circumspection. The whole controversy before the learned Additional Judicial Commissioner turned on the question whether or not prior residence was a pre-condition for the issue of accreditation, under Rule 2 (1) of S. II of the Rules for Accreditation of Press Correspondents and News Agencies (for short 'the Rules'), in the writ petition filed by the respondent, but the question was left undetermined. Rule 2 of S. II of the Rules is as follows :

"2. The correspondent of a newspaper, news agency, etc., should fulfil the following conditions for accreditation:

(1) His residence should be at the headquarters of the Government of Goa, Daman and Diu during his period of accreditation.

(2) His full-time occupation should be the profession of journalism.

(3) At the time of application he should have spent not less than three consecutive years in the profession of journalism and/or should be a person of sufficient experience and standing to be able to discharge his duties in a competent responsible manner."

The learned Addl. Judicial Commissioner instead of dealing with the question relating to the construction of Rule 2 (1) of S. II of the Rules, has unnecessarily

raised the spectre of supposed contempt upon the wrongful assumption that there was breach of an undertaking by the Administrator and the Acting Chief Secretary, and wilful disobedience of a lawful direction made by him in the matter of accreditation which lowered the dignity of the Court and was calculated to show disrespect to his authority.

2. In order to bring out the point in controversy, it is necessary to state a few facts. The respondent Mario Cabral e Sa, a professional journalist, applied for grant of accreditation to the Government of Goa, Daman and Diu, under Rule 2 of S. II of the Rules. It appears that the Accreditation Committee had recommended the grant, but the Government of Goa, Daman and Diu, declined the recommendation. The decision of the Government was conveyed to the respondent by a letter dated April 27, 1979 of the Director of Information and Public Relations, Department of Information, Panaji, Goa, informing him that the Government could not allow his application for accreditation since it did not fulfil the requirements of Rule 2 (1) of S. II of the Rules.

3. As the Government declined the grant of accreditation, the respondent filed an application under Art. 226 of the Constitution before the Court of the Judicial Commissioner, Goa, Daman and Diu, for the issue of a writ in the nature of mandamus or an appropriate writ, direction or order in the matter of grant of accreditation. The matter came up for hearing before the learned Addl. Judicial Commissioner on April 29, 1980, when he made the following order:

"Mr. Dias, learned Government Advocate undertakes to advise the Government that accreditation will be issued to the petitioner on condition that he should be at the headquarters of the Government of Goa, Daman and Diu, during his period of accreditation as per Rule 2 (1) of the S. II of the Rules for Accreditation to Press Correspondents representing Indian Newspapers and News Agencies.

In view of the above assurance furnished on behalf of Government, this Special Civil Application is disposed of accordingly but without costs."

4. On June 9, 1980, the respondent moved the learned Addl. Judicial Com-

missioner for taking action under the Contempt of Courts Act, 1971, against the Union of India, Government of Goa, Daman and Diu, Director of Information and Public Relations, and four others, who are members of the Accreditation Committee, i.e., respondents Nos. 1 to 7 therein, for breach of the undertaking given, and thereupon the learned Addl. Judicial Commissioner issued show-cause notices. The application was based on the premise that there was an enforceable order. On August 16, 1980, the Director of Information and Public Relations, filed a counter-affidavit showing cause. It was stated that the Government had been advised that accreditation and residence of the respondent at Panaji must be simultaneous, and therefore, he had, by his letter dated July 21, 1980, asked the respondent to advise the Government whether he was residing at the headquarters of the Government of Goa, Daman and Diu, at Panaji, and let him know his address to enable the Government to take further action on his request for grant of accreditation. It then went on to say that the respondent by his reply dated July 24, 1980, stated that he was not residing at Panaji, the headquarters of the Government. It was said that the letter had been addressed to the respondent 'in order to avoid proceedings to cancel his accreditation in the event it is found that he does not reside in Panaji'. Incidentally, the respondent resides at Piedade, an island off the Coast, seven kilometres from Panaji. The Government has allotted land to accredited press correspondents to build residential houses at Sangolda belonging to the Comunidade of Sangolda, a suburb of Panaji, which, we are told, falls outside the headquarters of the Government at Panaji and is also about seven kilometres away. After the filing of the counter-affidavit by the Director of Information and Public Relations, the respondent filed a supplementary affidavit showing that the Government had not insisted upon prior residence as a precondition for the issue of accreditation in the case of some other press correspondents while granting accreditation. On Sept. 22, 1980, the learned Government Advocates filed an application stating that the relevant file had been submitted to the Administrator but he was out of station, and ten days' time

be granted to the Government to enable it to obtain the approval of the Administrator. The matter came up for hearing on October 1, 1980. On that day, Mr. Dias, the learned Government Advocate, reported no instructions. There was no appearance by any other lawyer for the Government, and after hearing arguments of the respondent, the learned Addl. Judicial Commissioner reserved the case for orders. On October 3, 1980, Mr. P. Mulgaonkar, Government Advocate, who was directed to appear in place of Mr. Dias, made an application seeking an opportunity to make his submissions. The application came up for hearing on October 7, 1980, the prayer made by Mr. Mulgaonkar was allowed and the parties were heard.

5. By order dated October 10, 1980, the learned Addl. Judicial Commissioner held that prior residence was not a precondition for the issue of accreditation and accordingly directed that the Government of Goa, Daman and Diu should issue accreditation to the respondent within seven days from the date of the order, i.e., by October 17, 1980, and also made a direction for the production of the relevant files by the next date. On October 17, 1980, the learned Government Advocate moved an application stating that the Administrator had gone out of station, and, therefore, it was not possible for the Government to apprise him of the order of the Court as to the issue of accreditation, and since no action was possible without a decision of the Administrator, who was expected to return to Goa that evening, the Government should be given reasonable time to deal with the matter. It was submitted that the accreditation files were in the custody of the learned Government Advocate and he would produce them along with other files as soon as they were made available to him, in compliance with the directions of the Court. On the same day, the Government Advocate reported no instructions and withdrew from the case. Apparently, the Government must have instructed him to do so as the respondent had, in the meanwhile, on October 13, 1980, moved an application seeking to implead the Administrator and the Acting Chief Secretary as contempters, on the allegation that they were the persons who had committed contempt. The learned Addl. Judicial

Commissioner by his order dated October 17, 1980, observed that 'it is now clear that none of the seven respondents seems to have played any part in the ultimate refusal of accreditation', presumably on the basis of the allegation of the respondent that even though the Council of Ministers had cleared the file in his favour, he had reasons to believe that the Administrator at the instigation of the Acting Chief Secretary was seeking to frustrate compliance of the Court's order dated April 29, 1980. He accordingly, directed issue of notices to the Administrator and the Acting Chief Secretary to show cause why they should not be committed for contempt. The reason given by the learned Addl. Judicial Commissioner for taking this unusual step is :

"(I)n order to decide who is the person who has committed the contempt of Court it is necessary to implead the Administrator as well as the Chief Secretary as parties to the Contempt Petition when it is alleged that they are responsible."

The appellants were therefore constrained to make an application on October 18, 1980, under sub-s. (3) of S. 19 of the Act to the learned Addl. Judicial Commissioner for suspension of the impugned orders dated October 10 and 17, 1980, to enable them to secure from this Court an order of stay in terms of sub-s. (2) thereof. The learned Addl. Judicial Commissioner by his order of October 21, 1980, however, rejected the application, observing that the words 'from any order or decision of the High Court' appearing in sub-s. (1) of S. 19 of the Act, 'do not take in its sweep' the impugned orders in question, and, therefore, 'no appeal to the Supreme Court was competent'.

6. The question of maintainability of the appeal under S. 19 (1) of the Act need not detain us for long. In *Purshottam Das Goyal v. Mr. Justice B. S. Dhillon*, (1978) 3 SCR 510 : (AIR 1978 SC 1014), this Court held that an order initiating proceedings for contempt by a notice issued under S. 17 of the Act, is not appealable under S. 19 thereof. It was observed (at p. 1015 of AIR) :

"In our considered judgment, an order merely initiating the proceedings without anything further, does not decide anything against the alleged contemner and cannot be appealed against as a matter of right under S. 19. In a given

case special leave may be granted under Art. 136 of the Constitution from an order initiating the proceeding. But that is entirely a different matter."

In the present case, we have heard the parties on merits on the basis that the appeals are by special leave.

7. In support of the appeals, two contentions are advanced. In the first place, it is urged that the order passed by the learned Addl. Judicial Commissioner on April 29, 1980, disposing of the writ petition on the basis of the undertaking given by the learned Government Advocate contained no 'enforceable direction' and, therefore, the failure of the Government to grant accreditation would not amount to contempt of the Court. Secondly, it is urged that after the learned Addl. Judicial Commissioner had held that there was no contempt committed by respondents Nos. 1 to 7, the application for contempt moved by the respondent did not survive and, therefore, there was no warrant or any material for the learned Addl. Judicial Commissioner to go in search of new contemnors. It is said that the direction made by him for impleading the Administrator and the Acting Chief Secretary was wholly uncalled for. It is, therefore, submitted that the learned Addl. Judicial Commissioner acted illegally in directing the Administrator and the Acting Chief Secretary to be impleaded as parties to the contempt proceedings and in issuing notices to them to show cause why they should not be committed for contempt of the Court.

8. The appellants, in these appeals, have filed an affidavit of the Acting Chief Secretary, wherein it is asserted that though accreditation was refused to the respondent on the ground that he did not fulfil the requirements of R. 2 (1), because admittedly, he had no residence at the headquarters of the Government, nevertheless, the Government still had the inherent right to grant or refuse accreditation under Rule 4 of S. I of the Rules. In contesting the claim of the respondent, it is said that 'the profession of journalism is not his full-time occupation', that he is 'just a free-lancer' and that he does not possess sufficient experience and standing' to be able to discharge his duties in a responsible manner. From the tenor of the af-

fidavit, it is quite obvious that the respondent has incurred the displeasure of the powers that be.

9. Repelling the contentions, the respondent who appeared in person, argued the appeals with conspicuous ability. He took serious exception to the affidavit of the Acting Chief Secretary filed in the appeal, and urged that the refusal of accreditation to him being based on the sole ground that he did not fulfil the requirements of Rule 2 (1) of S. II of the Rules, its validity must be judged by the reason so mentioned, and the Government cannot be allowed to supplement by other grounds in the shape of affidavit or otherwise. Our attention was drawn to various orders passed by the learned Addl. Judicial Commissioner culminating in the issue of notice for contempt to the Administrator and the Acting Chief Secretary, to highlight that prior residence at the headquarters was not insisted upon in the past as a condition precedent to the grant of accreditation in the case of other correspondents and that nowhere in the three conditions set out in R. 2 of S. II of the Rules, has it been stated that accreditation should not be given unless the press correspondent was residing at the headquarters at the time of issuing accreditation. It was, therefore, urged that the learned Government advocates had rightly conceded that no such condition could be insisted upon in the case of the respondent.

9-A. It seems to us that the essential question is not whether the learned Addl. Judicial Commissioner could issue a direction for the grant of accreditation under R. 2 of S. II of the Rules in view of the fact that it is a matter of privilege and not of right, and in terms of R. 4 of S. I of the Rules, the Government has the inherent right to grant or refuse the accreditation to any correspondent. Nor, it seems to us, is the question whether prior residence at the headquarters by a press correspondent cannot be insisted upon for grant of accreditation under R. 2 (1) of S. II of the Rules. On these questions, we refrain from expressing any opinion. These are all matters to be dealt with in the writ petition. The fundamental question, we think, is whether there was wilful breach on the part of the appellants of an undertaking

given to the Court, or wilful disobedience to any order or direction by them so as to constitute 'civil contempt', as defined in S. 2 (b) of the Act, or whether they committed an act which lowers or tends to lower the authority of any Court so as to amount to 'criminal contempt', within the meaning of S. 2 (c) of the Act. We are left with the impression that the learned Addl. Judicial Commissioner is not sure of his ground. It is difficult to attribute that the appellants were guilty of contempt in that they committed a wilful breach of an undertaking or wilful disobedience of any order or direction. Nor, can it be said that the refusal of the Government to grant accreditation was an act which lowers or tends to lower the authority of the Court, in the facts and circumstances of the case.

10. The legality and propriety of the action taken by the learned Addl. Judicial Commissioner are open to question. The operative part of the order rests on the assurance given by the learned Government advocate that he 'would advise the Government' that accreditation be issued to the respondent on condition that he should be at the headquarters of the Government, as required by Rule 2 (1) of S. II of the Rules. It appears that the learned Government advocate tendered his advice, but the Government was of the view that prior residence should be a pre-condition for the issue of accreditation. The learned Government advocate never intended or meant to convey that the Government would in all circumstances, grant accreditation to the respondent. Nor was he authorised to make a binding commitment in that behalf. All that the learned Government advocate conveyed by his undertaking to the learned Addl. Judicial Commissioner was that he 'would advise the Government' upon which the learned Addl. Judicial Commissioner made no orders in the writ petition. It was up to the Government to act upon that advice or not. When the Government placed its point of view before the learned Addl. Judicial Commissioner, the proper course for him to adopt was to have restored the writ petition to file and decide it on merits. The order passed by him on April 29, 1980, contained no 'enforceable direction'. There being no undertaking for the grant of accreditation, the failure of the Government to

do so would not amount to contempt of the Court. We are distressed to find that a responsible judicial officer like the Addl. Judicial Commissioner should have displayed such lack of judicial propriety in issuing notices for contempt when there was none.

11. The contention of the respondent that the Government cannot be permitted to shift the ground for refusal to grant accreditation must be accepted. The legality of the governmental action must be adjudged on the reason stated in the impugned order, and it is impermissible for the Government to take a new ground. In *Commr. of Police, Bombay v. Gordhandas Bhanji*, 1952 SCR 135 : (AIR 1952 SC 16). Vivian Bose, J., speaking for the Court, observed (at p. 18 of AIR) :

"(P)ublic orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

It was, therefore, not permissible for the Government to offer a justification for refusal to grant accreditation to the respondent, on grounds other than the one that he did not fulfil the requirements of R. 2 (1) of S. II of the Rules.

12. The question whether prior residence at the headquarters of the Government was a pre-condition for the issue of accreditation turns on the construction of Rule 2 (1) of S. II of the Rules. That question is involved in the writ petition filed by the respondent, and it is one to be determined by the Court of the Judicial Commissioner.

13. For these reasons, the impugned orders passed by the Addl. Judicial Commissioner on October 10 and 17, 1980, are set aside, and the proceedings for contempt are quashed. In view of the stand taken by the Government of Goa, Daman and Diu, that the respondent was not entitled to accreditation under R. 2 (1) of S. II of the Rules for Accreditation of Press Correspondents

and News Agencies; the earlier order passed by the Addl. Judicial Commissioner on April 29, 1980, is also set aside. The Judicial Commissioner is directed to restore the proceedings in Special Civil Application (Writ Petition) No. 93 of 1979, to file, and dispose it of on merits as expeditiously as possible, without being influenced by any of the observations made above.

Order accordingly.

AIR 1982 SUPREME COURT 696

S. MURTAZA FAZAL ALI AND

A. VARADARAJAN. JJ.

Writ Petn. No. 1206 of 1981, D/- 2-4-1981.

Mohd. Zakir. Petitioner v. Delhi Administration and others, Respondents.

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 — Detention — Documents relied on by authorities not supplied with grounds of detention — Detention is illegal. (Constitution of India, Art. 22 (5)).

It is the constitutional mandate which requires the detaining authority to give the documents relied on or referred to in the order of detention *pari passu* the grounds of detention in order that the detenu may make an effective representation immediately instead of waiting for the documents to be supplied with. It is manifest that question of demanding the documents is wholly irrelevant. The infirmity in this regard is violative of constitutional safeguard enshrined in Art. 22 (5) of Constitution. AIR 1980 SC 1983 and AIR 1981 SC 814. Foll.

(Para 2)

Cases Referred: Chronological Paras

AIR 1981 SC 814; 1981 Cri LJ 353 2

AIR 1980 SC 1983; (1980) 4 SCC 531 2

ORDER:— In this writ of habeas corpus filed by the detenu, the detenu was arrested on Nov. 29, 1980 and the grounds of detention were served on him on Dec. 1, 1980. A representation was sent by the detenu on Dec. 30, 1980 which was rejected by the Government on Jan. 6, 1981. A prayer for further documents was made by the detenu on Jan. 5, 1981 which were supplied to him. We are not concerned with the other events in the

case because this petition must succeed on a short point.

2. Mr. Asok Sen appearing for the detenu submitted that in para 1 of the grounds of detention, which is extracted at pages 24-25 of the paper-book, the grounds clearly mentioned certain information and documents which have been relied upon for the purpose of detaining the petitioner and formed the subject-matter of the subjective satisfaction of the detaining authority. These documents would show that one Mr. D. H. Anand had a pass-port dated Feb. 12, 1975 and had flown to Hong Kong by flight No. T602 and declared 90 kgs of silver. It was also alleged that the detenu having passport dated Oct. 4, 1978 travelled from Delhi on flight No. PA 002 and declared 50 kgs of silver. There was Darshan Lal Anand also who had returned from Bangkok and declared 117 kgs of silver. It was further stated that necessary enquiries from the Customs Department confirmed the information received from Hong Kong regarding the declaration of silver. Perusal of the grounds of detention would show that the pivotal ground on the basis of which the detenu was detained was the allegation that he smuggled out huge amount of silver from India to foreign countries. The documents regarding the facts mentioned in the grounds of detention referred to above and relied upon by the detaining authority were not admittedly furnished to the detenu at the time when the grounds were served on him or *pari passu* the same. On the other hand, these documents were supplied to him much later, i. e., on Jan. 5, 1981. This infirmity therefore is clearly violative of the constitutional safeguard enshrined in Art. 22 (5) of the Constitution as held by this Court in a series of cases. Mr. Hardy appearing for the respondents tried to support the order of detention on the ground that some documents had been supplied along with the grounds, but these documents were given to him only when the same were demanded by him. In the view that we have taken in a number of decisions starting from Smt. Icchu Devi Choraria's case (1980) 4 SCC 531: (AIR 1980 SC 1983) to the case of Kamla Kanahiylal Khushalani, W. P. No. 5873 of 1980, decided on Jan. 6, 1981 (reported in AIR 1981 SC 814), it is manifest that the question of demanding the documents is wholly irrelevant because it is the constitutional mandate which

requires the detaining authority to give the documents relied on or referred to in the order of detention *pari passu* the grounds of detention in order that the detenu may make an effective representation immediately instead of waiting for the documents to be supplied with. In the instant case, the detenu did make a representation promptly on Dec. 30, 1980 but was seriously handicapped in making an effective representation because the aforesaid documents which were of vital importance were not supplied to him.

3. For these reasons, therefore, the continued order of detention of the detenu is rendered void. We, therefore, allow this petition and direct the detenu to be released forthwith.

Petition allowed.

AIR 1982 SUPREME COURT 697

(From: Madhya Pradesh)*

CHANDRACHUD, C. J. AND

D. A. DESAI, J.

Civil Appeals Nos. 1025-26 of 1978 and 213 of 1979, D/- 26-11-1981.

(1) Western Coalfields Ltd., Appellant v. Special Area Development Authority, Korba and another. Respondents

And

(2) Bharat Aluminium Company Ltd., Appellant v. Special Area Development Authority, Korba and others. Respondents.

(A) M. P. Nagar Tatha Gram Nivesh Adhiniyam (23 of 1973), S. 69 (d) (as amended in 1976) — Property tax on lands and buildings — Power of Development Authority to levy — Legislation by reference to other Acts in Cl. (d) — Development Authority is competent to draw upon powers conferred by amendments made in the Acts subsequent to insertion of Cl. (d). (i) M. P. Municipalities Act (37 of 1961), S. 127A; (ii) M. P. Municipal Corporation Act (23 of 1956), S. 135; (iii) General Clauses Act (1897), S. 6; (iv) Interpretation of Statutes — Legislation by incorporation, (v) Constitution of India, Art. 254).

* (1) Misc. Petn. Nos. 61 and 62 of 1978, D/- 15-4-1978, (M. P.) and:

(2) 1978 Jab LJ 494: 1978 Tax LR NOC 182.

LY/LY/F787/81/MVJ

The Development Authority can levy property tax under S. 69 (d) by availing the provisions of S. 127-A of M. P. Municipalities Act 1961 and S. 135 of M. P. Municipal Corporation Act which provisions were inserted subsequent to insertion of Cl. (d) in S. 69 in 1976. S. 127A and S. 135 which, by their own force, create and levy the charge of property tax were inserted in the Municipalities Act and the Municipal Corporation Act respectively with effect from Apr. 1, 1976, that is, subsequent to the insertion of Cl. (d) in S. 69 of the Act of 1973. It could not be contended that the Development Authority could exercise only such powers to levy property tax as the Municipal Corporation or the Municipal Council had under the M. P. Municipal Corporation Act, 1956, or the M. P. Municipalities Act, 1961, as these Acts stood on Feb. 27, 1976, when Cl. (d) was inserted in its present form in S. 69 of the Act of 1973 and that the provisions conferring powers of taxation under the aforesaid two Acts must be taken to have been incorporated in S. 69 (d) of the Act of 1973 and any subsequent change in those provisions by amendment of the two Acts cannot be availed of by the Authority. (Para 13)

It is well settled that if an earlier legislation is incorporated into a later legislation, the provisions of earlier law which are incorporated into the later law become a part and parcel of the later law. Therefore, amendments made in the earlier law after the date of incorporation cannot, by their own force, be read into the later law. But these rules are not absolute and inflexible. There is a distinction between a mere reference to or a citation of one statute in another and an incorporation which in effect means the bodily lifting of provisions of one enactment and making them part of another. In the circumstances of the case it must be held that the subsequent amendments made to the Municipal Corporation Act and the Municipalities Act will also apply to the power of taxation provided for in S. 69 (d) of the Act of 1973. The Act of 1973 did not, by S. 69 (d), incorporate in its true significance any particular provision of the two earlier Acts. It provided that, for the purpose of taxation, the Special Area Development Authority shall have the powers which a Municipal Corporation or a Municipal Council has under the M. P. Municipal Corporation Act, 1956

or the M. P. Municipalities Act, 1961. The case therefore is not one of incorporation but of mere reference to the powers conferred by the earlier Acts. S. 69 (d) must accordingly be read to mean that the Development Authority shall have all the powers of taxation which a Municipal Corporation or a Municipal Council has for the time being, that is to say, at the time when the Authority seeks to exercise those powers.

(Para 16)

Further, the Act of 1973 does not provide for any independent power of taxation or any machinery of its own for exercising the power of taxation. It rests content by pointing its finger to the provisions contained in the two Municipal Acts. The three Acts are therefore supplemental, from which it must follow that amendments made to the earlier Acts after the enactment of S. 69 (d) shall have to be read into that section. Without recourse to such a construction, the power of taxation conferred by that section will become ineffectual. A reading of the reference to the two earlier Municipal Acts as a reference to those Acts as they stand at the time when the power of taxation is sought to be exercised by the Authority does not cause repugnancy between the two earlier Acts on the one hand and the Act of 1973 on the other. 1978 Tax LR (NOC) 182 (Madh Pra), Affirmed. (Para 17)

(B) M. P. Nagar Tatha Gram Nivesh Adhiniyam (23 of 1973), S. 69 (d) (as amended in 1976) — M. P. Municipalities Act (37 of 1961), Ss. 127-A and 129 (ii); M. P. Municipal Corporation Act (23 of 1956), Ss. 135 and 133 — Levy of property tax under S. 69 (d) by invoking Ss. 127-A and 135 — Procedure prescribed by S. 129 of Act of 1961 and S. 133 of Act of 1956 need not be followed.

Sections 127A and 135 create, by their own force, the liability to be brought to property tax and the right to levy that tax. Nothing further is required to be done by the Municipality or the Municipal Corporation in order to impose the property tax and therefore the procedure preliminary to the imposition of other taxes which is prescribed by Ss. 129 and 133 of the two Acts, can have no application to the imposition of the property tax. Apart from this, the position is put beyond doubt by the language of Ss. 129 and 133 of the two Acts. S. 129 of the M. P. Municipalities Act pre-

scribes the procedure for "the imposition of any tax under S. 127". Similarly S. 133 of the M. P. Municipal Corporation Act prescribes the procedure for "the imposition of any tax under S. 132". The property tax is imposed under S. 127A and S. 135. It is not imposed under S. 127 of the former Act or S. 132 of the latter Act. It is therefore not necessary to follow the procedure prescribed by S. 129 and S. 133 of the respective Acts. This position is made clear, out of abundant caution, by cl. (4) of Sec. 133 of the Municipal Corporation Act, which provides that nothing contained in S. 133 shall apply to the tax mentioned in cl. (a) of sub-sec. (1) of S. 132, which shall be charged and levied in accordance with S. 135. S. 132 (1) (a) refers to property tax. (Para 18)

It could not also be contended that the taxing authority must apply its mind to the question whether it wants to bring to tax the land or building or both. Ss. 127A and 135 of the two Acts in question leave no such choice open to the taxing authority. The obligation which the statute places upon it is to impose tax on lands where there are lands only and they can be taxed, on buildings where buildings alone can be brought to tax and on both lands and buildings where lands are built upon and both can be brought to tax. This is not rationalising the taxing power.

(Para 19)

(C) M. P. Nagar Tatha Gram Nivesh Adhiniyam (23 of 1973), S. 69 (d) — M. P. Municipalities Act (37 of 1961), S. 127-A — M. P. Municipal Corporation Act (23 of 1956), S. 135 — Property tax — Exemption in respect of lands and buildings belonging to Govt. — Companies incorporated under Companies Act, though entire share capital subscribed by Govt. of India are not entitled to such exemption. (Constitution of India, Art. 285).

Even though the entire share capital of the companies has been subscribed by the Government of India, it cannot be predicated that the companies themselves are owned by the Government of India. The companies, which are incorporated under the Companies Act, have a corporate personality of their own, distinct from that of the Government of India. The lands and buildings are vested in and owned by the companies, the Government of India only owns the share capital. AIR 1970 SC 554; AIR

In the instant case there is no scope for applying the doctrine of lifting the veil in order to have regard to the realities of the situation. The appellant Companies viz. the Western Coalfields Ltd.; and the Bharat Aluminium Co. Ltd. were incorporated under the Companies Act for a lawful purpose. Their property is their own and it vests in them. If the lands and buildings on which the Authority has imposed the property tax cannot be regarded as the property of the Central Government for several other purposes like attachment and sale, there is no reason why, for taxing purposes, the property can be treated as belonging to that Government as distinct from the company which has a juristic personality. (Para 21)

(D) M. P. Municipalities Act (37 of 1961), S. 147, Expl. — M. P. Municipal Corporation Act (23 of 1956), S. 141 (1) — Property tax on land and buildings — Liability of owner and occupier.

Under S. 147, Explanation, though the property tax has to be paid by the owner of the land or building, as the case may be, for the purposes of that section a tenant of land or building or both, who holds the same under a lease for an agreed period with a covenant for its renewal thereafter, is deemed to be the owner thereof. S. 141 (1) of the M. P. Municipal Corporation Act provides that the property tax shall be paid primarily by the owner. By sub-sec. (2) of S. 141, the property tax levied on the owner can also be recovered from the occupier of the land or the building. (Para 22)

(E) M. P. Nagar Tatha Gram Nivesh Adhiniyam (23 of 1973), S. 69 (d) — Mines and Minerals (Development and Regulation) Act (1957), S. 2 — Property tax provided under S. 69 (d) — It is not beyond legislative competence. (Constitution of India, Arts. 246, 254 and Sch. 7, List 1, Entry 54 and List 2, Entry 23).

The property tax provided in Act of 1973 on lands and buildings is not beyond the legislative competence of the State Legislature, it has nothing to do with the development of mines. The power conferred by the State Legislature on Special Area Development Authorities to impose the property tax on lands and buildings is therefore not in conflict with the power conferred by the Coal Mines Nationalisation Act on the Union

Government to regulate and develop the coal mines so as to ensure rational and scientific utilisation of coal resources. The paramount purpose behind the declaration contained in S. 2 of the Mines and Minerals (Regulation and Development) Act, 1957 is not in any manner defeated by the legitimate exercise of taxing power under S. 69 (d) of the Act of 1973. AIR 1976 SC 1654 and AIR 1980 SC 1955; Foll. AIR 1970 SC 1436. Distinguished. (Para 26)

(F) M. P. Nagar Tatha Gram Nivesh Adhiniyam (23 of 1973), S. 69 (d) — Property tax — Power of Development Authority to levy — Chairman of Development Authority entering into agreement with appellant Govt. Companies binding himself not to impose any tax for a period of 10 years in consideration of payment of lump sum annually by latter as seed capital — Held, that Chairman acted in excess of his authority in entering into agreement. (Para 30)

Cases Referred; Chronological Paras
 AIR 1980 SC 1955 : (1980) 3 SCR 331 :
 1980 All LJ 950 29
 AIR 1976 SC 1654 : (1976) 3 SCR 628 28
 AIR 1975 SC 1835 : (1976) 1 SCR 6 :
 1975 Cri LJ 1639 15
 AIR 1970 SC 82 : (1969) 3 SCR 995 :
 1970 Lab IC 212 21
 AIR 1970 SC 564 : (1970) 3 SCR 530 20
 AIR 1970 SC 1436 : (1970) 2 SCR 100 27
 AIR 1965 SC 177 : (1964) 6 SCR 666 26
 AIR 1964 SC 1486 : (1964) 7 SCR 17 21A
 AIR 1962 SC 316 : (1962) 3 SCR 786 :
 1962 (1) Cri LJ 364 15, 16
 1950 KB 18 : 65 TLR 422 : 93 SJ 465,
 Tamlin v. Hansford 21A
 AIR 1931 PC 149 : 58 Ind App 259 : 1931
 All LJ 475 14, 15
 (1881) 8 QBD 63 : 51 LJQB 1 : 46 LT 49,
 Clarke v. Bradlaugh 15
 Mr. L. N. Sinha, Attorney General,
 Mr. R. B. Datar and Miss A. Subhashini,
 Advocates with him for Appellants;
 Mr. Y. S. Dharamadhikari, Sr. Advocate,
 Dr. N. M. Ghatate and Mr. S. V. Deshpande,
 Advocates with him for Respondents;
 Dr. Y. S. Chitale, Sr. Advocate,
 Mr. Suresh Sethi and Mr. S. K. Bhat-
 tacharya, Advocates with him for Ap-
 plicant intervener — Municipal Corpn.
 of Delhi; Mr. Altaf Ahmed, Advocate for
 Applicant intervener J. and K. State
 Agro. Industrial Corpn. Ltd.; Mr. S. K.
 Gambhir, Advocate for Applicant inter-
 vener State of M. P.

CHANDRACHUD, C. J.:— These ap-
 peals by special leave involve the ques-

tion of the legality of the demand for property-tax made by respondent 1 on the appellant Companies, Civil Appeal No. 213 of 1979 filed by the Bharat Aluminium Company Ltd. arises out of Misc. Petition No. 555 of 1977 filed by it in the High Court of Madhya Pradesh under Art. 226 of the Constitution. Respondent 1 is the Special Area Development Authority, Korba, District Bilaspur, M. P., respondent 2 is its Chairman and respondent 3 is the State of Madhya Pradesh. Since the three appeals raise similar questions, we will refer to the facts of Civil Appeal No. 213 of 1979 only. Civil Appeals Nos. 1025 and 1026 of 1978 are by Western Coalfields Ltd.

2. The appellant, Bharat Aluminium Company Ltd., is a Government company incorporated under the Companies Act, 1956, the entire share capital being owned by the Government of India. Respondent 1, the Special Area Development Authority for the Korba Special Area, is constituted under S. 65 of the M. P. Nagar Tatha Gram Nivesh Adhiniyam (23 of 1973), referred to hereinafter as 'the Act of 1973'. That Act was passed by the M. P. Legislature in order "to make provision for planning and development and use of land to make better provision for the preparation of development plans and zoning plans with a view to ensuring that town planning schemes are made in a proper manner and their execution is made effective; to constitute Town and Country Planning Authority for proper implementation of town and country development plan; to provide for the development and administration of special areas through Special Area Development Authority; to make provision for the compulsory acquisition of land required for the purpose of the development plans and for purposes connected with matters aforesaid". Chapter VIII of the Act, consisting of Ss. 64 to 71, is entitled "Special Areas". S. 64 empowers the State Government to declare any area as a special area by issuing a notification. S. 65 provides that for every Special Area there shall be a Special Area Development Authority consisting of a Chairman and such other members as the Government may determine from time to time. The Chairman and the members of the Development Authority are appointed by the Government. S. 68, which prescribes the functions of the Development Authority, lays down by cls. (v) and (vi) that the

Development Authority shall make provision for the municipal services and municipal management of the Special Area. S. 69, by cls. (c) and (d), confers upon the Development Authority powers for the purpose of municipal administration and for the purpose of taxation. These two clauses of S. 69 and cls. (v) and (vi) of S. 68 were inserted in their present shape by Ordinance 26 of 1975 which came into force on Feb. 27, 1976. The Ordinance was replaced by the M. P. Nagar Tatha Gram Nivesh (Sanshodhan) Adhiniyam, 1976 (6 of 1976).

3. Section 69 (d) of the Act of 1973 reads thus:

"69. Powers: The Special Area Development Authority shall —

(d) for the purpose of taxation have the powers which a municipal corporation or a municipal council has as the case may be, under the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956) or the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961). —

(a) where the municipal corporation or municipal council existed in such area prior to its designation as special area under Section 64, according to the municipal law by which such special area was governed; and

(b) where no municipal corporation or municipal council existed in such area prior to its designation as special area under Section 64, according to such of the aforesaid Acts as the State Government may direct."

Clauses (a) and (b) above are sub-clauses of cl. (d). (They should better have not been so numbered alphabetically since the main clauses themselves are similarly numbered).

4. Since there was no Municipal Corporation or Municipal Council in the Korba Special Area prior to the constitution of the Development Authority, the Government was required under sub-cl. (b) above to direct whether the M. P. Municipal Corporation Act, 1956, or the M. P. Municipalities Act, 1961, shall apply to the Korba Special Area for the purposes of cls. (v) and (vi) of S. 68 and cls. (c) and (d) of S. 69. Such a direction was first issued by Notification dated Jan. 28, 1976 published in the Government Gazette, dated Feb. 27 1976 by which the Development Authority, Korba, was directed to exercise the powers and perform the functions of a class I Municipality constituted under

the M. P. Municipalities Act, 1961. This Notification became effective from Feb. 27, 1976 from which date Ordinance No. 26 of 1975 was made effective. By another Notification, dated Mar. 15, 1977, published in Government Gazette dated July 15, 1977, the Development Authority, Korba, was directed under the aforesaid clauses of Ss. 68 and 69 to exercise the powers and perform the functions under the M. P. Municipal Corporation Act, 1956.

5. S. 127 (1) (i) of the M. P. Municipalities Act, 1961 empowers a municipal council to impose, in the whole or any part of the municipality "a tax payable by the owners of houses, buildings or lands situated within the limits of Municipality with reference to annual letting value of the house, building or land called property tax". The corresponding provision in the M. P. Municipal Corporation Act, 1956 is S. 132 (1) (a). It says that "the Corporation shall impose a tax payable by the owners of buildings or lands situated within the city with reference to the gross annual letting value of the building or land called the property tax". The procedure for imposition of taxes is contained in S. 129 of the Municipalities Act and S. 133 of the Municipal Corporation Act.

6. In 1964, the M. P. State Legislature had enacted the M. P. Nagariya Sthawar Sampatti Kar Adhiniyam, which was made applicable to the whole State, including the urban areas. By S. 36 of the aforesaid Adhiniyam, local authorities were prohibited from recovering the property tax from Nov. 24, 1970.

7. Towards the beginning of 1976, the Government decided to abolish octroi tax and to impose in its place a 'tax on the entry of goods'. To compensate the municipal councils and the municipal corporations for the loss arising from the abolition of the octroi tax, the Government decided to confer powers on these bodies for levying property tax. For conferring powers to levy tax on the entry of goods in place of octroi tax, the M. P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhyadesh, 1976 (6 of 1976) was promulgated. For conferring powers to levy property tax, Ordinance No. 4 of 1976 was promulgated. Both of these Ordinances were published in the M. P. Gazette, dated Apr. 30, 1976 from which date they came into force. Ordinance No. 4 of 1976 inserted certain pro-

visions in the Municipalities Act and the Municipal Corporation Act. This Ordinance was replaced by Act No. 50 of 1976. By S. 1 (2) of that Act, the provisions inserted in the Municipalities Act and the Municipal Corporation Act, with which we are concerned, were deemed to have come into force with effect from Apr. 1, 1976. S. 127A which was inserted in the Municipalities Act for imposition of property tax reads as follows, in so far as relevant:

"127A. (1) Notwithstanding anything contained in this chapter, as and from the financial year 1976-77, there shall be charged, levied and paid for each financial year a tax on the lands or buildings or both situate in a municipality other than class IV municipality at the rate specified in the table below:—

- | | |
|---|--|
| (i) where the annual letting value exceeds Rs. 1800/- but does not exceed Rs. 6,000/- | 6 per centum of the annual letting value. |
| (ii)-(iv) x x x x x x | |
| (v) where the annual letting value exceeds Rs. 24,000/- | 20 per centum of the annual letting value. |

(2) The property tax levied under subsection (1) shall not be leviable in respect of the following properties, namely:

(a) buildings and lands owned by or vesting in —

- (i) the Union Government;
- (ii) the State Government;
- (iii) the Council."

Similar provisions were inserted in Ss. 135 and 136 of the Municipal Corporation Act.

8. On June 24, 1976, respondent 1 (the Special Area Development Authority, Korba) entered into an agreement with the appellant company under which the Company agreed to contribute a sum of Rupees three lakhs annually to the "seed capital" of the Authority in consideration of the Authority agreeing not to exercise its power of taxation or of levying any other charges on the assets and activities of company under the Act of 1973 as amended from time to time or under any other Act or notification. The agreement was to remain in force for a period of ten years beginning from the calendar year 1976 and the annual payments due from 1977 were to be made in January every year. The appellant Company paid the contribution

for the year 1976 as agreed. In the same year, the Company was called upon by the Sales Tax authorities to pay the tax on entry of goods which was introduced in substitution of the octroi tax. While the Company was pursuing that matter with the State Government, contending that it was not liable to pay the entry tax by reason of the aforesaid agreement, on Jan. 4, 1977 respondent 1 made a further demand of Rs. 3 lakhs on the Company for contribution for the year 1977. That amount not having been paid as provided in the agreement, respondent 1 terminated the agreement by its letter dated Feb. 4, 1977. The Company sent a cheque for Rs. 3 lakhs to respondent 1 on Apr. 28, 1977.

9. By a notice issued under S. 65 of the Act of 1973 on Feb. 21, 1977 and by another notice issued under S. 164 (3) of the M. P. Municipalities Act 1961 on Apr. 15, 1977, the Chief Executive Officer of respondent 1 called upon the Company to pay a sum of Rs. 13,22,160 by way of property tax for the year 1976-77. By a letter dated May 21, 1977 respondent 1 reduced the demand by Rs. 3 lakhs being the amount paid by the Company by way of contribution for the year 1977, under the agreement of 1976. On July 16, 1977 the Company was called upon to pay a further sum of Rs. 13,65,673.50 as property tax for the year 1977-78.

10. The appellant Company disputed its liability to pay the aforesaid amounts on the grounds, principally, that no tax was leviable on its property since the Company was owned wholly by the Government of India and that respondent 1 was estopped from levying the property tax by reason of the agreement of 1976. Having failed to persuade respondent 1 to accept its point of view, the Company filed a Writ Petition in the Madhya Pradesh High Court asking that the demands be quashed, Civil Appeal No. 213 of 1979 by special leave is directed against the dismissal of the Writ Petition.

10A. In the other two appeals (Nos. 1025 and 1026 of 1978), the appellant, Western Coalfields Ltd., is also a hundred per cent undertaking of the Government of India. That Company has been called upon by respondent 1 to pay property tax for the years 1976-77 and 1977-78 in the sum of Rs. 3,71,461 for each year. The Writ Petitions (61 and 62 of 1978) filed by it were dismissed by the

High Court, following the judgment delivered in the Writ Petition filed by the Bharat Aluminium Company Ltd.

11. Civil Misc. Petitions Nos. 13211 of 1979 and 3767 of 1980 are for intervention by the Jammu and Kashmir State Agro Industries Corporation Ltd. and the Delhi Municipal Corporation respectively. The Delhi High Court has held in L. P. A. 105 of 1979 that the Delhi Municipal Corporation has the power to levy property-tax on the property of the Jammu and Kashmir State Agro Industries Corporation Ltd., whose share capital is owned by the State of Jammu and Kashmir and the Union of India in the proportion of 51% and 49% respectively. In Special Leave Petition No. 10688 of 1979 filed against that judgment, the question raised is whether the property of a public corporation owned wholly by the State Government and the Union Government is exempt from taxes by reason of Arts. 285 and 289 of the Constitution. We have allowed both the parties to intervene in these appeals.

12. The learned Attorney General, who appears on behalf of the appellants, has raised four or five principal points, any one of which, if accepted, will result in the success of these appeals. However, we are unable to accept any of these.

13. The first contention of the learned Attorney General is that respondent 1 can exercise only such powers to levy property tax as the Municipal Corporation or the Municipal Council had under the M. P. Municipal Corporation Act, 1956, or the M. P. Municipalities Act, 1961, as these Acts stood on Feb. 27, 1976, when Cl. (d) was inserted in its present form in S. 69 of the Act of 1973. It is urged that the provisions conferring powers of taxation under the aforesaid two Acts must be taken to have been incorporated in S. 69 (d) of the Act of 1973 and any subsequent change in those provisions by amendment of the two Acts cannot be availed of by respondent 1. S. 127A and S. 135 which, by their own force, create and levy the charge of property tax were inserted in the Municipalities Act and the Municipal Corporation Act respectively with effect from Apr. 1, 1976, that is subsequent to the insertion of Cl. (d) in S. 69 of the Act of 1973. Relying on this, it is argued that respondent 1 was incompetent to exercise the powers of the Municipality or the Municipal Corporation under S. 127A

of the Municipalities Act or S. 135 of the Municipal Corporation Act.

14. The answer to this contention will depend mainly upon whether the provisions of the Municipalities Act and the Municipal Corporation Act were incorporated into the Act of 1973 by its S. 69 (d). It is well settled that if an earlier legislation is incorporated into a later legislation, the provisions of earlier law which are incorporated into the later law become a part and parcel of the later law. Therefore, amendments made in the earlier law after the date of incorporation cannot, by their own force, be read into the later law. That is because the legislature, which adopts by incorporation the existing provisions of another law, cannot be assumed to intend to bind itself to all future amendments or modifications which may be made in the earlier law. In other words, the incorporating Act does nothing more than borrow certain provisions of an existing Act and instead of setting out, verbatim, those provisions in its own creation, refers to them as a matter of convenience in the mode of drafting. (See Secretary of State for India in Council v. Hindusthan Co-operative Insurance Society Ltd., (1931) 58 Ind App 259: (AIR 1931 PC 149); Craies on Statute Law, 7th Edition, pages 360-361).

15. The principle, broadly, is that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second (see Clarke v. Bradlaugh (1881) 8 QBD 63 (69)). Likewise, logically, where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it. (see Secretary of State for India in Council v. Hindusthan Co-operative Insurance Society Ltd. (1931) 58 Ind App 259: (AIR 1931 PC 149)). But these rules are not absolute and inflexible. In the case last cited, the Privy Council qualified its statement of the law by saying that the principle, that an amendment of the first law which is not expressly made applicable to the subsequent incorporating Act cannot be deemed to be incorporated into the second Act, applies "if it is possible for the subsequent Act to function effectually without the addition" (page 267) (of Ind App) (at p. 152 of AIR). Besides,

as held by a Constitution Bench of this Court in the Collector of Customs, Madras v. Nathella Sampathu Chetty (1962) 3 SCR 786: (AIR 1962 SC 316) the decision of the Privy Council could not be extended too far so as to cover every case in which the provisions of another statute are adopted by absorption (see page 837) (of SCR) (at p. 336 of AIR). Finally, in State of M. P. v. M. V. Narasimhan (1976) 1 SCR 6: (AIR 1975 SC 1835) this Court held, after an examination of the relevant decisions, that the broad principle that where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act, is subject to four exceptions, one of which is that the principle will not apply to cases "where the subsequent Act and the previous Act are supplemental to each other".

16. Applying these principles, we are of the opinion that in the instant case, subsequent amendments made to the Municipal Corporation Act and the Municipalities Act will also apply to the power of taxation provided for in S. 69 (d) of the Act of 1973. The Act of 1973 did not, by S. 69 (d), incorporate in its true signification any particular provision of the two earlier Acts. It provides that, for the purpose of taxation, the Special Area Development Authority shall have the powers which a Municipal Corporation or a Municipal Council has under the M. P. Municipal Corporation Act, 1956 or the M. P. Municipalities Act, 1961. The case therefore is not one of incorporation but of mere reference to the powers conferred by the earlier Acts. As observed in Nathella Sampathu Chetty. (AIR 1962 SC 316) there is a distinction between a mere reference to or a citation of one statute in another and an incorporation which in effect means the bodily lifting of the provisions of one enactment and making them part of another, so much so that the repeal of the former leaves the later wholly untouched. S. 69 (d) of the Act of 1973 must accordingly be read to mean that respondent 1 shall have all the powers of taxation which a Municipal Corporation or a Municipal Council has for the time being, that is to say, at the time when respondent 1 seeks to exercise those powers.

17. The Act of 1973 does not provide for any independent power of taxation or any machinery of its own for exercising the power of taxation. It rests content by pointing its finger to the provisions contained in the two Municipal Acts. The three Acts are therefore supplemental, from which it must follow that amendments made to the earlier Acts after the enactment of S. 69 (d) shall have to be read into that section. Without recourse to such a construction, the power of taxation conferred by that section will become ineffectual. A reading of the reference to the two earlier Municipal Acts as a reference to those Acts as they stand at the time when the power of taxation is sought to be exercised by respondent 1, will not, possibly, cause repugnancy between the two earlier Acts on one hand and the Act of 1973 on the other, nor indeed will it cause any confusion in the practical application of the earlier Acts, because the Act of 1973 does not contain any independent provision or machinery for exercising the power of taxation. The first contention of the Attorney General must therefore fail.

18. The second contention is that assuming that S. 127A of the Municipalities Act or S. 135 of the Municipal Corporation Act, which were introduced by an amendment made after the enactment of S. 69 (d), can be invoked for levying the property tax, respondent 1 cannot impose the tax without following the procedure prescribed by Ss. 129 and 133 of the aforesaid Acts, respectively. This contention is devoid of substance. Ss. 127A and 135 create, by their own force, the liability to be brought to property tax and the right to levy that tax. They provide:

"Notwithstanding anything contained in this chapter, as and from the financial year 1976-77, there shall be charged, levied and paid for each financial year tax on the lands or buildings or both at the rate specified in the table below:"

Nothing further is required to be done by the Municipality or the Municipal Corporation in order to impose the property tax and therefore the procedure preliminary to the imposition of other taxes which is prescribed by Ss. 129 and 133 of the two Acts, can have no application to the imposition of the property tax. Apart from this, the position is put beyond doubt by the language of Ss. 129 and 133 of the two Acts. S. 129 of the

M. P. Municipalities Act prescribes the procedure for "the imposition of any tax under S. 127". Similarly S. 133 of the M. P. Municipal Corporation Act prescribes the procedure for "the imposition of any tax under S. 132". The property tax is imposed by respondent 1 under S. 127A of the Municipalities Act and S. 135 of the Municipal Corporation Act. It is not imposed under S. 127 of the former Act or S. 132 of the latter Act. It is therefore not necessary to follow the procedure prescribed by Ss. 129 and 133 of the respective Acts. This position is made clear, out of abundant caution, by cl. (4) of S. 133 of the Municipal Corporation Act, which provides that nothing contained in S. 133 shall apply to the tax mentioned in cl. (a) of subsec. (1) of S. 132, which shall be charged and levied in accordance with S. 135. S. 132 (1) (a) refers to property tax.

19. The learned Attorney General contends that the taxing authority must all the same apply its mind to the question whether it wants to bring to tax the land or the building or both. It is not possible to accept this submission because Ss. 127A and 135 of the two Acts in question leave no such choice open to the taxing authority. The obligation which the statute places upon it is to impose tax on lands where there are lands only and they can be taxed, on buildings where buildings alone can be brought to tax and on both lands and buildings where lands are built upon and both can be brought to tax. This is not, as said by the Attorney General, rationalising the taxing power. What we have said is the plain meaning of the taxing provision.

20. The third contention of the Attorney General flows from the provisions of Art. 285 (1) of the Constitution which says that the property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State. Sec. 127A (2) of the M. P. Municipalities Act and S. 136 of the M. P. Municipal Corporation Act also provide that the property tax shall not be leviable, inter alia, on "buildings and lands owned by or vesting in the Union Government". Relying on these provisions, it is contended by the Attorney General that since the appellants are wholly owned by the Government of India, the lands and

buildings owned by the companies cannot be subjected to property tax. The short answer to this contention is that even though the entire share capital of the appellant companies has been subscribed by the Government of India it cannot be predicated that the companies themselves are owned by the Government of India. The companies, which are incorporated under the Companies Act, have a corporate personality of their own, distinct from that of the Government of India. The lands and buildings are vested in and owned by the companies, the Government of India only owns the share capital. In *Rustom Cavasjee Cooper v. Union of India* (1970) 3 SCR 530, 555 : (AIR 1970 SC 564 at p. 584) (The Banks Nationalisation case) it was held:

"A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the profit."

21. In *Heavy Engineering Mazdoor Union v. The State of Bihar*, (1969) 3 SCR 995 : (AIR 1970 SC 82) the Heavy Engineering Corporation Limited was incorporated under the Companies Act and its entire share capital was contributed by the Central Government. It was therefore a Government Company under S. 617 of the Companies Act. On the question as to whether the Corporation carried on an industry under the authority of the Central Government within the meaning of S. 2 (a) of the I. D. Act, 1947, it was held by this Court that an incorporated company has a separate existence and the law recognises it as a juristic person, separate and distinct from its members. The mere fact that the entire share capital of the respondent company was contributed by the Central Government and the fact that all its shares were held by the President and certain officers of the Central Government did not make any difference to that position.

21A. The decision of this Court in the *Andhra Pradesh State Road Transport Corporation v. Income-tax Officer*, (1964) 7 SCR 17 : (AIR 1964 SC 1486) puts the matter beyond all doubt. In that case,

the Andhra Pradesh Road Transport Corporation claimed exemption from taxation under Art. 289 of the Constitution by which, the property and income of a State is exempt from Union taxation. This Court, while rejecting the Corporation's claim, held that though it was wholly controlled by the State Government it had a separate entity and its income was not the income of the State Government. Gajendragadkar, C. J. while speaking for the Court, referred to the judgment of Lord Denning in *Tamlin v. Hansford* 1950 KB 18 in which the learned Judge observed:

"In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a Government department nor do its powers fall within the province of Government".

In Pennington's Company Law, 4th Edition, pages 50-51, it is stated that there are only two decided cases where the court has disregarded the separate legal entity of a company and that was done because the company was formed or used to facilitate the evasion of legal obligations. The learned author, after referring to English and American decisions, has summed up the position in the words of an American Judge, Sanborn, J. to the effect that as a general rule, a corporation will be looked upon as a legal entity and an exception can be made "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime", in which case, "the law will regard the corporation as an association of persons". In cases such as those before us, there is no scope for applying the doctrine of lifting the veil in order to have regard to the realities of the situation. The appellant companies were incorporated under the Companies Act for a lawful purpose. Their property is their own and it vests in them. Under S. 5 (1) of the Coal Mines (Nationalisation) Act, 26 of 1973, which applies in the instant case, the right, title and interest of a nationalised coal mine vest, by direction of the Central

Government, in the Government company. If the lands and building on which respondent 1 has imposed the property tax cannot be regarded as the property of the Central Government for several other purposes like attachment and sale, there is no reason why, for taxing purposes, the property can be treated as belonging to that Government as distinct from the company which has a juristic personality.

22. The learned Attorney General resisted the taxation on the lands by contending that they belong to the M. P. State Government and were taken on lease for a period of 30 years by the appellants companies. It is urged that if at all the lands can be subjected to property tax, it is the State Government and not the appellants companies who can be called upon to pay that tax. This contention does not appear to have been taken before the assessing authority. No documents seem to have been filed before it to bear out facts which are sought to be placed before us nor indeed have we evidence before us to show that the lands belong to the State Government. The appellants may if so advised, raise this particular point in future assessments. We would, however, like to draw attention to the Explan. to Section 147 of the M. P. Municipalities Act which says that though the property tax has to be paid by the owner of the land or building, as the case may be, for the purposes of that section a tenant of land or building or both, who holds the same under a lease for an agreed period with a covenant for its renewal thereafter, shall be deemed to be the owner thereof. Section 141 (1) of the M. P. Municipal Corporation Act provides that the property tax shall be paid primarily by the owner. By subsection (2) of Section 141, the property tax levied on the owner can also be recovered from the occupier of the land or the building. These provisions shall have to be borne in mind by the appellants before any attempt is made before the assessing authority to transfer or avoid the impost of the property tax.

23. Finally, the learned Attorney General raised a contention of fundamental importance which was not raised in the High Court. The lands and buildings on which respondent 1 has imposed the property tax are used for the purposes of and are covered by coal

mines. Basing himself on that consideration the Attorney General argues:

(1) By virtue of the declaration contained in Sec. 2 of the Mines and Minerals (Development and Regulation) Act, 1957, the legislative field covered by Entry 23, List II passed on to the Parliament by virtue of Entry 54, List I.

(2) The Parliament enacted the Coal Mines Nationalisation Act, 1973 for acquisition of coal mines with a view to reorganising and reconstructing such coal mines so as to ensure the rational, co-ordinated and scientific development and utilisation of coal resources as best to subserve the common good.

(3) Under Sec. 5 of the Nationalisation Act, the acquired properties were vested in a Government Company in order to carry out more conveniently the object of that Act and for that purpose the properties were freed from all encumbrances by Section 6 of the Act.

(4) The taxing power of the State legislature must be construed as limited in its scope so as not to come in conflict with the power and function of the Union to regulate and develop the mines as envisaged by the Nationalisation Act.

(5) The impugned tax is manifestly an impediment in the discharge of the aforesaid function since it substantially increases the cost of the developmental activities. The tax is not in the nature of a fee.

24. Apart from the fact that there is no data before us showing that the property tax constitutes an impediment in the achievement of the goals of the Coal Mines Nationalisation Act, the provisions of the M. P. Act of 1973, under which Special Areas and Special Area Development Authorities are constituted afford an effective answer to the Attorney General's contention. Entry 23 of List II relates to "Regulation of Mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union," Entry 54 of List I relates to "Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest". It is true that on account of the declaration contained in S. 2 of the Mines and Minerals (Development and Regulation) Act 1957 the legislative field covered by Entry 23 of List II will pass on to Parliament by virtue of Entry 54.

List I. But in order to judge whether on that account, the State legislature loses its competence to pass the Act of 1973, it is necessary to have regard to the object and purpose of that Act and to the relevant provisions thereof, under which Special Area Development Authorities are given the power to tax lands and buildings within their jurisdiction. We have set out the objects of the Act at the commencement of this judgment, one of which is to provide for the development and administration of Special Areas through Special Area Development Authorities. Section 64 of the Act of 1973, which provides for the constitution of special areas lays down by sub-section (4) that : Notwithstanding anything contained in the M. P. Municipal Corporation Act, 1956, the M. P. Municipalities Act, 1961, or the M. P. Panchayats Act, 1962, the Municipal Corporation, Municipal Council, Notified Area Committee or a Panchayat, as the case may be, shall in relation to the Special area and as from the date the Special Area Development Authority undertakes the functions under clause (v) or clause (vi) of Sec. 68 cease to exercise the powers and perform the functions and duties which the Special Area Development Authority is competent to exercise and perform under the Act of 1973. Section 68 defines the functions of the Special Area Development Authority, one of which, as prescribed by clause (v), is to provide the Municipal services as specified in Sections 123 and 124 of the M. P. Municipalities Act, 1961. Section 69 which defines the powers of the Authority, shows that those powers are conferred, inter alia, for the purpose of municipal administration. Surely, the functions, powers and duties of Municipalities do not become an occupied field by reason of the declaration contained in Section 2 of the Mines and Minerals (Development and Regulation) Act, 1957. Though, therefore, on account of that declaration, the legislative field covered by Entry 23, List II may pass on to the Parliament by virtue of Entry 54, List I, the competence of the State Government to enact laws for municipal administration will remain unaffected by that declaration.

25. Entry 5 of List II relates to "Local Government, that is to say, the constitution and powers of municipal corporations and other local authorities for the purpose of local self-Government". It is in pursuance of this power that the State

Legislature enacted the Act of 1973. The power to impose tax on lands and buildings is derived by the State Legislature from Entry 49 of List II: "Taxes on lands and buildings". The power of the Municipalities to levy tax on lands and buildings has been conferred by the State Legislature on the Special Area Development Authorities. Those Authorities have the power to levy that tax in order effectively to discharge the municipal functions which are passed on to them. Entry 54 of List I does not contemplate the taking over of municipal functions.

26. Shri Dharmadhikari, who appears on behalf of the respondents, has drawn our attention to the judgment of a Constitution Bench of this Court in *H. R. S. Murthy v. Collector of Chittoor* (1964) 6 SCR 666: (AIR 1965 SC 177), which provides a complete answer to the Attorney General's contention. In that case, under the terms of a mining lease, the lessee worked the mines and bound himself to pay a dead rent if he used the leased land for the extraction of iron ore and to pay surface rent in respect of the surface area occupied or used by him. Demands were made upon the lessee for successive years for the payment of land cess under Secs. 78 and 79 of the Madras District Boards Act, 1920. Those demands were challenged by the lessee on the ground, inter alia, that the provision imposing the land cess quoad royalty under the mining leases must be held to have been repealed by the Central Act viz. the Mines and Minerals (Regulation and Development) Act, 1948, and the Mines and Minerals (Regulation and Development) Act, 1957. This contention was repelled by this Court by holding that Sections 78 and 79 of the Madras District Boards Act had nothing to do with the development of mines and minerals or their regulation. The proceeds of the land cess were required to be credited to the District fund which had to be used for everything necessary for or conducive to the safety, health, convenience or education of the inhabitants or the amenities of the local area concerned. It was further held by the Court that the land cess was not a tax on mineral rights but was in truth and substance a "tax on lands" within the meaning of Entry 49 of the State List. The reasoning adopted in this decision shows that it is not correct to say that the property tax provided for in the Act of

1973 is beyond the legislative competence of the State Legislature; that tax has nothing to do with the development of mines. The power conferred by the State Legislature on Special Area Development Authorities to impose the property tax on lands and buildings is therefore not in conflict with the power conferred by the Coal Mines Nationalisation Act on the Union Government to regulate and develop the Coal mines so as to ensure rational and scientific utilisation of coal resources. The paramount purpose behind the declaration contained in Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957 is not in any manner defeated by the legitimate exercise of taxing power under Section 69 (d) of the Act of 1973.

27. The decision of this Court in *Bainath Kedia v. State of Bihar* (1970) 2 SCR 100: (AIR 1970 SC 1436), on which the learned Attorney General relies, is distinguishable. In that case, the Bihar Government demanded dead rent, royalty and surface rent from the appellant contrary to the terms of his lease on the strength of the amended Section 10 (2) of the Bihar Land Reforms Act, 1950, and the amended Rule 20 of the Bihar Rules. This Court held that the pith and substance of the amended Section 10 (2) fell within Entry 23 although it incidentally touched land and that, therefore, the amendment was subject to the overriding power of Parliament as declared in Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957. By the aforesaid declaration and the enactment of Section 15, the whole of the field relating to minor minerals had come within the jurisdiction of Parliament and no scope was left for the enactment of the second proviso to Section 10 of the Bihar Land Reforms Act. The second sub-rule added to Rule 20 was held to be without jurisdiction for the same reason.

28. That the declaration in Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957 does not result in invalidation of every State legislation relating to mines and minerals is demonstrated effectively by the decision in *State of Haryana v. Chanan Mal* (1976) 3 SCR 688: (AIR 1976 SC 1654). The Haryana State Legislature passed the Haryana Minerals (Vesting of Rights) Act 1973, under which two notifications

were issued for acquisition of right to saltpetre, a minor mineral, and for auctioning certain saltpetre bearing areas. It was held by this Court that the Haryana Act was not in any way repugnant to the provisions of the Act of 1957 made by Parliament and that the ownership rights could be validly acquired by the State Government under the State Act.

29. The decision of a Constitution Bench of this Court in *Ishwari Khetan Sugar Mills (P.) Ltd. v. State of U. P.* (1980) 3 SCR 331: (AIR 1980 SC 1955), is even more to the point. In that case, 12 sugar undertakings stood transferred to and were vested in a Government undertaking under the U. P. Sugar Undertakings (Acquisition) Ordinance, 1971, which later became an Act. It was contended on behalf of the sugar undertakings that since sugar is a declared industry under the Industries (Development and Regulation) Act, 1951, Parliament alone was competent to pass a law on the subject and the State Legislature had no competence to pass the impugned Act by reason of Entry 52, List I read with Entry 24, List II. The majority, speaking through one of us, Desai J., held that the legislative power of the State under Entry 24, List II, was eroded only to the extent to which control was assumed by the Union Government pursuant to the declaration made by the Parliament in respect of a declared industry and that the field occupied by such enactment was the measure of the erosion of the legislative competence of the State legislature. Since the Central Act was primarily concerned with the development and regulation of declared industries and not with ownership of industrial undertakings, it was held that the State legislature had the competence to enact the impugned law. Justice Pathak and Justice Koshal, who gave a separate judgment concurring with the conclusion of the majority, preferred to rest their decision on the circumstance that the impugned legislation fell within Entry 42, List III — 'Acquisition and requisition of property' — and was therefore within the competence of the State legislature.

30. These are the main points argued by the learned Attorney General on behalf of the appellant Companies. In the High Court, an additional point was taken, based upon the agreement dated

June 24, 1976, which was entered into between the appellant Companies and respondent 1. It was contended in the High Court that respondent 1 had waived its power of taxation by that agreement and, therefore, the imposition of property tax was invalid. The High Court has given weighty reasons for rejecting that argument and we endorse those reasons. We adopt, particularly, the reasoning of the High Court that in the meeting of January 29, 1976, respondent 1 had decided to give up its right to impose the octroi tax only. The Chairman of respondent 1, therefore, acted beyond the scope of his authority in entering into the agreement with the appellant Companies, under which respondent 1 bound itself not to impose any tax whatsoever.

31. For these reasons the appeals fail and are dismissed with costs.

Appeals dismissed.

AIR 1982 SUPREME COURT 709

(From : Bombay)

Y. V. CHANDRACHUD, C. J.,
A. VARADARAJAN AND
AMARENDRA NATH SEN, JJ.

Civil Appeal No. 1795 of 1981, D/-
18-11-1981.

Kamlabai, Appellant v. Bhikchand
Kishanlal, Respondent.

Civil P. C. (5 of 1908), S. 51, O. 21,
R. 35 (3) — Decree for eviction — Execution of — Notice by Court to tenant to remove his machinery lying in the premises — Tenant not complying with notice — Removal of machinery by Court — Machinery lying in court for 4 years — Auction sale of machinery by Court thereafter — Application by tenant subsequently, for possession of machinery — Held, tenant had no right whatsoever to the machinery sold to the auction purchaser in accordance with law — Plea of tenant that machinery was sold at gross undervalue could not be entertained in the absence of any material. (Paras 5, 6)

CHANDRACHUD, C. J.:— Respondent No. 1 Balkisan and his step-brother Hanumandas (who is now represented by respondent 2), were joint owners of a structure admeasuring approximately 48' x 27' at Dhule, Maharashtra. The appellant's husband Mangaldas Chunilal, who was in possession thereof as a tenant, was conducting a flour mill in the said

premises. Respondent No. 1 filed Suit No. 247 of 1965 against Mangaldas asking for possession of the particular portion of the property which had fallen to his share. Radhabai, the step-mother of Hanumandas, also filed a suit for eviction of Mangaldas in respect of the portion which had fallen to Hanumandas' share. That was Suit No. 234 of 1966. That suit was decreed by the trial court and the decision therein, not having been appealed from, has become final. The trial court had decreed Suit No. 247 of 1965 filed by respondent No. 1 also. Mangaldas filed an appeal against that decree and he succeeded in the District Court which allowed the appeal and dismissed the suit. Respondent No. 1, however, filed Spl. Civil Appln. No. 2685 of 1967 in the High Court of Bombay which was allowed and respondent 1's suit for eviction was decreed.

2. Respondent No. 1 applied for execution of the decree obtained by him and, in 1971, he succeeded in obtaining possession of the suit premises. It appears that there were certain moveable properties in the premises, consisting of parts of the flour mill which the appellant's husband was running. A notice was given to the appellant by the execution court, her husband having died in the meanwhile, to remove those moveables, but she did not do so. The moveables were then removed to the court where they were lying from 1971 till 1975. In about 1975, they were sold in an auction to respondent No. 2 for Rs. 1,851.

3. The appellant then took proceedings in the Court of the learned Joint Civil Judge, Dhule, against respondent No. 1, praying that she should be put back in possession of the premises as well as the machinery. That application was taken through all its stages and ultimately, Civil Revision Application No. 521 of 1979 filed by her was dismissed by the High Court. The appellant took similar proceedings against respondent No. 2 which were also dismissed eventually by the High Court.

4. Being aggrieved by the common judgment dated Feb. 29, 1980 delivered by the High Court in the two Revision Applications, the appellant has filed this appeal by special leave. Special leave to appeal was dismissed against respondent No. 1 and leave was granted against respondent No. 2 only. Respondent No. 2 has not appeared in the present proceedings.

5. We have done our utmost to see whether some relief can be granted to the appellant who is in impecunious circumstances, but we find it impossible to do so. Her grievance is that the machinery which was removed from the premises was of the value of about Rs. 25,000 but was sold to respondent No. 2 for a paltry sum of Rs. 1,851. Her contention has been rejected by all the courts and frankly, we are unable to see any reason, on the basis on which her contention can at all be accepted. She was given due notice to remove the machinery which she failed to do. In fact, she declined to accept the notice. The machinery was thereafter removed to the court premises where it was lying for nearly four years. There is no material on the record whatsoever on the basis of which we could come to the conclusion that the machinery was purchased by respondent No. 2 at a gross undervalue. If we were to direct that respondent No. 2 should be asked to bring back the machinery, it will, in all probability, be in a far worse condition than it was in when it was purchased by him in 1975. The appellant would undoubtedly be entitled to withdraw the sale proceeds of Rs. 1,851 which are still lying in the court and all we can do is to direct that the aforesaid amount shall be paid to her forthwith.

6. We are thankful to Shri Misra, who appears for the appellant as an amicus curiae on behalf of the Supreme Court Legal Aid Society. He says that respondents Nos. 1 and 2 should be called upon to pay a reasonable sum, ex gratia, to the appellant. We do not think that we can call upon the respondents to pay any such amount to the appellant. If the appellant had even the semblance of a right to the relief claimed by her, it may have been possible to persuade the respondents to contribute to the costs incurred by her. But we find that the appellant has no right whatsoever to the machinery which has been sold to respondent No. 2 in accordance with law.

7. Regretfully, therefore, we have to dismiss the appeal which we hereby do. There will be no order as to costs.

8. We exempt the appellant from payment of court-fees.

Appeal dismissed.

AIR 1982 SUPREME COURT 710

= 1982 Cri. L. J. 340

W. V. CHANDRACHUD, C. J., P. N. BHAGWATI, A. C. GUPTA, V. D. FULZAPURKAR AND D. A. DESAI, JJ.*

Writ Petns. Nos. 5724, 5874 and 5433 of 1980, D/- 28-12-1981.

A. K. Roy, Petitioner v. Union of India and another, Respondents.

And

Than Singh Tyagi, Petitioner v. Union of India and another, Respondents.

And

Dr. Vasant Kumar Pandit, Petitioner v. Union of India, Respondent.

(A) Constitution of India, Arts. 13, 123, 357, 367 — Power to issue Ordinances — Legislative and not executive in character.

An ordinance made by the President is not an executive act. An ordinance issued by the President or the Governor is as much law as an Act passed by the Parliament and is, fortunately and unquestionably, subject to the same inhibitions. It is not true to say that, under our Constitution, the exercise of legislative power by the legislature properly so-called is the only source of law. Ordinances issued by the President and the Governors and the laws made by the President or his delegate under Article 357 (1) (a) partake fully of legislative character and are made in the exercise of legislative power, within the contemplation of the Constitution. AIR 1970 SC 564, Rel. on. (Paras 15 and 16)

(B) Constitution of India, Arts. 21, 123 (2), 367 (2) — Ordinance is "law" within meaning of Art. 21.

Per Majority (Gupta, J. dissenting)—

An ordinance is law within the meaning of Art. 21. The contention that the word 'law' in Article 21 must be construed to mean a law made by the legislature only and cannot include an Ordinance, contradicts directly the express provisions of Articles 123 (2) and 367 (2). Besides, if an Ordinance is not law within the meaning of Article 21, it will stand released from the wholesome and salutary restraint imposed upon the legislative power by Article 13 (2). The word 'established' is used in Article 21 in order to denote

*Note:— In this case the Judges of the Supreme Court differ in their views. The difference of opinion is mentioned in Pt. (B) and Pt. (J) of the Headnote.—Editor.

and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the precise extent of such deprivation. The fact that any particular law has a temporary duration is immaterial for the purposes of Article 21 so long as the procedure prescribed by it is definite and reasonably ascertainable. AIR 1962 SC 945; AIR 1962 SC 1517; AIR 1960 SC 932; AIR 1967 SC 212; AIR 1975 SC 1378; AIR 1967 SC 1639 and AIR 1959 SC 395, Rel. on. (Paras 18, 19, 22)

There is no substance in the argument that the Ordinance-making power, if extended to cover matters mentioned in Art. 21, will destroy the basic structure of the separation of powers as envisaged by the Constitution. In the first place, Art. 123 (1) is a part of the Constitution as originally enacted and secondly, our Constitution does not follow the American pattern of a strict separation of powers. (Para 23)

(C) Constitution of India, Arts. 123 and 356 — President's satisfaction under — Justiciability — Observations in AIR 1977 SC 1361, Held no longer good law in view of the 44th Constitution Amendment.

The question whether the pre-conditions of the exercise of the power conferred by Art. 123 are satisfied cannot be regarded as a purely political question. (Para 26)

It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction. Observations in AIR 1977 SC 1361, Held no longer good law in view of the 44th Constitution Amendment. (Para 27)

(D) Constitution of India, Pre. — Constitutional adjudication — Question of academic importance — Need not be decided.

The position is firmly established in the field of constitutional adjudication that the Court will decide no more than needs to be decided in any particular case. Abstract questions present interesting challenges, but it is for scholars and text-book writers to unravel their mystique. It is not for the Courts to decide questions which are but of academic importance. (Para 28)

(E) Constitution of India, Art. 123 — Power to issue Ordinance — Scope — Not confined to virgin land or fresh field only.

The Constitution does not impose by its terms any inhibition on the Ordinance-making power that it shall not be used to deal with a subject matter which is already covered by a law made by the Legislature. There is

no justification for imposing any such restriction on the Ordinance-making power, especially when an Ordinance, like any law made by the Legislature, has to comply with the mandate of Art. 13 (2). Besides, legislative activity, properly so-called, has proliferated so enormously in recent times that it is difficult to discover a virgin land or a fresh field on which the Ordinance-making power can operate, as if on a clean slate. To-day, there is possibly no subject under the sun which the Legislature has not touched. (Para 30)

(F) Constitution of India, Arts. 13 (2), 14, 19, 21 and 123 — Power to issue Ordinance — Effect — Articles 14, 19 and 21 not reduced to dead letters.

An Ordinance which is subject to the same constraints as a law made by the Legislature cannot in its practical operation, result, in the obliteration of Arts. 14, 19 and 21. The answer to such contention is to be found in the provisions contained in Art. 13 (2). (Para 31)

(G) Constitution of India, Arts. 21 and 22 — Preventive detention — Not basically impermissible under the Constitution.

It is evident that the power of preventive detention was conferred by the Constitution in order to ensure that the security and safety of the country and the welfare of its people are not put in peril. So long as a law of preventive detention operates within the general scope of the affirmative words used in the respective entries of the Union and concurrent lists which give that power and so long as it does not violate any condition or restriction placed upon that power by the Constitution, the Court cannot invalidate that law on the specious ground that it is calculated to interfere with the liberties of the people. (Paras 35, 37)

(H) Constitution of India, Art. 368 (2) — Constitution (44th Amendment) Act (1978), S. 1 (2) — No antithesis between Art. 368 (2) and S. 1 (2).

The amendments introduced by the 44th Amendment Act did not become a part of the Constitution on April 30, 1979. They will acquire that status only when the Central Government brings them into force by issuing a notification under S. 1 (2) of the Amendment Act. (Para 48)

There is no internal contradiction between the provisions of Article 368 (2) and those of S. 1 (2) of the 44th Amendment Act. Article 368 (2) lays down a rule of general application as to the date from which the Constitution would stand amended in accordance with the Bill assented to by the President.

Section 1 (2) of the Amendment Act specifies the manner in which that Act or any of its provisions may be brought into force.

(Para 47)

Just as a law duly passed by the legislature can have no effect unless it comes or is brought into force, similarly, an amendment of the Constitution can have no effect unless it comes or is brought into force. The fact that the Constituent body may itself specify a future date or dates with effect from which the Amendment Act or any of its provisions will come into force shows that there is no antithesis between Article 368 (2) and Section 1 (2) of the 44th Amendment Act. The expression of legislative or constituent will as regards the date of enforcement of the law or Constitution is an integral part thereof.

(Para 48)

(I) Constitution of India, Art. 368 (1) — Constitution (44th Amendment) Act (1978), S. 1 (2) — Section 1 (2) is not ultra vires.

Section 1 (2) of the 44th Amendment Act is not ultra vires the power of amendment conferred upon the Parliament by Art. 368 (1).

(Para 51)

It is true that the constituent power, that is to say, the power to amend any provision of the Constitution by way of an addition, variation or repeal must be exercised by the Parliament itself and cannot be delegated to an outside agency. That is clear from Article 368 (1) which defines at once the scope of the constituent power of the Parliament and limits that power to the Parliament. The power to issue a notification for bringing into force the provisions of a constitutional amendment is not a constituent power, because, it does not carry with it the power to amend the Constitution in any manner. It is, therefore, permissible to the Parliament to vest in an outside agency the power to bring a constitutional amendment into force.

(Para 50)

(J) Constitution of India, Art. 32 — Constitution (44th Amendment) Act (1978), Ss. 1 (2) and 3 — Amendment receiving assent of President — Notification, however, bringing into force S. 3 not issued by Central Govt. — Mandamus whether can be issued.

Per Majority (Gupta and Tulzapurkar, JJ. dissenting):—

The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the Court to compel the Government to do that which, according to the mandate of the Parliament, lies in the

discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive. If it were permissible to the Court to compel the Government by a mandamus to bring a constitutional amendment into force on the ground that the Government has failed to do what it ought to have done, it would be equally permissible to the Court to prevent the Government from acting, on some such ground as that, the time was not yet ripe for issuing the notification for bringing the amendment into force. It is difficult to appreciate what practical difficulty can possibly prevent the Government from bringing into force the provisions of Section 3 of the 44th Amendment, after the passage of two and half years. But the remedy is not the writ of mandamus. The Parliament having seen the necessity of introducing into the Constitution a provision like Sec. 3 of the 44th Amendment, it is not open to the Central Government to sit in judgment over the wisdom of the policy of that section. If only the Parliament were to lay down an objective standard to guide and control the discretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge the function assigned to it by the Parliament.

(Paras 52, 53)

(K) Constitution of India, Art. 14 — Constitution (44th Amendment) Act (1978), Section 1 (2) — Not violative of Art. 14 on the ground that it confers uncontrolled power on the Executive.

(Para 55)

(L) Constitution (44th Amendment) Act (1978), Ss. 1 (2) and 3 — Central Govt.'s failure to bring S. 3 into force — Not mala fide.

The Parliament has chosen to leave to the discretion of the Central Government the determination of the question as to the time when the various provisions of the 44th Amendment should be brought into force. Delay in implementing the will of the Parliament can justifiably raise many an eyebrow, but it is not possible to say on the basis of available data, that the Central Government is actuated by any ulterior motive in not bringing S. 3 into force.

(Para 56)

(M) National Security Act (65 of 1980), S. 3 (1) and (2) — Provisions cannot be struck down on ground of vagueness.

The concepts 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers', which are mentioned in Section 3 of the Act, are not of any great certainty or definiteness. But in the very nature of things they are difficult to define. Therefore provisions of Section 3 of the Act cannot be struck down on the ground of their vagueness and uncertainty. However, since the concepts are not defined, undoubtedly because they are not capable of a precise definition. Courts must strive to give to those concepts a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionality of clauses like those in S. 3, which are fraught with grave consequences to personal liberty, if construed liberally. (Para 64)

No person can be detained with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community unless, by a law, order or notification made or published fairly in advance, the supplies and services, the maintenance of which is regarded as essential to the community and in respect of which the order of detention is proposed to be passed, are made known appropriately, to the public. (Para 68)

(N) Constitution of India, Arts. 14, 19, 21 and 22 — National Security Act (65 of 1980), Pre. — Constitutionality — Act is not unconstitutional on the ground that by its nature it is generally violative of Arts. 14, 19, 21 and 22 of Constitution. (Para 71)

(O) National Security Act (65 of 1980), S. 3 (3) — Not invalid on ground of conferring of unreasonable powers upon District Magistrate or Commissioner of Police.

In view of the in-built safeguards, it cannot be said that excessive or unreasonable power is conferred upon the District Magistrate or the Commissioner of Police to pass orders under sub-section (2). (Para 73)

(P) National Security Act (65 of 1980), S. 5 — Detention in "such place" — Normal rule to be followed.

It is neither fair nor just that a detenu should have to suffer detention in "such place", as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the environs of his or her ordinary place of residence. Besides, keeping a person in detention in a place other than the

one where he habitually resides makes it impossible for his friends and relatives to meet him or for the detenu to claim the advantage of facilities like having his own food. The requirements of administrative convenience, safety and security may justify in a given case the transfer of a detenu to a place other than that where he ordinarily resides, but that can only be by way of an exception and not as a matter of general rule. Even when a detenu is required to be kept in or transferred to a place which is other than his usual place of residence, he ought not to be sent to any far off place which, by the very reason of its distance, is likely to deprive him of the facilities to which he is entitled. Immediately after a person is taken in custody in pursuance of an order of detention, the members of his household preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention, including the place where the detenu is transferred from time to time. (Paras 74, 75)

(Q) National Security Act (65 of 1980), S. 8 — Communication of grounds of detention — Period for — Normal rule.

The normal rule is that the grounds of detention must be communicated to the detenu without avoidable delay. It is only in order to meet the practical exigencies of administrative affairs that the detaining authority is permitted to communicate the grounds of detention not later than five days ordinarily, and not later than 10 days if there are exceptional circumstances. If there are any such circumstances, the detaining authority is required by S. 8 (1) to record its reasons in writing. (Para 76)

(R) National Security Act (65 of 1980), S. 13 — Maximum period of detention — Discretionary.

Any law of preventive detention has to provide for the maximum period of detention, just as any punitive law like the Penal Code has to provide for the maximum sentence which can be imposed for any offence. The fact that a person can be detained for the maximum period of 12 months does not place upon the detaining authority the obligation to direct that he shall be detained for the maximum period. The detaining authority can always exercise its discretion regarding the length of the period of detention. (Para 78)

(S) National Security Act (65 of 1980), S. 16 — Not invalid on ground of unwarranted protection to officers.

If an officer intends to pass an order in good faith, he will pass it in good faith and if he intends to pass the order mala fide he will pass it likewise. Moreover, an act which is not done in good faith will not receive the protection of S. 16 merely because it was intended to be done in good faith. It is also necessary that the act complained of must have been in pursuance of the Act. If the policy of a law is to protect honest acts, whether they are done with care or not, it cannot be said that the law is unreasonable. In fact, honest acts deserve the highest protection. Then again, the line which divides a dishonest act from a negligent act is often thin and, speaking generally, it is not easy for a defendant to justify his conduct as honest, if it is accompanied by a degree of negligence. The fact, therefore, that the definition contained in S. 3 (22) of the General Clauses Act includes negligent acts in the category of acts done in good faith will not always make material difference to the proof of matters arising in proceedings under S. 16 of the Act.

(Paras 79, 80)

(T) National Security Act (65 of 1980), S. 9 — Provisions as to constitution of Advisory Board in conformity of unamended Art. 22 (4) of Constitution — Not bad.

The question as to whether S. 9 is bad for the reason that it is inconsistent with the provisions of S. 3 of the 44th Amendment Act, has to be decided on the basis that Section 3, though a part of the 44th Amendment Act, is not a part of the Constitution. If Sec. 3 is not a part of the Constitution, it is difficult to appreciate how the validity of S. 9 can be tested by applying the standard laid down in that section. So long as Section 3 of the 44th Amendment Act has not been brought into force, Art. 22 (4) in its unamended form will continue to be a part of the Constitution and so long as that provision is a part of the Constitution, the amendment introduced by S. 3 of the 44th Amendment Act cannot become a part of the Constitution. The validity of the constitution of Advisory Boards has to be tested in the light of the provisions contained in Art. 22 (4) as it stands now and not according to the amended Art. 22 (4). According to that Article as it stands now, an Advisory Board may consist of persons, inter alia, who are qualified to be appointed as Judges of a High Court. Section 9 provides for the constitution of the Advisory Boards in conformity with that provision. It is impossible to hold that the provision of a statute, which conforms strictly with the existing provisions

of the Constitution, can be declared bad either on the ground that it does not accord with the provisions of a constitutional amendment which has not yet come into force, or on the ground that the provisions of the section are harsh or unjust. The standard which the Constitution, as originally enacted, has itself laid down for constituting Advisory Boards, cannot be characterised as harsh or unjust. (Para 82)

(U) Constitution of India, Art. 22 — National Security Act (65 of 1980), Ss. 10 and 11 — Procedure to be followed by Advisory Board — Legality — Rights available to detenu — Extent of.

According to the express intendment of the Constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him. In view of this, it cannot be held by the application of abstract, general principles or on a priori considerations that the detenu has the right of being represented by a legal practitioner in the proceedings before the Advisory Board. Since the Constitution, as originally enacted, itself contemplates that such a right should not be made available to a detenu, it cannot be said that the denial of the said right is unfair, unjust or unreasonable. (Para 87)

To read the right of legal representation in Art. 22 (5) is straining the language of that article. Clause (5) confers upon the detenu the right to be informed of the grounds of detention and the right to be afforded the earliest opportunity of making a representation against the order of detention. That right has undoubtedly to be effective, but it does not carry with it the right to be represented by a legal practitioner before the Advisory Board merely because, by Section 10 of the National Security Act, the representation made by the detenu is required to be forwarded to the Advisory Board for its consideration. If anything, the effect of S. 11 (4) of the Act, which conforms to Art. 22 (3) (b), is that the detenu cannot appear before the Advisory Board through a legal practitioner. (Para 89)

If the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. (Para 94)

The embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and sub-

stance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend.

(Para 95)

A detenu cannot claim the right of cross-examination in the proceeding before the Advisory Board. In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on facts proved either by applying the test of preponderance of probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceeding of the Advisory Board has therefore to be structured differently from the proceeding of judicial or quasi-judicial Tribunals, before which there is a lis to adjudicate upon.

(Paras 99, 104)

Neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. If the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any other Tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the detenu must complete his evidence.

(Para 105)

(V) National Security Act (65 of 1980), S. 11 (2) — Detention of person after submission of its report by Advisory Board — Question as to — Cannot be decided by Board.

Section 11 (2) of the Act provides specifically that the report of the Advisory Board shall specify its opinion "as to whether or not there is sufficient cause for the detention of the person concerned". This implies that the question to which the Advisory Board has to apply its mind is whether on the date of its report there is sufficient cause for the detention of the person. What inquiry ne-

cessarily involves the consideration of the question as to whether there was sufficient cause for the detention of the person when the order of detention was passed, but there is no justification for extending the jurisdiction of the Advisory Board to the consideration of the question as to whether it is necessary to continue the detention of the person beyond the date on which it submits its report or beyond the period of three months after the date of detention. The question as to whether there are any circumstances on the basis of which the detenu should be kept in detention after the Advisory Board submits its report and how long, is for the detaining authority to decide and not for the Board. AIR 1958 SC 163, Rel. on.

(Para 106)

(W) National Security Act (65 of 1980), Ss. 10 and 11 — Proceedings before Advisory Board — Need not be open to public.

The proceedings of the Advisory Board need not be thrown open to the public. The interests of justice will not be served better by giving access to the public to the proceedings of the Advisory Board.

(Para 107)

(X) National Security Act (65 of 1980), Ss. 9 and 10 — Treatment to detenus — Reasonable facilities should be provided.

It is difficult to frame a code for the treatment of detenus while they are held in detention. However the detenus must be afforded all reasonable facilities for an existence consistent with human dignity. There is no reason why they should not be permitted to wear their own clothes, eat their own food, have interviews with the members of their families at least once a week and, last but not the least, have reading and writing material according to their reasonable requirements. AIR 1980 SC 1579, Rel. on.

(Para 108)

(Y) National Security Act (65 of 1980), Ss. 9 and 10 — Detenus under the Act must be kept separately.

The persons who are detained under the National Security Act must be segregated from the convicts and kept in a separate part of the place of detention. It is hardly fair that those who are suspected of being engaged in prejudicial conduct should be lodged in the same ward or cell where the convicts whose crimes are established are lodged. AIR 1969 SC 1153, Rel. on.

(Para 109)

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- Mr. R. K. Garg, Sr. Advocate; Mr. V. J.
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dents 2 and 3 in W. P. No. 5874/80.

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Dr. L. M. Singhvi, Dr. Anand Prakash and Mr. S. N. Kackar, Sr. Advocates, M/s. G. Mukhoty, B. B. Sinha, A. K. Srivastava, Randhir Jain, M. L. Lahoty, Kapil Sibal, L. K. Pandey and S. S. Khanduja, Advocates with them, for Intervener No. 13.

Mrs. Subhadra Joshi, Advocate, for Intervener No. 14.

Mr. Ram Jethmalani, Sr. Advocate, Miss. Rani Jethmalani, Advocate with him, for Intervener No. 15.

Mr. L. N. Sinha, Attorney General, Mr. Altaf Ahmed, Advocate with him, for Intervener No. 16.

CHANDRACHUD, C. J. (For himself and on behalf of Bhagwati and Desai, JJ.):— This is a group of writ petitions under Art. 32 of the Constitution challenging the validity of the National Security Ordinance, 2 of 1980, and certain provisions of the National Security Act, 65 of 1980, which replaced the Ordinance. Writ Petition No. 5724 of 1980 is by Shri A. K. Roy, a Marxist member of the Parliament, who was detained under the Ordinance by an order passed by the District Magistrate, Dhanbad, on the ground that he was indulging in activities which were prejudicial to public order. Ten members of the Parliament, one an Independent and the other belonging to various political parties in opposition, applied for permission to intervene in the writ petition on the ground that since the Ordinance-making power of the President is destructive of the system of Parliamentary democracy, it is necessary to define the scope of that power. We allowed the intervention. So did we allow the applications for intervention by the People's Union of Civil Liberties, the Supreme Court Bar Association and the State of Jammu and Kashmir which is interested in the upholding of the Jammu & Kashmir Public Safety Act, 1978. Shri R. K. Garg argued the writ petition, respondents being represented by the Attorney General and the Solicitor General.

2. After the Ordinance became an Act, more writ petitions were filed to challenge

the validity of the Act as well. Those petitions were argued on behalf of the petitioners by Dr. N. M. Ghatate, Shri Ram Jethmalani, Shri Shiv Pujan Singh and Shri Kapil Sibal. Shri V. M. Tarkunde appeared in person for the People's Union of Civil Liberties and Dr. L. M. Singhvi for the Supreme Court Bar Association.

3. Broadly, Sri Garg concentrated on the scope and limitations of the Ordinance-making power, Shri Ram Jethmalani on the vagueness and unreasonableness of the provisions of the Act and the punitive conditions of detention and Dr. Ghatate on the effect of the 44th Constitution Amendment Act and the validity of its Sec. 1 (2). Shri Tarkunde dwelt mainly on the questions relating to the fulfilment of pre-conditions of the exercise of the Ordinance-making power, the effect of non-implementation by the Central Government of the provisions of the 44th Amendment regarding the composition of the Advisory Boards and the broad, undefined powers of detention conferred by the Act. Dr. L. M. Singhvi laid stress on the need for the grant of minimal facilities to detenus, the nature of the right of detenus to make an effective representation against the order of detention and the evils of the exercise of the power to issue ordinances.

4. The National Security Ordinance, 1980, was passed in order "to provide for preventive detention in certain cases and for matters connected therewith". It was made applicable to the whole of India except the State of Jammu & Kashmir and it came into force on Sept. 23, 1980. The Parliament was not in session when it was promulgated and its preamble recites that it was being issued because the "President is satisfied that circumstances exist which render it necessary for him to take immediate action".

5. Shri R. K. Garg, appearing for the petitioners, challenges the power of the President to issue an Ordinance depriving any person of his life or liberty. He contends:

(a) The power to issue an Ordinance is an executive power, not a legislative power;

(b) Ordinance is not 'law' because it is not made by an agency created by the Constitution for making laws and no law can be made without the intervention of the legislature;

(c) There is a marked shift towards distrust of power in order to preserve the people's rights and therefore, liberty, democracy and the independence of judiciary are amongst the principal matters which are outside the Ordinance-making power;

(d) By Article 21 of the Constitution, a person can be deprived of his life or liberty according only to the procedure established by law. Ordinance is not 'law' within the meaning of Art. 21 and therefore no person can be deprived of his life or liberty by an Ordinance;

(e) The underlying object of Article 21 is to wholly deny to the executive the power to deprive a person of his life or liberty. Ordinance-making power, which is executive power, cannot therefore be used for that purpose. The executive cannot resort to the power to make Ordinances so as or in order to remove the restraints imposed upon it by Art. 21;

(f) The procedure prescribed under an Ordinance is not procedure established by law because, Ordinances have a limited duration in point of time. The procedure prescribed by an Ordinance is neither firm nor certain, by reason of which the procedure cannot be said to be 'established'. From this it follows that no person can be deprived of his life or liberty by procedure prescribed by an Ordinance;

(g) The power to issue an Ordinance is ordaining power of the executive which cannot be used to liberate it from the discipline of laws made by a democratic legislature. Therefore, the power to issue ordinances can be used, if at all, on a virgin land only. No ordinance can operate on a subject which is covered by a law made by the legislature;

(h) Equating an Ordinance made by the executive with a law made by the legislature will violate the principle of separation of powers between the executive and the legislature, which is a part of the basic structure of the Constitution; and,

(i) Articles 14, 19 and 21 of the Constitution will be reduced to a dead letter if the executive is permitted to take away the life and liberty of the people by an Ordinance, lacking the support of a law made by the legislature. The Ordinance-making power must, therefore, be construed harmoniously with those and other provisions of the Constitution.

6. This many-pronged attack on the Ordinance-making power has one central theme: 'Ordinance is not law'. We must therefore consider the basic question as to whether the power to make an ordinance is a legislative power as contended by the learned Attorney General or whether it is an executive power masquerading as a legislative power, as contended on behalf of the petitioners.

7. In support of these submissions Shri Garg relies on many texts and decisions which we need not discuss at length since, primarily, we have to consider the scheme of our Constitution and to interpret its provisions in order to determine the nature and scope of the ordinance-making power. Counsel drew our attention, with great emphasis, to the statements in Montesquieu's *'Esprit des lois'* (1748) and Blackstone's *'Commentaries on the Laws of England'* (1765) which are reproduced in *'Modern Political Constitutions'* by C. F. Strong (8th edition) at page 211. According to Montesquieu, "when the legislative and executive powers are united in the same person or body of persons there can be no liberty, because of the danger that the same monarch or senate should enact tyrannical laws and execute them in a tyrannical manner". Blackstone expresses the same thought by saying that "wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty". Reliance was also placed on views and sentiments expressed to the same effect in Walter Begehut's *'The English Constitution'* (1867), Wade's *'Administrative Law'* (3rd edition) pages 323-324, *'Constitutional Laws of the British Empire'* by Jennings and Young, *'Law and Orders'* by C. K. Allen (1945) and Harold Laski's *'Liberty in the Modern State'* (1961). According to Laski (pages 42-43),

"... if in any State there is a body of men who possess unlimited political power, those over whom they rule can never be free. For the one assured result of historical investigation is the lesson that uncontrolled power is invariably poisonous to those who possess it. They are always tempted to impose their canon of good upon others, and, in the end, they assume that the good of the community depends upon the continuance of their power. Liberty always demands a limitation of political authority, and it is never attained unless the rulers of a state can, where necessary, be called to account. That is why Pericles insisted that the secret of liberty is courage."

Finally, counsel drew on Jawaharlal Nehru's Presidential Address to the Lucknow Congress (April 12, 1936) in which he referred to the rule by ordinances as "the humiliation of ordinances" (Selected Works of Jawaharlal Nehru, Volume 7, page 183).

8. We are not, as we cannot be, unmindful of the danger to people's liberties which comes in any community from what is called the tyranny of the majority. Uncontrolled power in the executive is a great enemy of

10. The Constituent Assembly had before it the Government of India Act, 1935 and many of its members had experienced the traumas and travails resulting from the free exercise of the Ordinance-making power conferred by that Act. They were also aware that such a power was not claimed by the Governments of two leading democracies of the world, the English and the American. And yet, they took the Government of India Act

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

Article 213, which occurs in Part VI, Chapter IV, called "Legislative Power of the Governor" confers similar power on the Governors of States to issue ordinances.

12. As we have said earlier while setting out the petitioner's case, the thrust of his argument is that the power to issue an ordinance is an executive power, not a legislative power, and consequently, ordinance is not law. In view of the clear and specific provisions of the Constitution bearing upon this question, it is quite impossible to accept this argument. The heading of Chapter III of Part V is "Legislative Powers of the President". Clause (2) of Article 123 provides that an ordinance promulgated under Art. 123 "shall have the same force and effect as an Act of Parliament". The only obligation on the Government is to lay the ordinance before both Houses of Parliament and the only distinction which the Constitution makes between a law made by the Parliament and an ordinance issued by the President is that whereas the life of a law made by the Parliament would depend upon the terms of that law, an ordinance, by reason of sub-cl. (a) of Cl. (2), ceases to operate at the expiration of six weeks from the reassembly of Parliament, unless resolutions disapproving it are passed by both Houses before the expiration of that period.

13. Article 13 (2) provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this provision shall, to the extent of the contravention, be void. Clause (3) of Article 13 provides that in Article 13, "law" includes, inter alia, an ordinance, unless the context otherwise requires. In view of the fact that the context does not otherwise so require, it must follow from the combined operation of

Cl. (2) and (3) of Art. 13 that an ordinance issued by the President under Art. 123, which is equated by Cl. (2) of that article with an Act of Parliament, is subject to the same constraints and limitations as the latter. Therefore, whether the legislation is Parliamentary or Presidential, that is to say, whether it is a law made by the Parliament or an ordinance issued by the President, the limitation on the power is that the fundamental rights conferred by Part III cannot be taken away or abridged in the exercise of that power. An ordinance, like a law made by the Parliament, is void to the extent of the contravention of that limitation.

14. The exact equation, for all practical purposes, between a law made by the Parliament and an ordinance issued by the President is emphasised by yet another provision of the Constitution. Article 367 which supplies a clue to the "Interpretation" of the Constitution provides by Clause (2) that—

"Any reference in this Constitution to Acts or laws of, or made by Parliament, or to Acts or laws of, or made by, the Legislature of a State, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, as the case may be."

It is clear from this provision, if indeed there was any doubt about the true position, that the Constitution makes no distinction in principle between a law made by the legislature and an ordinance issued by the President. Both, equally, are products of the exercise of legislative power and, therefore, both are equally subject to the limitations which the Constitution has placed upon that power.

15. It may sound strange at first blush that the executive should possess legislative powers, but a careful look at our Constitution will show that the scheme adopted by it envisages the exercise of legislative powers by the executive in stated circumstances. An ordinance can be issued by the President provided that both Houses of the Parliament are not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action. An ordinance which satisfies these pre-conditions has the same force and effect as an Act of Parliament. Article 356 empowers the President to issue a proclamation in case of failure of constitutional machinery in the States. By Article 357 (1) (a), if by a proclamation issued under Article 356 (1) it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it is competent for the Parliament to confer on

the President the power of the Legislature of the State to make laws. Indeed, by the aforesaid Clause (a), the Parliament cannot only confer on the President the power of the State Legislature to make laws but it can even authorise the President to delegate the power so conferred to any authority to be specified by him in that behalf. The marginal note to Art. 357 speaks of the "Exercise of Legislative powers" under the proclamation issued under Art. 356. There cannot be the slightest doubt that not only the power exercised by the President under Art. 357 (1) (a) but even the power exercised by his delegate under that clause is legislative in character. It is therefore not true to say that, under our Constitution, the exercise of legislative power by the legislature properly so-called is the only source of law. Ordinances issued by the President and the Governors and the laws made by the President or his delegate under Art. 357 (1) (a) partake fully of legislative character and are made in the exercise of legislative power, within the contemplation of the Constitution.

16. It is thus clear that the Constituent Assembly was of the view that the President's power to legislate by issuing an ordinance is as necessary for the peace and good government of the country as the Parliament's power to legislate by passing laws. The mechanics of the President's legislative power was devised evidently in order to take care of urgent situations which cannot brook delay. The Parliamentary process of legislation is comparatively tardy and can conceivably be time-consuming. It is true that it is not easy to accept with equanimity the proposition that the executive can indulge in legislative activity but the Constitution is what it says and not what one would like it to be. The Constituent Assembly indubitably thought, despite the strong and adverse impact which the Governor-General's Ordinance-making power had produced on the Indian community in the pre-independence era, that it was necessary to equip the President with legislative powers in urgent situations. After all, the Constitution makers had to take into account life's realities. As observed by Shri Seervai in 'Constitutional Law of India' (2nd Edn., p. 16), "Grave public inconvenience would be caused if on an Act, like the Bombay Sales Tax Act, being declared void, no machinery existed whereby a valid law could be promptly promulgated to take the place of the law declared void". Speaking for the majority in *R. C. Cooper v. Union of India*, (1970) 3 SCR 530 at p. 559 : (AIR 1970 SC 564 at p. 587), Shah J. said : "The President

is under the Constitution not the repository of the legislative power of the Union, but with a view to meet extraordinary situations demanding immediate enactment of laws, provision is made in the Constitution investing the President with power to legislate by promulgating Ordinances". The Constituent Assembly therefore conferred upon the executive the power to legislate, not of course intending that the said power should be used recklessly or by imagining a state of affairs to exist when, in fact, it did not exist; nor, indeed, intending that it should be used mala fide in order to prevent the people's elected representatives from passing or rejecting a Bill after a free and open discussion, which is of the essence of democratic process. Having conferred upon the executive the power to legislate by ordinances, if the circumstances were such as to make the exercise of that power necessary, the Constituent Assembly subjected that power to the self-same restraints to which a law passed by the legislature is subject. That is the compromise which they made between the powers of the Government and the liberties of the people. Therefore, in face of the provisions to which we have already referred, it seems to us impossible to accept Shri Garg's contention that an ordinance made by the President is an executive and not a legislative act. An ordinance issued by the President or the Governor is as much law as an Act passed by the Parliament and is, fortunately and unquestionably, subject to the same inhibitions. In those inhibitions lies the safety of the people. The debates of the Constituent Assembly (Vol. 8, Part V, Chapter III, pp. 201 to 217) would show that the power to issue ordinances was regarded as a necessary evil. That power was to be used to meet extraordinary situations and not perverted to serve political ends. The Constituent Assembly held forth, as it were, an assurance to the people that an extraordinary power shall not be used in order to perpetuate a fraud on the Constitution which is conceived with so much faith and vision. That assurance must in all events be made good and the balance struck by the founding fathers between the powers of the Government and the liberties of the people not disturbed or destroyed.

17. The next contention of Shri Garg is that even assuming that the power to issue ordinances is legislative and not executive in character, ordinance is not 'law' within the meaning of Art. 21 of the Constitution. That article provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law".

It is contended by the learned counsel that the decision of this Court in *A. K. Gopalan*, 1950 SCR 88 : (AIR 1950 SC 27) establishes that the supremacy of the legislature is enshrined in Art. 21 as a fundamental right in order to afford protection to the life and liberty of the people against all executive powers and, therefore, the supremacy of the legislature cannot be replaced by making the executive supreme by allowing it to promulgate ordinances which have the effect of depriving the people of their life and liberty. The extent of protection afforded to the right conferred by Art. 21 consists, according to counsel, in the obligation imposed upon a democratic legislature to devise a fair, just and reasonable procedure for attenuating the liberties of the people. Since the very object of Art. 21 is to impose restraints on the power of the executive in the matter of deprivation of the life and liberty of the people, it is absurd, so the argument goes, to concede to the executive the power to deprive the people of the right conferred by Art. 21 by issuing an ordinance. The argument, in other words, is that the executive cannot under any conditions or circumstances be permitted to liberate itself from the restraints of Art. 21. Shri Garg says that if ordinances are not excluded from the precious area of life and liberty covered by Art. 21, it is the executive which will acquire the right to trample upon the freedoms of the people rather than the people acquiring the fundamental right to life and liberty. It is also urged that by elevating ordinances into the status of laws, the principle of separation of powers, which is a part of the basic structure of the Constitution, shall have been violated. An additional limb of the argument is that an ordinance can never be said to 'establish' a procedure, because it has a limited duration and is transient in character.

18. In one sense, these contentions of Shri Garg stand answered by what we have already said about the true nature and Character of the ordinance-making power. The contention that the word 'law' in Art. 21 must be construed to mean a law made by the legislature only and cannot include an ordinance, contradicts directly the express provisions of Articles 123 (2) and 367 (2) of the Constitution. Besides, if an ordinance is not law within the meaning of Art. 21, it will stand released from the wholesome and salutary restraint imposed upon the legislative power by Art. 13 (2) of the Constitution.

19. The contention that the procedure prescribed by an ordinance cannot be equated with the procedure established by law is equally unsound. The word 'established' is

used in Art. 21 in order to denote and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the precise extent of such deprivation. The decisions of this Court in *State of Orissa v. Bhupendra Kumar Bose*, 1962 Supp (2) SCR 380 at pp. 398-400 : (AIR 1962 SC 945 at pp. 953, 954) and *Muhammadbhai Khudabux Chhipa v. State of Gujarat*, 1962 Supp (3) SCR 875 : (AIR 1962 SC 1517), illustrate that enduring rights and obligations can be created by ordinances. The fact that any particular law has a temporary duration is immaterial for the purposes of Article 21 so long as the procedure prescribed by it is definite and reasonably ascertainable. In fact, the Preventive Detention laws were in their inception of a temporary character since they had a limited duration. They were only extended from time to time.

20. The argument of the petitioner that the fundamental right conferred by Art. 21 cannot be taken away by an ordinance really seeks to add a proviso to Art. 123 (1) to the following effect: "Provided that such Ordinances shall not deprive any person of his right to life or personal liberty conferred by Art. 21 of the Constitution". An amendment substantially to that effect was moved in the Constituent Assembly by Shri B. Pocker Sahib, but was rejected by the Constituent Assembly, (See Constituent Assembly Debates, Vol. 8, p. 203). Speaking on the amendment moved by Shri Pocker, Dr. Ambedkar said: "Clause (3) of Article 102 lays down that any law made by the President under the provisions of Art. 102 shall be subject to the same limitations as a law made by the legislature by the ordinary process. Now, any law made in the ordinary process by the legislature is made subject to the provisions contained in the Fundamental Rights articles of this Draft Constitution. That being so, any law made under the provisions of Art. 102 would also be automatically subject to the provisions relating to fundamental rights of citizens, and any such law therefore will not be able to override those provisions and there is no need for any provision as was suggested by my friend, Mr. Pocker, in his amendment No. 1796" (page 214). It may be mentioned the Draft Art. 102 corresponds to the present Art. 123 of the Constitution.

21. Another answer to Shri Garg's contention is that what Art. 21 emphasises is that the deprivation of the right to life or liberty must be brought about by a State-made law and not by the rules of natural law (see *A. K.*

Gopalan, 1950 SCR 88 at pp. 111, 169, 199, 229, 236 and 308-309 : (AIR 1950 SC 27 at pages 39, 60, 61). Reference may usefully be made in this behalf to a few representative decisions which illustrate that Article 21 takes in laws other than those enacted by the legislature. In *Re: Sant Ram*, (1960) 3 SCR 499 at page 506 : (AIR 1960 SC 932 at page 935), the Rules made by the Supreme Court; in *State of Nagaland v. Ratan Singh*, (1966) 3 SCR 830 at pp. 851, 852 : (AIR 1967 SC 212 at pp. 223, 224), the Rules made for the governance of Nagaland Hills District; in *Govind v. State of Madh. Pra.*, (1975) 3 SCR 946 at pp. 955-956 : (AIR 1975 SC 1378 at pp. 1385, 1386), the Regulations made under the Police Act; in *Ratilal Bhanji Mithani v. Asstt. Collector of Customs, Bombay*, (1967) 3 SCR 926 at pp. 928-931 : (AIR 1967 SC 1639 at pp. 1641, 1642, 1643), the Rules made by the High Court under Art. 225 of the Constitution; and in *Pandit M. S. M. Sharma v. Shri Sri Krishna Sinha*, 1959 Supp (1) SCR 806 at pp. 860-861 : (AIR 1959 SC 395 at pp. 410-411), the Rules made by a House of Legislature under Art. 208, were all regarded as laying down procedure established by 'law' for the purposes of Art. 21.

22. We must therefore reject the contention that Ordinance is not 'law' within the meaning of Art. 21 of the Constitution.

23. There is no substance in the argument that the ordinance-making power, if extended to cover matters mentioned in Art. 21, will destroy the basic structure of the separation of powers as envisaged by the Constitution. In the first place, Art. 123 (1) is a part of the Constitution as originally enacted; and secondly, our Constitution does not follow the American pattern of a strict separation of powers.

24. We may here take up for consideration some of the submissions made by Shri Tarkunde on the validity of the National Security Ordinance. He contends that the power to issue an ordinance under Art. 123 is subject to the pre-condition that circumstances must exist which render it necessary for the President to take immediate action. The power to issue an ordinance is conferred upon the President in order to enable him to act in unusual and exceptional circumstances. Therefore, according to Shri Tarkunde, unusual and exceptional circumstances must be shown to exist, they must be relevant on the question of the necessity to issue an ordinance and they must be such as to satisfy a reasonable person that, by reason thereof, it was necessary to take immediate action and issue

an ordinance. The legislative power to issue an ordinance being conditional, the question as regards the existence of circumstances which compelled the issuance of ordinance is justiciable and it is open to this Court, says Shri Tarkunde, to determine whether the power was exercised on the basis of relevant circumstances which establish the necessity to take immediate action or whether it was exercised for a collateral purpose. In support of this contention, Shri Tarkunde relies on the circumstance that the amendment introduced in Art. 123 by the 38th Constitution Amendment Act, 1975, was deleted by the 44th Constitution Amendment Act, 1978. Section 2 of the 38th Amendment Act introduced Clause (4) in Art. 123 to the following effect:

"Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in Cl. (1) shall be final and conclusive and shall not be questioned in any Court on any ground."

This amendment was expressly deleted by Section 16 of the 44th Amendment Act. Shri Tarkunde says that the deletion of the particular clause is a positive indication that the Parliament did not consider it safe or proper to entrust untrammelled powers to the executive to issue ordinances. It therefore decided that the President's satisfaction should not be "final and conclusive" and that it should be open to judicial scrutiny. Shri Tarkunde added that the exercise of a conditional power is always subject to the proof of conditions and no distinction can be made in this regard between conditions imposed by a statute and conditions imposed by a constitutional provision. Relying on Section 106 of the Evidence Act, Shri Tarkunde says that circumstances which necessitated the passing of the ordinance being especially within the knowledge of the executive, the burden lies upon it to prove the existence of those circumstances.

25. It is strongly pressed upon us that we should not avoid the decision of these points on the plea that they involve political questions. Shri Tarkunde distinguishes the decision in the *Rajasthan Assembly Dissolution* case (1978) 1 SCR 1 : (AIR 1977 SC 1361) on this aspect by saying that Art. 356 which was under consideration in that case uses language which is much wider than that of Article 123. He relies on Seervai's observation in the 'Constitutional Law of India' (2nd Edition, Volume III pages 1795 and 1797) to the effect that "there is no place in our Constitution for the doctrine of the political

question", since that doctrine is based on, and is a consequence of, a rigid separation of powers in the U. S. Constitution and our Constitution is not based on a rigid separation of powers. Reliance is placed by Shri Tarkunde on the decision in the Privy Purse case (1971) 3 SCR 9, 75, 168-169 : (AIR 1971 SC 530 at pp. 564, 565, 618, 619 and 620) in which Shah, J. observed that "Constitutional mechanism in a democratic polity does not contemplate existence of any function which may qua the citizens be designated as political and orders made in exercise whereof are not liable to be tested for their validity before the lawfully constituted Courts". In the same case Hegde, J., said that "There is nothing like a political power under our Constitution in the matter of relationship between the executive and the citizens".

26. We see the force of the contention that the question whether the pre-conditions of the exercise of the power conferred by Art. 123 are satisfied cannot be regarded as a purely political question. The doctrine of the political question was evolved in the United States of America on the basis of its Constitution which has adopted the system of a rigid separation of powers, unlike ours. In fact, that is one of the principal reasons why the U. S. Supreme Court had refused to give advisory opinions (See Seervai on Constitutional Law of India, Vol. III, p. 1796, Foot Notes 64 and 65. (The Constitution of the United States, Congressional Edition, 4th Ed., pp. 649-50)). In *Baker v. Carr*, (1962) 7 Law Ed 2d 663 at pp. 685-86, Brennan, J. said that the doctrine of political question was "essentially a function of the separation of powers". There is also a sharp difference in the position and powers of the American President on one hand and the President of India on the other. The President of the United States exercises executive power in his own right and is responsible not to the Congress but to the people who elect him. In India, the executive power of the Union is vested in the President of India, but he is obliged to exercise it on the aid and advice of his Council of Ministers. The President's "satisfaction" is therefore nothing but the satisfaction of his Council of Ministers in whom the real executive power resides. It must also be mentioned that in the United States itself, the doctrine of the political question has come under a cloud and has been the subject matter of adverse criticism. It is said that all that the doctrine really means is that in the exercise of the power of judicial review, the Courts must adopt a 'prudential' attitude, which requires that they should be wary of deciding upon the merit of any issue

in which claims of principle as to the issue and claims of expediency as to the power and prestige of Courts are in sharp conflict. The result, more or less, is that in America the phrase "political question" has become "a little more than a play of words".

27. The Rajasthan case (AIR 1977 SC 1361) is often cited as an authority for the proposition that the Courts ought not to enter the "political thicket". It has to be borne in mind that at the time when that case was decided, Article 356 contained Clause (5) which was inserted by the 38th Amendment, by which the satisfaction of the President mentioned in Clause (1) was made final and conclusive and that satisfaction was not open to be questioned in any Court on any ground. Clause (5) has been deleted by the 44th Amendment and, therefore, any observations made in the Rajasthan case on the basis of that clause cannot any longer hold good. It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction.

28. There are, however, two reasons why we do not propose to discuss at greater length the question as regards the justiciability of the President's satisfaction under Art. 123 (1) of the Constitution. In the first place, the Ordinance has been replaced by an Act. It is true, as contended by Shri Tarkunde, that if the question as regards the justiciability of the President's satisfaction is not to be considered for the reason that the ordinance has become an Act, the occasion will hardly ever arise for considering that question because, by the time the challenge made to an Ordinance comes up for consideration before the Court, the ordinance almost invariably shall have been replaced by an Act. All the same, the position is firmly established in the field of constitutional adjudication that the Court will decide no more than needs to be decided in any particular case. Abstract questions present interesting challenges, but it is for scholars and text-book writers to unravel their mystique. It is not for the Courts to decide questions which are but of academic importance.

29. The other reason why we are not inclined to go into the question as regards the justiciability of the President's satisfaction under Art. 123 (1) is that on the material which is placed before us, it is impossible for us to arrive at a conclusion one way or the other. We are not sure whether a question like the one before us would be governed by the rule of burden of proof contained in Sec-

tion 106 of the Evidence Act, though we are prepared to proceed on the basis that the existence of circumstances which led to the passing of the Ordinance is especially within the knowledge of the executive. But before casting the burden on the executive to establish those circumstances, at least a *prima facie* case must be made out by the challenger to show that there could not have existed any circumstances necessitating the issuance of the Ordinance. Every casual or passing challenge to the existence of circumstances, which rendered it necessary for the President to take immediate action by issuing an ordinance, will not be enough to shift the burden of proof to the executive to establish those circumstances. Since the petitioners have not laid any acceptable foundation for us to hold that no circumstances existed or could have existed which rendered it necessary for the President to take immediate action by promulgating the impugned Ordinance, we are unable to entertain the contention that the Ordinance is unconstitutional for the reason that the pre-conditions to the exercise of the power conferred by Art. 123 are not fulfilled. That is why we do not feel called upon to examine the correctness of the submission made by the learned Attorney General that in the very nature of things, the "satisfaction" of the President which is the basis on which he promulgates an Ordinance is founded upon materials which may not be available to others and which may not be disclosed without detriment to public interest and that, the circumstances justifying the issuance of the Ordinance as well as the necessity to issue it lie solely within the President's judgment and are, therefore, not justiciable.

30. The two surviving contentions of Shri Garg that the power to issue an ordinance can operate on a virgin land only and that Articles 14, 19 and 21 will be reduced to a dead letter if the executive is permitted to take away the life or liberty of the people by an ordinance, need not detain us long. The Constitution does not impose by its terms any inhibition on the ordinance-making power that it shall not be used to deal with a subject matter which is already covered by a law made by the Legislature. There is no justification for imposing any such restriction on the ordinance-making power, especially when an ordinance, like any law made by the Legislature, has to comply with the mandate of Art. 13 (2) of the Constitution. Besides, legislative activity, properly so-called, has proliferated so enormously in recent times that it is difficult to discover a virgin land or a fresh field on which the ordinance-making power can operate, as if on a clean slate.

Today, there is possibly no subject under the sun which the Legislature has not touched.

31. As regards Articles 14, 19 and 21 being reduced to a dead letter, we are unable to appreciate how an ordinance which is subject to the same constraints as a law made by the Legislature can, in its practical operation, result in the obliteration of these articles. The answer to this contention is again to be found in the provisions contained in Article 13 (2).

32. That disposes of the contentions advanced by the various parties on the validity of the ordinance. We must mention that in a recent judgment dated October 20, 1981 delivered by a Constitution Bench of this Court in Writ Petn. No. 355 of 1981 : (reported in AIR 1981 SC 2138) (the Bearer Bonds case), the question as regards the nature and scope of the ordinance-making power has been discussed elaborately. We adopt the reasoning of the majority judgment in that case.

33. The arguments advanced on behalf of the various petitioners can be broadly classified under six heads: (1) The scope, limits and justiciability of the ordinance-making power; (2) The validity of Preventive Detention in the light of the severe deprivation of personal liberty which it necessarily entails; (3) The effect of the non-implementation of the 44th Amendment in so far as it bears upon the Constitution of the Advisory Boards; (4) The vagueness of the provisions of the National Security Act, authorizing the detention of person for the reasons mentioned in Section 3 of the Act; (5) The unfairness and unreasonableness of the procedure before the Advisory Boards; and (6) The unreasonableness and harshness of the conditions of detention. We have dealt with the first question fully though the impugned ordinance has been replaced by an Act, since the question was argued over several days and arises frequently — as frequently as ordinances are issued. All that needs have been said was said on that question by the various counsel and the relevant data was fully placed before us. We will now turn to the second question relating to the validity of Preventive Detention as a measure for regulating the liberties of the subject.

34. There can be no doubt that personal liberty is a precious right. So did the founding fathers believe at any rate because, while their first object was to give unto the people a Constitution whereby a Government was established, their second object, equally important, was to protect the people against the Government. That is why, while conferring

extensive powers on the Government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights and the power to issue Ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect those rights is a lesson taught by all history and all human experience. Our Constitution-makers had lived through bitter years and seen an alien government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the government we fought for". And therefore, while arming the government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people.

35. But, the liberty of the individual has to be subordinated, within reasonable bounds, to the good of the people. Therefore, acting in public interest, the Constituent Assembly made provisions in Entry 9 of List I and Entry 3 of List III, authorising the Parliament and the State legislatures by Art. 246 to pass laws of preventive detention. These entries read thus :

Entry 9, List I :

"Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention."

Entry 3, List III :

"Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention." The practical need and reality of the laws of preventive detention find concrete recognition in the provisions of Art. 22 of the Constitution. Laws providing for preventive detention are expressly dealt with by that article and their scope appropriately defined. "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that

power is limited, it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions" (see *Queen v. Burah*, (1878) 5 Ind App 178, 193-194 Per Lord Selborne. The legislative power in respect of preventive detention is expressly limited to the specific purposes mentioned in Entry 9, List I and Entry 3, List III. It is evident that the power of preventive detention was conferred by the Constitution in order to ensure that the security and safety of the country and the welfare of its people are not put in peril. So long as a law of preventive detention operates within the general scope of the affirmative words used in the respective entries of the union and concurrent lists which give that power and so long as it does not violate any condition or restriction placed upon that power by the Constitution, the Court cannot invalidate that law on the specious ground that it is calculated to interfere with the liberties of the people. *Khanna J.*, in his judgment in the *Habeas Corpus* case, 1976 Supp SCR 172 at pp. 291-292, 294-296 : (AIR 1976 SC 1207 at pp. 1268, 1269, 1270, 1271 and 1272), has dwelt upon the need for preventive detention in public interest.

36. The fact that England and America do not resort to preventive detention in normal times was known to our Constituent Assembly and yet it chose to provide for it, sanctioning its use for specified purposes. The attitude of two other well-known democracies to preventive detention as a means of regulating the lives and liberties of the people was undoubtedly relevant to the framing of our Constitution. But the framers having decided to adopt and legitimise it, we cannot declare it unconstitutional by importing our notions of what is right and wrong. The power to judge the fairness and justness of procedure established by a law for the purposes of Art. 21 is one thing : that power can be spelt out from the language of that article. Procedural safeguards are the handmaids of equal justice and since, the power of the government is colossal as compared with the power of an individual, the freedom of the individual can be safe only if he has a guarantee that he will be treated fairly. The power to decide upon the justness of the law itself is quite another thing : that power springs from a 'due process' provision such as is to be found in the 5th and 14th Amendments of the American Constitution by which no person can be deprived of life, liberty or property "without due process of law".

37. In so far as our Constitution is concerned, an amendment was moved by Pandit

Thakur Dass Bhargava to draft Article 15, which corresponds to Art. 21 of the Constitution, for substituting the words "without due process of law" for the words "except according to procedure established by law". Many members spoke on that amendment on Dec. 6, 1948, amongst whom were Shri K. M. Munshi, who was in favour of the amendment, and Sir Alladi Krishnaswamy Ayyar who, while explaining the view of the Drafting Committee, said that he was 'still open to conviction'. The discussion of the amendment was resumed by the Assembly on Dec. 13, 1948 when, Dr. Ambedkar, who too had an open mind on the vexed question of 'due process', said :

"..... I must confess that I am somewhat in a difficult position with regard to Article 15 and the amendment moved by my friend Pandit Bhargava for the deletion of the words "procedure according to law" and the substitution of the words "due process".

xx xx xx xx"

"The question of "due process" raises, in my judgment, the question of the relationship between the legislature and the judiciary. In a federal constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation which are granted by the Constitution to the particular legislature. The 'due process' clause, in my judgment, would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law. The question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles."

"..... There are dangers on both sides. For myself I cannot altogether omit the possibility of a Legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not

see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefore would not say anything. I would leave it to the House to decide in any way it likes." (See Constituent Assembly Debates Vol. VII, pp. 999-1001.)

The amendment was then put to vote and was negatived. In view of this background and in view of the fact that the Constitution, as originally conceived and enacted, recognizes preventive detention as a permissible means of abridging the liberties of the people, though subject to the limitations imposed by Part III, we must reject the contention that preventive detention is basically impermissible under the Indian Constitution.

38. The third contention centres around the 44th Constitution Amendment Act, 1978, with particular reference to S. 1 (2) and Section 3 thereof. Section 1 reads thus :

"1. Short title and commencement. —

(1) This Act may be called the Constitution (Forty-fourth Amendment) Act, 1978.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act."

Section 3 reads thus :

"3. Amendment of Art. 22.— In Article 22 of the Constitution, —

(a) for clause (4), the following clause shall be substituted, namely :—

"(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention :

Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving Judge of the appropriate High Court and the other members shall be serving or retired Judges of any High Court :

Provided further that nothing in this clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (a) of Cl. 7.

Explanation.— In this clause, 'appropriate High Court' means,—

(i) in the case of the detention of a person in pursuance of an order of detention made by the Government of India or an officer or authority subordinate to that Government, the High Court for the Union Territory of Delhi;

(ii) in the case of the detention of a person in pursuance of an order of detention made by the Government of any State (other than a Union Territory), the High Court for that State; and

(iii) in the case of the detention of a person in pursuance of an order of detention made by the administrator of a Union Territory or an officer or authority subordinate to such administrator, such High Court as may be specified by or under any law made by Parliament in this behalf”;

(b) in clause (7) —

(i) sub-clause (a) shall be omitted;

(ii) sub-clause (b) shall be re-lettered as sub-clause (a); and

(iii) sub-clause (c) shall be re-lettered as sub-clause (b) and in the sub-clause as so re-lettered, for the words, brackets, letter and figure “sub-clause (a) of clause (4)”, the word, brackets and figure “clause (4)” shall be substituted.”

Clause (4) of Article 22 of the Constitution to which the above amendment was made by the 44th Amendment reads thus :

“22 (4). No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless —

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).”

Clause (7) of Article 22 to which also amendment was made by the 44th Amendment reads thus :

“22 (7). Parliament may by law prescribe —

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for

preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).”

39. The 44th Amendment Act received the assent of the President under Art. 368 (2) on April 30, 1979. Most of the provisions of the 44th Amendment were brought into force with effect from June 20, 1979 by a notification issued by the Central Government on June 19, 1979. The rest of the provisions of the Amendment were brought into force with effect from August 1, 1979 except S. 3 whereby Article 22 was amended, which has not yet been brought into force. The position, as it stands today from the Government's point of view, is that Advisory Boards can be constituted to consist of persons who are or have been, or are qualified to be appointed as, Judges of a High Court in accordance with the provisions of Article 22 (4) (a) in its original form. The amendment made to that article by S. 3 of the 44th Amendment not having been brought into force by the Central Government by issuing a notification under S. 1 (2), it is not necessary, according to the Union Government, to constitute Advisory Boards in accordance with the recommendations of the Chief Justice of the appropriate High Court and consisting of a Chairman and not less than two other members, the Chairman being a serving Judge of the appropriate High Court and the other members being serving or retired Judges of any High Court.

40. Before advertng to the arguments advanced before us on the question of the 44th Amendment, it must be mentioned that the National Security Ordinance which came into force on Sept. 22, 1980 provided by clause (9) for the constitution of Advisory Boards strictly in accordance with the provisions of S. 3 of the 44th Amendment Act, in spite of the fact that the aforesaid section was not brought into force. The National Security Act was passed on Dec. 27, 1980 replacing the Ordinance retrospectively. Section 9 of the Act makes a significant departure from Cl. (9) of the Ordinance by providing for the constitution of Advisory Boards in accordance with Art. 22 (4) in its original form and not in accordance with the amendment made to that article by Sec. 3 of the 44th Amendment Act.

41. The arguments advanced before us by various counsel, bearing on the 44th Amendment have different facets and shall have to be considered separately. The main thrust of Dr. Ghatate's argument is that the Central Government was under an obligation to bring Sec. 3 of the 44th Amendment into force within a reasonable time after the President gave his assent to the Amendment and since it has failed so far to do so, this Court must, by a mandamus, ask the Central Government to issue a notification under Section 1 (2) of the Amendment, bringing it into force without any further delay. Alternatively, Dr. Ghatate contends that clause (2) of Sec. 1 of the 44th Amendment is ultra vires the amending power conferred upon the Parliament by Art. 368 of the Constitution. He argues: The power to amend the Constitution is vested in the Parliament by Article 368, which cannot be delegated to the executive. By such delegation, the Parliament has created a parallel constituent body which is impermissible under the terms of Art. 368. Sub-section (2) of S. 1 of the 44th Amendment Act vests an uncontrolled power in the executive to amend the Constitution at its sweet will, which is violative of the basic structure of the Constitution. Section 1 (2) is also bad because by conferring an unreasonable, arbitrary and unguided power on the executive, it violates Arts. 14 and 19 which are an integral part of the basic structure of the Constitution.

42. Shri Tarkunde does not ask for a mandamus, compelling the Central Government to bring S. 3 of the 44th Amendment Act into force. He challenges the Central Government's failure to bring Section 3 into force as mala fide and argues: By refusing to bring S. 3 into force within a reasonable time without any valid reason, the Central Government has flouted the constituent decision of the Parliament arbitrarily, which is violative of Art. 21. No law of preventive detention can be valid unless it complies with Art. 22 of the Constitution, particularly with Cl. (4) of that Article. Since the National Security Act does not provide for the constitution of Advisory Boards in accordance with S. 3 of the 44th Amendment Act, the whole Act is bad. There was an obligation upon the Central Government to bring the whole of the 44th Amendment into force within a reasonable time, since Section 1 (2) cannot be construed as conferring a right of veto on the executive to nullify or negate a constitutional amendment. The bringing into force of a constitutional Amendment, when such power is left to the executive, may be conceivably deferred for

reasons arising out of the inherent nature of the provisions which are to be brought into force. But the executive cannot defer or postpone giving effect to a constitutional amendment for policy reasons of its own which are opposed to the policy of the constituent body as reflected in the constitutional amendment. The fact that the National Security Ordinance provided by Cl. (9) for the constitution of Advisory Boards in accordance with the provisions of the 44th Amendment shows that no administrative difficulty was envisaged or felt in bringing the particular provision into force. The National Security Act dissolves the Advisory Boards constituted under the Ordinance in accordance with the 44th Amendment and substitutes them by Advisory Boards whose composition is contrary to the letter and spirit of that Amendment.

43. Shri Jethmalani, like Shri Tarkunde, relies upon the provisions of the 44th Amendment in regard to the constitution of Advisory Boards in support of the contention that the National Security Act is bad for non-compliance with S. 3 of the Amendment, despite the fact that the said section has not been brought into force. No Act passed by a legislature, according to Shri Jethmalani, can flout the constituent view or decision of the Parliament, whether or not the Constitutional Amendment has been brought into force. In any event, contends the learned counsel, even if Section 3 of the 44th Amendment Act has not been brought into force, the wisdom of that Amendment, in so far as it bears on the composition of Advisory Boards, is available to the Court. The view of the constituent body on that question cannot but be regarded as reasonable, and to the extent that the provisions of the impugned Act run counter to that view, the Act must be held to be unreasonable and for that reason struck down.

44. Both Dr. Ghatate and Shri Garg contend that despite the provisions of S. 1 (2) of the 44th Amendment Act, Art. 22 of the Constitution stood amended on April 30, 1979 when the 44th Amendment Act received the assent of the President and that there was nothing more that remained to be done by the executive. Section 1 (2) which, according to them is misconceived and abortive must be ignored and severed from the rest of the Amendment Act and the rest of it deemed to have come into force on Apr. 30, 1979.

45. In so far as the arguments set out above bear on the reasonableness of the provisions of the National Security Act, we

will consider them later when we will take up for examination the contention that the Act is violative of Arts. 19 and 21 on account of the unreasonableness or unfairness of its provisions and of the procedure prescribed by it. At this juncture we will limit ourselves to a consideration of those arguments in so far as they bear upon the interpretation of S. 1 (2) of the 44th Amendment Act, the consequences of the failure of the Central Government to issue a notification under that provision for bringing into force the provisions of Sec. 3 within a reasonable time and the question as to whether, despite the provision contained in S. 1 (2), the 44th Amendment Act must be deemed to have come into force on the date on which the President gave his assent to it. The point last mentioned raises the question as to whether S. 1 (2) of the 44th Amendment Act is severable from the rest of its provisions, if that section is bad for any reason.

46. The argument arising out of the provisions of Art. 368 (2) may be considered first. It provides that when a Bill whereby the Constitution is amended is passed by the requisite majority, it shall be presented to the President who shall give his assent to the Bill, "and thereupon the Constitution shall stand amended in accordance with the terms of the Bill". This provision shows that a constitutional amendment cannot have any effect unless the President gives his assent to it and secondly, that nothing more than the President's assent to an amendment duly passed by the Parliament is required, in order that the Constitution should stand amended in accordance with the terms of the Bill. It must follow from this that the Constitution stood amended in accordance with the terms of the 44th Amendment Act when the President gave his assent to that Act on April 30, 1979. We must then turn to that Act for seeing how and in what manner the Constitution stood thus amended. The 44th Amendment Act itself prescribes by S. 1 (2) a pre-condition which must be satisfied before any of its provisions can come into force. That pre-condition is the issuance by the Central Government of a notification in the Official Gazette, appointing the date from which the Act or any particular provision thereof will come into force, with power to appoint different dates for different provisions. Thus, according to the very terms of the 44th Amendment, none of its provisions can come into force unless and until the Central Government issues a notification as contemplated by S. 1 (2).

47. There is no internal contradiction between the provisions of Art. 368 (2) and those of S. 1 (2) of the 44th Amendment Act. Article 368 (2) lays down a rule of general application as to the date from which the Constitution would stand amended in accordance with the Bill assented to by the President. Section 1 (2) of the Amendment Act specifies the manner in which that Act or any of its provisions may be brought into force. The distinction is between the Constitution standing amended in accordance with the terms of the Bill assented to by the President and the date of the coming into force of the Amendment thus introduced into the Constitution. For determining the date with effect from which the Constitution stands amended in accordance with the terms of the Bill, one has to turn to the date on which the President gave, or was obliged to give, his assent to the Amendment. For determining the date with effect from which the Constitution, as amended, came or will come into force, one has to turn to the notification, if any, issued by the Central Government under S. 1 (2) of the Amendment Act.

48. The Amendment Act may provide that the amendment introduced by it shall come into force immediately upon the President giving his assent to the Bill or it may provide that the amendment shall come into force on a future date. Indeed, no objection can be taken to the Constituent body itself appointing a specific future date with effect from which the Amendment Act will come into force; and if that be so, different dates can be appointed by it for bringing into force different provisions of the Amendment Act. The point of the matter is that the Constitution standing amended in accordance with the terms of the Bill and the amendment thus introduced into the Constitution coming into force are two distinct things. Just as a law duly passed by the Legislature can have no effect unless it comes or is brought into force, similarly, an amendment of the Constitution can have no effect unless it comes or is brought into force. The fact that the Constituent body may itself specify a future date or dates with effect from which the Amendment Act or any of its provisions will come into force shows that there is no antithesis between Art. 368 (2) of the Constitution and S. 1 (2) of the 44th Amendment Act. The expression of legislative or constituent will as regards the date of enforcement of the law or Constitution is an integral part thereof. That is why it is difficult to accept the submission that, contrary to

the expression of the constituent will, the amendments introduced by the 44th Amendment Act came into force on April 30, 1979 when the President gave his assent to that Act. The true position is that the amendments introduced by the 44th Amendment Act did not become a part of the Constitution on April 30, 1979. They will acquire that status only when the Central Government brings them into force by issuing a notification under S. 1 (2) of the Amendment Act.

49. The next question for consideration is whether S. 1 (2) of the 44th Amendment Act is ultra vires the power conferred on the Parliament by Art. 368 to amend the Constitution. The argument is that the constituent power must be exercised by the constituent body itself and it cannot be delegated by it to the executive or any other agency. For determining this question, it is necessary to bear in mind that by 'constituent power' is meant the power to frame or amend the Constitution. The power of amendment is conferred upon the Parliament by Art. 368 (1), which provides that the Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in that article. The power thus conferred on the Parliament is plenary subject to the limitation that it cannot be exercised so as to alter the basic structure or framework of the Constitution. It is well settled that the power conferred upon the Parliament by Art. 245 to make laws is plenary within the field of legislation upon which that power can operate. That power, by the terms of Art. 245, is subject only to the provisions of the Constitution. The constituent power, subject to the limitation aforesaid, cannot be any the less plenary than the legislative power, especially when the power to amend the Constitution and the power to legislate are conferred on one and the same organ of the State, namely, the Parliament. The Parliament may have to follow a different procedure while exercising its constituent power under Art. 368 than the procedure which it has to follow while exercising its legislative power under Article 245. But the obligation to follow different procedures while exercising the two different kinds of power cannot make any difference to the width of the power. In either event, it is plenary, subject in one case to the constraints of the basic structure of the Constitution and in the other, to the provisions of the Constitution.

50. The contention raised by the petitioners, that the power to appoint a date for

bringing into force a constitutional amendment is a constituent power and therefore it cannot be delegated to an outside agency is without any force. It is true that the constituent power, that is to say, the power to amend any provision of the Constitution by way of an addition, variation or repeal must be exercised by the Parliament itself and cannot be delegated to an outside agency. That is clear from Art. 368 (1) which defines at once the scope of the constituent power of the Parliament and limits that power to the Parliament. The power to issue a notification for bringing into force the provisions of a constitutional amendment is not a constituent power, because, it does not carry with it the power to amend the Constitution in any manner. It is, therefore, permissible to the Parliament to vest in an outside agency the power to bring a constitutional amendment into force. In the instant case, that power is conferred by the Parliament on another organ of the State, namely, the executive, which is responsible to the Parliament for all its actions. The Parliament does not irretrievably lose its power to bring the amendment into force by reason of the empowerment in favour of the Central Government to bring it into force. If the Central Government fails to do what, according to the Parliament, it ought to have done, it would be open to the Parliament to delete Section 1 (2) of the 44th Amendment Act by following the due procedure and to bring into force that Act or any of its provisions.

51. We need not enter into the much debated question relating to the delegation of legislative powers. In *The Queen v. Burah*, (1878) 5 Ind App 178, the Privy Council upheld the delegated power to bring a law into force in a district and to apply to it, the whole or part of the present or future laws which were in force in other districts. In *Russell v. The Queen*, (1882) 7 AC 829, it upheld the provision that certain parts of an Act should come into force only on the petition of a majority of electors. In *Hodge v. The Queen*, (1883) 9 AC 117, it upheld the power conferred upon a Board to create offences and annex penalties. The American authorities on the question of the validity of delegated powers need not detain us because, the theory that a legislature is a delegate of the people and therefore, it cannot delegate its power to another does not hold true under our Constitution. The executive, under our Constitution, is responsible to the legislature and is not independent of it as in the United States. The three Privy Council decisions to which we have referred above

were considered by this Court in *Re Delhi Laws Act* case, 1951 SCR 747: (AIR 1951 SC 332), which is considered as a leading authority on the question of delegated legislation. The reference made in that case by the President under Art. 143 (1) of the Constitution to the Supreme Court, in regard to the validity of certain laws, was necessitated by the decision of the Federal Court in *Jatindra Nath Gupta v. State of Bihar*, 1949 FCR 595: (AIR 1949 FC 175), in which it was held by the majority that the power to extend the operation of an Act for a further period of one year with such modification as may be specified was a legislative power and that the provisions of S. 1 (3) of that Act which delegated that power to an outside agency was bad. One of the questions which was referred to this Court in *Delhi Laws Act* case was whether Section 7 of the *Delhi Laws Act*, 1912 was ultra vires the Legislature which passed that Act. That section provided that the Provincial Government may by a notification extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof any enactment which is in force in any part of British India at the date of such notification. The difficulty of discovering the ratio of the seven judgments delivered in the *Delhi Laws Act* case is well known. There is, however, no difference amongst the learned Judges in their perception and understanding of what was actually decided in the three Privy Council cases to which we have referred and which were discussed by them. They read the Privy Council decisions as laying down that conditional legislation is permissible whereby the legislature entrusts to an outside agency the discretionary power to select the time or place to enforce the law. As stated by Shri H. M. Seervai in his "Constitutional Law of India" (2nd edn. at p. 1203): "The making of laws is not an end in itself, but is a means to an end, which the legislature desires to secure. That end may be secured directly by the law itself. But there are many subjects of legislation in which the end is better secured by extensive delegation of legislative power". There are practical difficulties in the enforcement of laws contemporaneously with their enactment as also in their uniform extension to different areas. Those difficulties cannot be foreseen at the time when the laws are made. It, therefore, becomes necessary to leave to the judgment of an outside agency the question as to when the law should be brought into force and to which areas it should be extended from time to time. What is permissible to the Legislature

by way of conditional legislation cannot be considered impermissible to the Parliament when, in the exercise of its constituent power, it takes the view that the question as regards the time of enforcement of a constitutional amendment should be left to the judgment of the executive. We are, therefore, of the opinion that Sec. 1 (2) of the 44th Amendment Act is not ultra vires the power of amendment conferred upon the Parliament by Art. 368 (1) of the Constitution.

52. We may now take up for consideration the question which was put in the forefront by Dr. Ghatate, namely, that since the Central Government has failed to exercise its power within a reasonable time, we should issue a mandamus calling upon it to discharge its duty without any further delay. Our decision on this question should not be construed as putting a seal of approval on the delay caused by the Central Government in bringing the provisions of S. 3 of the 44th Amendment Act into force. That Amendment received the assent of the President on April 30, 1979 and more than two and half years have already gone by without the Central Government issuing a notification for bringing Section 3 of the Act into force. But we find ourselves unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of Section 3 into force. The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the Court to compel the Government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive. It would be quite anomalous that the inaction of the executive should have the approval of the Parliament and yet we should show our disapproval of it by issuing a mandamus. The Court's power of judicial review in such cases has to be capable of being exercised both positively and negatively, if indeed it has that power; positively, by issuing a mandamus calling upon the Government to act and negatively by inhibiting it from acting. If it were permissible to the Court to compel the Government by a mandamus to bring a constitutional amendment into force on the ground that

the Government has failed to do what it ought to have done, it would be equally permissible to the Court to prevent the Government from acting, on some such ground as that, the time was not yet ripe for issuing the notification for bringing the Amendment into force. We quite see that it is difficult to appreciate what practical difficulty can possibly prevent the Government from bringing into force the provisions of S. 3 of the 44th Amendment, after the passage of two and half years. But the remedy, according to us, is not the writ of mandamus. If the Parliament had laid down an objective standard or test governing the decision of the Central Government in the matter of enforcement of the Amendment, it may have been possible to assess the situation judicially by examining the causes of the inaction of the Government in order to see, how far they bear upon the standard or test prescribed by the Parliament. But, the Parliament has left the matter to the judgment of the Central Government without prescribing any objective norms. That makes it difficult for us to substitute our own judgment for that of the Government on the question whether S. 3 of the Amendment Act should be brought into force. This is particularly so when the failure of the Central Government to bring that section into force so far can be no impediment in the way of the Parliament in enacting a provision in the National Security Act on the lines of that section. In fact, the Ordinance rightly adopted that section as a model and it is the Act which has wrongly discarded it. It is for these reasons that we are unable to accept the submission that by issuing a mandamus, the Central Government must be compelled to bring the provisions of S. 3 of the 44th Amendment into force. The question as to the impact of that section which, though a part of the 44th Amendment Act, is not yet a part of the Constitution, will be considered later when we will take up for examination the argument as regards the reasonableness of the procedure prescribed by the Act.

53. We have said at the very outset of the discussion of this point that our decision on the question as to whether a mandamus should be issued as prayed for by the petitioners, should not be construed as any approval on our part of the long and unexplained failure on the part of the Central Government to bring S. 3 of the 44th Amendment Act into force. We have no doubt that in leaving it to the judgment of the Central Government to decide as to when the various provisions of the 44th Amendment should be

brought into force, the Parliament could not have intended that the Central Government may exercise a kind of veto over its constituent will by not ever bringing the Amendment or some of its provisions into force. The Parliament having seen the necessity of introducing into the Constitution a provision like S. 3 of the 44th Amendment, it is not open to the Central Government to sit in judgment over the wisdom of the policy of that section. If only the Parliament were to lay down an objective standard to guide and control the discretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge the function assigned to it by the Parliament. In the past, many amendments have been made by the Parliament to the Constitution, some of which were given retrospective effect, some were given immediate effect, while in regard to some others, the discretion was given to the Central Government to bring the Amendments into force. For example, Sections 3 (1) (a) and (4) of the Constitution (First Amendment) Act, 1951 gave retrospective effect to the amendments introduced in Arts. 19 and 31 by those sections. The 7th Amendment, 1956, fixed a specific date on which it was to come into force. The 13th Amendment, 1962, provided by Section 1 (2) that it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. That amendment was brought into force by the Central Government on Dec. 1, 1963. The 27th Amendment, 1971 brought Section 3 thereof into force at once, while the remaining provisions were to come into force on a date appointed by the Central Government, which was not to be earlier than a certain date mentioned in S. 1 (2) of the Amending Act. Those remaining provisions were brought into force by the Central Government on Feb. 15, 1972. The 32nd Amendment, 1973, also provided by S. 1 (2) that it shall come into force on a date appointed by the Central Government. That amendment was brought into force on July 1, 1974. The 42nd Amendment, 1976, by which the Constitution was recast extensively, gave power to the Central Government to bring it into force. By a notification dated Jan. 1, 1977 parts of that Amendment were brought into force in three stages (see Basu's Commentary on the Indian Constitution, Edn. 1977, Vol. C, Part III, p. 134). Certain sections of that Amendment, which were not brought into force, were repealed by S. 45 of the 44th Amendment.

54. It is in this background that the Parliament conferred upon the Central Government the power to bring the provisions of the 44th Amendment Act into force. The Parliament could not have visualised that, without any acceptable reason, the Central Government may fail to implement its constituent will. We hope that the Central Government will, without further delay, bring S. 3 of the 44th Amendment Act into force. That section, be it remembered, affords to the detenu an assurance that his case will be considered fairly and objectively by an impartial tribunal.

55. As regards the argument that S. 1 (2) of the 44th Amendment Act is bad because it vests an uncontrolled power in the executive, we may point out, briefly, how similar and even more extensive delegation of powers to the executive has been upheld by this Court over the years. In *Sardar Inder Singh v. State of Rajasthan*, 1957 SCR 605: (AIR 1957 SC 510), Sec. 3 of the Rajasthan (Protection of Tenants) Ordinance provided that it shall remain in force for a period of two years unless that period is further extended by the Rajpramukh. It was held by this Court that S. 3, in so far as it authorised the Rajpramukh to extend the life of the Ordinance, fell within the category of conditional legislation and was *intra vires*. The Court dissented from the view expressed in *Jatindra Nath Gupta v. State of Bihar* (AIR 1949 FC 175), that the power to extend the life of an enactment cannot validly be conferred on an outside authority. In *Sita Ram Bishembhar Dayal v. State of U. P.*, (1972) 2 SCR 141: (AIR 1972 SC 1168), S. 3-D (1) of the U. P. Sales Tax Act, 1948, which was challenged on the ground of excessive delegation, provided for levying taxes at such rates as may be prescribed by the State Government not exceeding the maximum prescribed. While rejecting the challenge, Hegde, J. speaking for the Court observed (at p. 1169 of AIR):

"However much one might deplore the 'New Despotism' of the executive, the very complexity of the modern society and the demand it makes on its Government have set in motion forces which have made it absolutely necessary for the legislatures to entrust more and more powers to the executive. Text book doctrines evolved in the 19th Century have become out of date."

In *Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. v. Assistant Commr. of Sales Tax*, (1974) 2 SCR 879: (AIR 1974 SC 1660), the question which arose for determination was whether the provisions of S. 8 (2) (b)

of the Central Sales Tax Act, 1956 suffered from the vice of excessive delegation because the Parliament, in not fixing the rate itself and in adopting the rate applicable to the sale or purchase of goods inside the appropriate State, had not laid down any legislative policy, abdicating thereby its legislative function. Rejecting this contention Khanna, J., who spoke for himself and two other learned Judges observed that the growth of the legislative power of the executive is a significant development of the twentieth century and that provision was therefore made for delegated legislation to obtain flexibility, elasticity, expedition and opportunity for experimentation. Mathew, J. speaking on behalf of himself and Ray, C.J. agreed with the conclusion that S. 8 (2) (b) did not suffer from the vice of excessive delegation of legislative power. The decisions bearing on the subject of excessive delegation have been surveyed both by Khanna, J. and Mathew, J. in their respective judgments. In *M. K. Papiiah & Sons v. Excise Commr.*, (1975) 3 SCR 607: (AIR 1975 SC 1007) it was contended for the appellants that the power to fix the rate of Excise Duty conferred by Section 22 of the Mysore Excise Act of 1965 on the Government was bad for the reason that it was an abdication by the State legislature of its essential legislative function. The Court, speaking through Mathew, J. upheld the validity of S. 22. We are unable to appreciate that the constituent body can be restrained from doing what a legislature is free to do. We are therefore unable to accept the argument that Section 1 (2) confers an uncontrolled power on the executive and is, by its unreasonableness, violative of Articles 14 and 19 of the Constitution.

56. We are also unable to accept Shri Tarkunde's argument that the Central Government's failure to bring S. 3 of the 44th Amendment into force is *mala fide*. The Parliament has chosen to leave to the discretion of the Central Government the determination of the question as to the time when the various provisions of the 44th Amendment should be brought into force. Delay in implementing the will of the Parliament can justifiably raise many an eyebrow, but it is not possible to say on the basis of such data, as has been laid before us, that the Central Government is actuated by any ulterior motive in not bringing S. 3 into force. The other limb of Shri Tarkunde's argument that there is an obligation upon the Central Government to bring the provisions of the 44th Amendment into force within a reasonable time has already been dealt with by us while considering the argument that, since the

Government has not brought S. 3 into force within a reasonable time, it should be compelled by a writ of mandamus to perform its obligation.

57. That disposes of all the contentions bearing on the 44th Amendment Act except one, which we will consider later, as indicated already.

58. The next question arises out of the provisions of Ss. 3 (1) and 3 (2) of the National Security Act which, according to the petitioners, are so vague in their content and wide in their extent that, by their application, it is easy for the Central Government or the State Government to deprive a person of his liberty for any fanciful reason which may commend itself to them. Clauses (1) and (2) of S. 3 of the Act read thus :

"3 (1). The Central Government or the State Government may,—

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation :— For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of S. 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act."

59. It is contended by Shri Jethmalani that the expressions 'defence of India', 'relations of India with foreign powers', 'security of India' and 'security of the State' which

occur in sub-sections (1) (a) and (2) of S. 3 are so vague, general and elastic that even conduct which is otherwise lawful can easily be comprehended within those expressions, depending upon the whim and caprice of the detaining authority. The learned counsel argues : These expressions are transposed from the legislative entries into the aforesaid two sub-sections without any attempt at precision or definition. In so far as 'defence of India' is concerned, the legislature could have easily indicated the broad content of that expression by including within it acts like inciting armed forces to rebellion, damaging or destroying defence installations or disclosing defence secrets. In the absence of such definition, a statement that corrupt officials are responsible for the purchase of defence equipment from a foreign power, may be considered as falling within the mischief of that expression. The expression 'acting in any manner prejudicial to the relations of India with foreign powers' is particularly open to grave objection because it can take in any and every piece of conduct. In the absence of a precise definition it is impossible for any person to know with reasonable certainty as to what in this behalf are the limits of lawful conduct which he must not transgress. Even if a person were to say, in the exercise of the right of his free speech and expression, that a foreign power, which is not friendly with India, is adopting ruthless measures to suppress human liberties, it would be open to the detaining authority to detain a person for making that statement. The vice, therefore, of S. 3 consists in the fact that the governing factor for the application of that section is the passing and personal opinion of the detaining authority in regard to the security and defence of the country and its external affairs. A cardinal requirement of the rule of law is that citizens must know with certainty where lawful conduct ends and unlawful conduct begins; but more than that, the bureaucrats must know the limits of their power. The vagueness of the expressions used in S. 3 confers uncontrolled discretion on the detaining authority to expand the horizon of their power, to the detriment of the liberty of the subject. Even the right to peaceful demonstration, which has been upheld by this Court, may be treated by the detaining authority as falling within the mischief of S. 3. The circumstance that, if a habeas corpus petition is filed, the Court may release the detenu is hardly any answer to the vice of the section because the fundamental principle is that a person cannot be deprived of his liberty on the basis of a vague and uncertain law. The provisions of the Northern

Ireland (Emergency Provisions) Act, 1973 (Halsbury's Statutes of England, 3rd Edition, Vol. 43, page 1235) is an instance of a statute which defines with precision the reasons for which a person can be detained. That Act was passed *inter alia* for the detention of terrorists in Northern Ireland. Section 10 (1) provides that any constable may arrest without warrant any person whom he suspects of being a terrorist. Section 20 of that Act defines the terms 'terrorist' and 'terrorism' with great care and precision in order that the power of detention may not be abused.

60. In support of these propositions Shri Jethmalani relies on the decisions of the American Supreme Court in *United States of America v. L. Cohen Grocery Co.*, (1970) 65 Law Ed 516 at p. 520, *Champlin Refining Co. v. Corporation Commission of the State of Oklahoma*, (1931) 76 Law Ed 1062 at p. 1082, *Ignatius Lanzetta v. State of New Jersey*, (1938) 83 Law Ed 888 and *David H. Scull v. Commonwealth of Virginia Ex Rel.*, Committee on Law Reform and Racial Activities, (1959) 3 Law Ed 2d 865. The ratio of these cases may be summed up by reproducing the third headnote of the case last mentioned:

"Fundamental fairness requires that a person cannot be sent to jail for a crime he could not with reasonable certainty know he was committing; reasonable certainty in that respect is all the more essential when vagueness might induce individuals to forgo their rights of speech, press, and association for fear of violating an unclear law."

Counsel has also drawn our attention to the decision of this Court in the State of Madh. Pra. v. Baldeo Prasad, (1961) 1 SCR 970 : (AIR 1961 SC 293) where a law was struck down on the ground, *inter alia*, that the word 'goonda' is of uncertain import, which rendered unconstitutional a law which permitted goondas to be externed.

61. In this behalf Dr. Singhvi, intervening on behalf of the Supreme Court Bar Association, has drawn our attention to S. 8 (3) of the Jammu & Kashmir Public Safety Act, 6 of 1968, which defines the expressions "acting in any manner prejudicial to the security of the State" and "acting in any manner prejudicial to the maintenance of public order". Where there is a will there is a way, and counsel contends that the way shown with admirable precision by the Jammu & Kashmir Legislature is there for the Parliament to follow, provided its intention is, as it ought to be, that before the people are deprived of their liberty, they must have the opportunity to regulate their conduct in order to ensure that it may conform to the requirements of law.

62. In making these submissions counsel seem to us to have overstated their case by adopting an unrealistic attitude. It is true that the vagueness and the consequent uncertainty of a law of preventive detention bears upon the unreasonableness of that law as much as the uncertainty of a punitive law like the Penal Code does. A person cannot be deprived of his liberty by a Law which is nebulous and uncertain in its definition and application. But in considering the question whether the expressions aforesaid which are used in Section 3 of the Act are of that character, we must have regard to the consideration whether the concepts embodied in those expressions are at all capable of a precise definition. The fact that some definition or the other can be formulated of an expression does not mean that the definition can necessarily give certainty to that expression. The British Parliament has defined the term "terrorism" in Section 28 of the Act of 1973 to mean "the use of violence for political ends", which, by definition, includes "any use of violence for the purpose of putting the public or any section of the public in fear". The phrase "political ends" is itself of an uncertain character and comprehends within its scope a variety of nebulous situations. Similarly, the definitions contained in S. 8 (3) of the Jammu and Kashmir Act of 1978 themselves depend upon the meaning of concepts like 'overawe the Government'. The formulation of definitions cannot be a panacea to the evil of vagueness and uncertainty. We do not, of course, suggest that the legislature should not attempt to define or at least to indicate the contours of expressions, by the use of which people are sought to be deprived of their liberty. The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature. But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of lending to them a definite meaning, can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further definitions of the terms defined. Acts prejudicial to the 'defence of India', 'security of India', 'security of the State', and 'relations of India with foreign powers' are concepts of that nature which are difficult to encase within the strait-jacket of a definition. If it is permissible to the legislature to enact laws of preventive detention, a certain amount of

minimal latitude has to be conceded to it in order to make those laws effective. That we consider to be a realistic approach to the situation. An administrator acting bona fide or a court faced with the question as to whether certain acts fall within the mischief of the aforesaid expressions used in section 3, will be able to find an acceptable answer either way. In other words, though an expression may appear in cold print to be vague and uncertain, it may not be difficult to apply it to life's practical realities. This process undoubtedly involves the possibility of error but then, there is hardly any area of adjudicative process which does not involve that possibility.

63. The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in *Maneka Gandhi*, (1978) 2 SCR 621 : (AIR 1978 SC 597). The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the proscribed area, when measured by common understanding. In criminal law, the legislature frequently uses vague expressions like 'bring into hatred or contempt', or 'maintenance of harmony between different religious groups', or 'likely to cause disharmony or hatred or ill-will', or 'annoyance to public'. (see Sections 124-A, 153-A (1) (b), 153-B (1) (c) and 268 of the Penal Code). These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language.

64. We see that the concepts aforesaid, namely, 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers', which are mentioned in Section 3 of the Act, are not of any great certainty or definiteness. But in the very nature of things they are difficult to define. We cannot therefore strike down these provisions of S. 3 of the Act on the ground of their vagueness and uncertainty. We must,

however, utter a word of caution that since the concepts are not defined, undoubtedly because they are not capable of a precise definition, Courts must strive to give to those concepts a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionality of clauses like those in Section 3, which are fraught with grave consequences to personal liberty, if construed liberally.

65. What we have said above in regard to the expressions 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' cannot apply to the expression "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" which occurs in Section 3 (2) of the Act. Which supplies and services are essential to the community can easily be defined by the Legislature and indeed, legislations which regulate the prices and possession of essential commodities either enumerate those commodities or confer upon the appropriate Government the power to do so. In the absence of a definition of 'supplies and services essential to the community', the detaining authority will be free to extend the application of this clause of sub-section (2) to any commodities or services the maintenance of supply of which, according to him, is essential to the community.

66. But that is not all. The Explanation to sub-section (2) gives to the particular phrase in that sub-section a meaning which is not only uncertain but which, at any given point of time, will be difficult to ascertain or fasten upon. According to the Explanation, no order of detention can be made under the National Security Act on any ground on which an order of detention may be made under the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980. The reason for this, which is stated in the Explanation itself, is that for the purposes of sub-section (2), "acting in any manner prejudicial to the maintenance of supplies essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies essential to the community" as defined in the Explanation to sub-section (1) of Section 3 of the Act of 1980. Clauses (a) and (b) of the Explanation to Section 3 of the Act of 1980 exhaust almost the entire range of essential commodities. Clause (a) relates to commit-

ting or instigating any person to commit any offence punishable under the Essential Commodities Act, 10 of 1955, or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community. Clause (b) of the Explanation to S. 3 of the Act of 1980 relates to dealing in any commodity which is an essential commodity as defined in the Essential Commodities Act, 1955, or with respect to which provisions have been made in any such other law as is referred in Clause (a). We find it quite difficult to understand as to which are the remaining commodities outside the scope of the Act of 1980, in respect of which it can be said that the maintenance of their supplies is essential to the community. The particular clause in sub-section (2) of S. 3 of the National Security Act is, therefore, capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. We consider the particular clause not only vague and uncertain but, in the context of the Explanation, capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be a flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Art. 21.

67. In so far as "services essential to the community" are concerned, they are not covered by the Explanation to S. 3 (2) of the Act. But in regard to them also, in the absence of a proper definition or a fuller description of that term or a prior enumeration of such services, it will be difficult for any person to know with reasonable certitude as to which services are considered by the detaining authority as essential to the community. The essentiality of services varies from time to time, depending upon the circumstances existing at any given time. There are, undoubtedly, some services like water, electricity, posts and telegraph, hospital, railways, ports and road and air transport which are essential to the community at all times but, people have to be forewarned if new categories are to be added to the list of services which are commonly accepted as being essential to the community.

68. We do not, however, propose to strike down the power given to detain persons under

S. 3 (2) on the ground that they are acting in any manner prejudicial to the maintenance of supplies and services essential to the community. The reason for this is that it is vitally necessary to ensure a steady flow of supplies and services which are essential to the community, and if the State has the power to detain persons on the grounds mentioned in Section 3 (1) and the other grounds mentioned in Section 3 (2), it must also have the power to pass orders of detention on this particular ground. What we propose to do is to hold that no person can be detained with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community unless, by a law, order or notification made or published fairly in advance, the supplies and services, the maintenance of which is regarded as essential to the community and in respect of which the order of detention is proposed to be passed, are made known appropriately, to the public.

69. That disposes of the question as to the vagueness of the provisions of the National Security Act. We will now proceed to the consideration of a very important topic, namely, the reasonableness of the procedure prescribed by the Act. The arguments advanced on this question fall under three sub-heads: (1) the reasonableness of the procedure which is generally prescribed by the Act; (2) the fairness and reasonableness of the substantive provisions in regard to the constitution of Advisory Boards; and (3) the justness and reasonableness of the procedure in the proceedings before the Advisory Boards. The discussion of these questions will conclude this judgment.

70. Shri Jethmalani attacked the constitutionality of the very National Security Act itself on the ground that it is a draconian piece of legislation which deprives people of their personal liberty excessively and unreasonably, confers vast and arbitrary powers of detention upon the executive, and sanctions the use of those powers by following a procedure which is unfair and unjust. The Act, according to the counsel, thereby violates Articles 14, 19 and 21 and is therefore wholly unconstitutional. This argument, it must be stated, is not to be confused with the fundamental premise of the petitioners that, under our Constitution, no law of preventive detention can at all be passed, whatever be the safeguards it provides for the protection of personal liberty. We have already dealt with that argument.

71. The argument of Shri Jethmalani against the validity of the National Security

Act can be disposed of briefly. We need not enter into the controversy which is reflected in the dissenting judgment of Kailasam, J. in *Maneka Gandhi* (AIR 1978 SC 597) as to whether the major premise of *Gopalan's* case (AIR 1950 SC 27) really was that Art. 22 is a complete code in itself and whether because of that premise, the decision in that case that Article 21 excluded the personal freedom conferred by Art. 19 (1) is incorrect. We have the authority of the decisions in the *Bank Nationalisation* case (AIR 1970 SC 564), *Haradhan Saha*, (1975) 1 SCR 778 : (AIR 1974 SC 2154), *Khudiram*, (1975) 2 SCR 832 : (AIR 1975 SC 550), *Sambhu Nath Sarkar*, (1974) 1 SCR 1 : (AIR 1973 SC 1425) and *Maneka Gandhi* for saying that the fundamental rights conferred by the different articles of Part III of the Constitution are not mutually exclusive and that therefore, a law of preventive detention which falls within Article 22 must also meet the requirements of Arts. 14, 19 and 21. Speaking for the Court in *Khudiram*, one of us, *Bhagwati, J.* said :

"This question, thus, stands concluded and a final seal is put on this controversy and in view of these decisions, it is not open to any one now to contend that a law of preventive detention, which falls within Art. 22, does not have to meet the requirement of Art. 14 or Article 19." (page 847 of SCR) : (at p. 559 of AIR)

But just as the question as to whether the rights conferred by the different articles of Part III are mutually exclusive is concluded by the aforesaid decisions, the question whether a law of preventive detention is unconstitutional for the reason that it violates the freedoms conferred by Arts. 14, 19, 21 and 22 of the Constitution is also concluded by the decision in *Haradhan Saha*. In that case the validity of the *Maintenance of Internal Security Act, 1971* was challenged on the ground that it violates these articles since its provisions were discriminatory, they constituted an unreasonable infringement of the rights conferred by Art. 19, they infringed the guarantee of fair procedure and they did not provide for an impartial machinery for the consideration of the representation made by the detenu to the Government. The Constitution Bench which heard the case considered these contentions and rejected them by holding that the MISA did not suffer from any constitutional infirmity. The MISA was once again challenged in *Khudiram*, but the Court refused to entertain that challenge on the ground that the question was con-

cluded by the decision in *Haradhan Saha* and that it was not open to the petitioner to challenge that Act on the ground that some argument directed against the constitutional validity of the Act under Art. 19 was not advanced or considered in *Haradhan Saha*. The Court took the view that the decision in *Haradhan Saha* must be regarded as having finally decided all questions as to the constitutional validity of MISA on the ground of challenge under Art. 19. We would like to add that in *Haradhan Saha* the challenge to MISA on the ground of violation of Arts. 14, 21 and 22 was also considered and rejected. The question therefore as to whether MISA violated the provisions of these four articles, namely, Articles 14, 19, 21 and 22, must be considered as having been finally decided in *Haradhan Saha*. Accordingly, we find it impossible to accept the argument that the *National Security Act*, which is in *pari materia* with the *Maintenance of Internal Security Act, 1971*, is unconstitutional on the ground that, by its very nature, it is generally violative of Arts. 14, 19, 21 and 22.

72. Though the Act, as a measure of preventive detention, cannot be challenged on the broad and general ground that such Acts are calculated to interfere unduly with the liberty of the people, we shall have to consider the challenge made by the petitioners' counsel, particularly by *Shri Jethmalani* and *Dr. Ghatate*, to certain specific provisions of the Act on the ground that they cause excessive and unreasonable interference with the liberty of the detenus and that the procedure prescribed by those provisions is not fair, just and reasonable. *Dr. Ghatate* has, with particular emphasis, challenged on these grounds the provisions of Ss. 3 (2), 3 (3), 5, 8, 9, 10, 11, 13 and 16 of the Act. *Shri Tar-kunde* challenged the provisions of Ss. 8 and 11 (4) of the Act.

73. We have already dealt with the argument arising out of the provisions of S. 3 (2) read with the Explanation, by which power is conferred to detain persons in order to prevent them from acting in any manner prejudicial to the maintenance of supplies and services essential to the community. In so far as sub-section (3) of Section 3 is concerned, the argument is that it is wholly unreasonable to confer upon the District Magistrate or the Commissioner of Police the power to issue orders of detention for the reasons mentioned in sub-section (2) of S. 3. The answer to this contention is that the said power is conferred upon these officers only if the State Government is satisfied that

having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of these officers, it is necessary to empower them to take action under sub-section (2). The District Magistrate or the Commissioner of Police can take action under sub-section (2) during the period specified in the order of the State Government only. Another safeguard provided is, that the period so specified in the order made by the State Government during which these officers can exercise the powers under sub-section (2), cannot, in the first instance, exceed three months and can be extended only from time to time not exceeding three months at any one time. By sub-section (4) of S. 3, the District Magistrate or the Commissioner of Police has to report forthwith the fact of detention to the State Government and no such order of detention can remain in force for more than 12 days after the making thereof unless, in the meantime, it has been approved by the State Government. In view of these in-built safeguards, it cannot be said that excessive or unreasonable power is conferred upon the District Magistrate or the Commissioner of Police to pass orders under sub-section (2).

74. By Section 5, every person in respect of whom a detention order has been made is liable—

(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention, whether in the same State or in another State, by order of the appropriate Government.

The objection of the petitioners to these provisions on the ground of their unreasonableness is not wholly without substance. Laws of preventive detention cannot, by the backdoor, introduce procedural measures of a punitive kind. Detention without trial is an evil to be suffered, but to no greater extent and in no greater measure than is minimally necessary in the interest of the country and the community. It is neither fair nor just that a detenu should have to suffer detention in "such place" as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the environs of his or her ordinary place of residence. If a person ordinarily resides in Delhi, to keep him in detention in a far off place like Madras or Calcutta is a punitive measure by itself which,

in matters of preventive detention at any rate, is not to be encouraged. Besides, keeping a person in detention in a place other than the one where he habitually resides makes it impossible for his friends and relatives to meet him or for the detenu to claim the advantage of facilities like having his own food. The requirements of administrative convenience, safety and security may justify in a given case the transfer of a detenu to a place other than that where he ordinarily resides, but that can only be by way of an exception and not as a matter of general rule. Even when a detenu is required to be kept in or transferred to a place which is other than his usual place of residence, he ought not to be sent to any far off place which, by the very reason of its distance, is likely to deprive him of the facilities to which he is entitled. Whatever smacks of punishment must be scrupulously avoided in matters of preventive detention.

75. Since Section 5 of the Act provides for, as shown by its marginal note, the power to regulate the place and conditions of detention, there is one more observation which we would like to make and which we consider as of great importance in matters of preventive detention. In order that the procedure attendant upon detentions should conform to the mandate of Art. 21 in the matter of fairness, justness and reasonableness, we consider it imperative that immediately after a person is taken in custody in pursuance of an order of detention, the members of his household, preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention, including the place where the detenu is transferred from time to time. This Court has stated time and again that the person who is taken in custody does not forfeit, by reason of his arrest, all and every one of his fundamental rights. It is, therefore, necessary to treat the detenu consistently with human dignity and civilized norms of behaviour.

76. The objection of the petitioners against the provision contained in S. 8 (1) is that it unreasonably allows the detaining authority to furnish the grounds of detention to the detenu as late as five days and in exceptional cases 10 days after the date of detention. This argument overlooks that the primary requirement of S. 8 (1) is that the authority making the order of detention shall communicate the grounds of detention to the detenu "as soon as may be". The normal rule

therefore is that the grounds of detention must be communicated to the detenu without avoidable delay. It is only in order to meet the practical exigencies of administrative affairs that the detaining authority is permitted to communicate the grounds of detention not later than five days ordinarily, and not later than 10 days if there are exceptional circumstances. If there are any such circumstances, the detaining authority is required by S. 8 (1) to record its reason in writing. We do not think that this provision is open to any objection.

77. Sections 9, 10 and 11 deal respectively with the constitution of Advisory Boards, reference to Advisory Boards and procedure of Advisory Boards. We will deal with these three sections a little later while considering the elaborate submissions made by Shri Jethmalani in regard thereto.

78. Dr. Ghatate's objection against S. 13 is that it provides for a uniform period of detention of 12 months in all cases, regardless of the nature and seriousness of the grounds on the basis of which the order of detention is passed. There is no substance in this grievance because, any law of preventive detention has to provide for the maximum period of detention, just as any punitive law like the Penal Code has to provide for the maximum sentence which can be imposed for any offence. We should have thought that it would have been wrong to fix a minimum period of detention, regardless of the nature and seriousness of the grounds of detention. The fact that a person can be detained for the maximum period of 12 months does not place upon the detaining authority the obligation to direct that he shall be detained for the maximum period. The detaining authority can always exercise its discretion regarding the length of the period of detention. It must also be mentioned that, under the proviso to Section 13, the appropriate Government has the power to revoke or modify the order of detention at any earlier point of time.

79. Section 16 is assailed on behalf of the petitioners on the ground that it confers a wholly unwarranted protection upon officers who may have passed orders of detention *mala fide*. That section provides that no suit or other legal proceeding shall lie against the Central Government or a State Government and no suit, prosecution or other legal proceeding shall lie against any person, for anything in good faith done or intended to be done in pursuance of the Act. The grievance of Dr. Ghatate is that even if an officer has in fact passed an order of detention *mala*

fide, but intended to pass it in good faith, he will receive the protection of this provision. We see a contradiction in this argument because, if an officer intends to pass an order in good faith, he will pass it in good faith and if he intends to pass the order *mala fide* he will pass it likewise. Moreover, an act which is not done in good faith will not receive the protection of Section 16 merely because it was intended to be done in good faith. It is also necessary that the Act complained of must have been in pursuance of the Act.

80. Shri Jethmalani also challenged the provisions of S. 16 on the ground of their unreasonableness. He contends that the expression "good faith", which occurs in Section 16, has to be construed in the sense in which it is defined in S. 3 (22) of the General Clauses Act, 10 of 1897, according to which, a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not. On the contrary, S. 52 of the Indian Penal Code provides that 'nothing is said to be done or believed in "good faith" which is done or believed without due care and attention'. If the definition contained in S. 52 of the Penal Code were made applicable, a suit or other proceeding could have lain against the detaining authority on the ground that the order was passed carelessly or without a proper application of mind. Counsel contends that since the General Clauses Act would apply, the detaining authority can defend the order and defeat the suit or other proceeding brought against it by showing merely that the order was passed honestly. We do not see any force in this grievance. If the policy of a law is to protect honest acts, whether they are done with care or not, it cannot be said that the law is unreasonable. In fact, honest acts deserve the highest protection. Then again, the line which divides a dishonest act from a negligent act is often thin and, speaking generally, it is not easy for a defendant to justify his conduct as honest, if it is accompanied by a degree of negligence. The fact, therefore, that the definition contained in S. 3 (22) of the General Clauses Act includes negligent acts in the category of acts done in good faith will not always make material difference to the proof of matters arising in proceedings under S. 16 of the Act.

81. That takes us to the last of the many points urged in this case, which relates to the constitution of Advisory Boards and the procedure before them. Three sections of the National Security Act are relevant in this context, namely, Sections 9, 10 and 11. It

may be recalled that S. 3 of the 44th Constitution Amendment Act, 1978 made an important amendment to Art. 22 (4) of the Constitution by providing that—

(i) no law of preventive detention shall authorise the detention of any person for more than two months unless an Advisory Board has reported before the expiry of that period that there is in its opinion sufficient cause for such detention;

(ii) the Advisory Board must be constituted in accordance with the recommendation of the Chief Justice of the appropriate High Court; and

(iii) the Advisory Board must consist of a Chairman and not less than two other members, the Chairman being a serving Judge of the appropriate High Court and the other members being serving or retired judges of any High Court.

The main points of distinction between the amended provisions and the existing provisions of Art. 22 (4) are that whereas, under the amended provisions, (i) the constitution of the Advisory Board has to be in accordance with the recommendation of the Chief Justice of the appropriate High Court, (ii) the Chairman of the Advisory Board has to be a serving Judge of the appropriate High Court, and (iii) the other members of the Advisory Board have to be serving or retired Judges of any High Court, under the existing procedure, (i) it is unnecessary to obtain the recommendation of the Chief Justice of any High Court for constituting the Advisory Board and (ii) the members of the Advisory Board need not be serving or retired Judges of a High Court: it is sufficient if they are "qualified to be appointed as Judges of a High Court". By Article 217 (2) of the Constitution, a citizen of India is qualified for appointment as a Judge of a High Court if he has been an advocate of a High Court for ten years.

82. The distinction between the provisions of the amended and the unamended provisions of Article 22 (4) in regard to the constitution of Advisory Board is of great practical importance from the point of view of the detenu. The safeguards against unfounded accusations and the opportunity for establishing innocence which constitute the hallmark of an ordinary criminal trial are not available to the detenu. He is detained on the basis of ex parte reports in regard to his past conduct, with a view to preventing him from persisting in that course of conduct in future. It is therefore of the utmost importance from the detenu's point of view that the Advisory Board should consist of persons who are in-

dependent, unbiassed and competent and who possess a trained judicial mind. But the question for our consideration is whether, as urged by Shri Jethmalani, S. 9 of the National Security Act is bad for the reason that its provisions do not accord with the requirements of S. 3 of the 44th Amendment Act. We find considerable difficulty in accepting this submission. Earlier in this judgment, we have upheld the validity of S. 1 (2) of the 44th Amendment Act, by which the Parliament has given to the Central Government the power to bring into force all or any of the provisions of that Act, with option to appoint different dates for the commencement of different provisions of the Act. The Central Government has brought all the provisions of the 44th Amendment Act into force except one, namely, Section 3, which contains the provision for the constitution of Advisory Boards. We have taken the view that we cannot compel the Central Government by a writ of mandamus to bring the provisions of S. 3 into force. We have further held that, on a true interpretation of Article 368 (2) of the Constitution, it is in accordance with the terms of the 44th Constitution Amendment Act that, upon the President giving his assent to that Act, the Constitution stood amended. Since S. 3 has not been brought into force by the Central Government in the exercise of its powers under Section 1 (2) of the 44th Amendment Act, that section is still not a part of the Constitution. The question as to whether Section 9 of the National Security Act is bad for the reason that it is inconsistent with the provisions of S. 3 of the 44th Amendment Act, has therefore to be decided on the basis that S. 3, though a part of the 44th Amendment Act, is not a part of the Constitution. If Sec. 3 is not a part of the Constitution, it is difficult to appreciate how, the validity of S. 9 of the National Security Act can be tested by applying the standard laid down in that section. It cannot possibly be that both the unamended provision of Art. 22 (4) of the Constitution are parts of the Constitution at one and the same time. So long as S. 3 of the 44th Amendment Act has not been brought into force, Art. 22 (4) in its unamended form will continue to be a part of the Constitution and so long as the provision is a part of the Constitution, the amendment introduced by S. 3 of the 44th Amendment Act cannot become a part of the Constitution. Section 3 of the 44th Amendment substitutes a new Art. 22 (4) for the old Art. 22 (4). The validity of the constitution of Advisory Boards has therefore to be tested in the light of the provisions contained in Art. 22 (4) as it stands now and

not according to the amended Art. 22 (4). According to that Article as it stands now, an Advisory Board may consist of persons, inter alia, who are qualified to be appointed as Judges of a High Court. Section 9 of the National Security Act provides for the constitution of the Advisory Boards in conformity with that provision. We find it impossible to hold that the provision of a statute, which conforms strictly with the existing provisions of the Constitution, can be declared bad either on the ground that it does not accord with the provisions of a constitutional amendment which has not yet come into force, or on the ground that the provision of the section is harsh or unjust. The standard which the Constitution, as originally enacted, has itself laid down for constituting Advisory Boards, cannot be characterised as harsh or unjust. The argument, therefore, that S. 9 of the National Security Act is bad for either of these reasons must fail.

83. We must hasten to add that the fact that Section 3 of the 44th Amendment has not yet been brought into force does not mean that the Parliament cannot provide for the constitution of Advisory Boards in accordance with its requirements. The Parliament is free to amend S. 9 of the National Security Act so as to bring it in line with Section 3 of the 44th Amendment. Similarly, the fact that S. 9 provides for the constitution of Advisory Boards consisting of persons "who are, or have been, or are qualified to be appointed as, Judges of a High Court" does not mean that the Central Government or the State Governments cannot constitute Advisory Boards consisting of serving or retired Judges of the High Court. The minimal standard laid down in Art. 22 (4) (a), which is adopted by Sec. 9 of the Act, is binding on the Parliament while making a law of preventive detention and on the executive while constituting an Advisory Board. That standard cannot be derogated from. But, it can certainly be improved upon. We do hope that the Parliament will take the earliest opportunity to amend Section 9 of the Act by bringing it in line with Section 3 of the 44th Amendment as the Ordinance did and that, the Central Government and the State Governments will constitute Advisory Boards in their respective jurisdictions in accordance with S. 3, whether or not S. 9 of the Act is so amended. We are informed that some enlightened State Governments have already given that lead. We hope that the other Governments will follow suit. After all, the executive must strive to reach the highest standards of justice and fairness in all its actions, whether

or not it is compellable by law to adopt those standards. Advisory Boards consisting of serving or retired Judges of High Courts, preferably serving, and drawn from a panel recommended by the Chief Justice of the concerned High Court will give credibility to their proceedings. There will then be a reasonable assurance that Advisory Boards will express their opinion on the sufficiency of the cause for detention, with objectivity, fairness and competence. That way, the implicit promise of the Constitution shall have been fulfilled.

84. Now, as to the procedure of Advisory Boards. Shri Jethmalani laid great stress on this aspect of the matter and, in our opinion, rightly. Consideration by the Advisory Board of the matters and material used against the detenu is the only opportunity available to him for a fair and objective appraisal of his case. Shri Jethmalani argues that the Advisory Boards must therefore adopt a procedure which is akin to the procedure which is generally adopted by judicial and quasi-judicial tribunals for resolving the issues which arise before them. He assails the procedure prescribed by Ss. 10 and 11 of the National Security Act on the ground that it is not in consonance with the principles of natural justice, that it does not provide the detenu with an effective means of establishing that what is alleged against him is not true and that it militates against the requirements of Art. 21. Learned counsel enumerated twelve requirements of natural justice which, according to him, must be observed by the Advisory Boards. Those requirements may be summed up, we hope without injustice to the argument, by saying that (i) the detenu must have the right to be represented by a lawyer of his choice; (ii) he must have the right to cross-examine persons on whose statements the order of detention is founded; and (iii) he must have the right to present evidence in rebuttal of the allegations made against him. Counsel also submitted that the Advisory Board must give reasons in support of its opinion which must be furnished to the detenu, that the entire material which is available to the Advisory Board must be disclosed to the detenu and that the proceedings of the Advisory Board must be open to the public. According to Shri Jethmalani, the Advisory Board must not only consider whether the order of detention was justified but it must also consider whether it would have itself passed that order on the basis of the material placed before it. Counsel says that the Advisory Board must further examine whether all the procedural steps which are obli-

gatory under the Constitution were taken until the time of its report, the impact of loss of time and altered circumstances on the necessity to continue the detention and last but not the least, whether there is factual justification for continuing the order of detention beyond the period of three months. Counsel made an impassioned plea that 25 years of the Gopalan jurisprudence have desensitised the community to the perils of preventive detention and that, it is imperative to provide for the maximum safeguards to the detenu in order to preserve and protect his liberty, which can be achieved by making at least the rudiments of due process available to him. How much process is due must depend, according to Shri Jethmalani, on the extent of grievous loss involved in the case. The loss in preventive detention is of the precious right of personal liberty and therefore, it is urged, all such procedural facilities must be afforded to the detenu as will enable him to meet the accusations made against him and to disprove them.

85. First and foremost, we must consider whether and to what extent the detenu is entitled to exercise the trinity of rights before the Advisory Board: (i) the right of legal representation; (ii) the right of cross-examination and (iii) the right to present his evidence in rebuttal. These rights undoubtedly constitute the core of just process because without them, it would be difficult for any person to disprove the allegations made against him and to establish the truth. But there are two considerations of primary importance which must be borne in mind in this regard. There is no prescribed standard of reasonableness and therefore, what kind of processual rights should be made available to a person in any proceeding depends upon the nature of the proceeding in relation to which the rights are claimed. The kind of issues involved in the proceeding determine the kind of rights available to the persons who are parties to that proceeding. Secondly, the question as to the availability of rights has to be decided not generally but on the basis of the statutory provisions which govern the proceeding, provided of course that those provisions are valid. In the instant case, the question as to what kind of rights are available to the detenu in the proceeding before the Advisory Board has to be decided in the light of the provisions of the Constitution, and on the basis of the provisions of the National Security Act to the extent to which they do not offend against the Constitution.

86. Turning first to the right of legal representation which is claimed by the peti-

tioners, the relevant article of the Constitution to consider is Art. 22 which bears the marginal note "protection against arrest and detention in certain cases". That article provides by clause (1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Clause (2) requires that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest and that no person shall be detained in custody beyond the said period without the authority of a Magistrate. Clause (3) provides that nothing in Cls. (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention. It may be recalled that Cl. (4) (a) of Art. 22 provides that no law of preventive detention shall authorise the detention of a person for a period longer than three months unless the Advisory Board has reported before the expiry of the said period of three months that there is in its opinion sufficient cause for such detention. By Cl. (7) (c) of Art. 22, the Parliament is given the power to prescribe by law the procedure to be followed by the Advisory Board in an inquiry under Cl. (4) (a).

87. On a combined reading of clauses (1), and (3) (b) of Art. 22, it is clear that the right to consult and to be defended by a legal practitioner of one's choice, which is conferred by Cl. (1), is denied by Cl. (3) (b) to a person who is detained under any law providing for preventive detention. Thus, according to the express intendment of the Constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him. In view of this, it seems to us difficult to hold, by the application of abstract, general principles or on a priori considerations that the detenu has the right of being represented by a legal practitioner in the proceedings before the Advisory Board. Since the Constitution, as originally enacted, itself contemplates that such a right should not be made available to a detenu, it cannot be said that the denial of the said right is unfair, unjust or unreasonable. It is indeed true to say, after the decision in the Bank Nationalisation case, (AIR 1970 SC 564) that though the subject of preventive detention is specifically dealt with in Article 22,

the requirements of Article 21 have nevertheless to be satisfied. It is therefore necessary that the procedure prescribed by law for the proceedings before the Advisory Boards must be fair, just and reasonable. But then, the Constitution itself has provided a yardstick for the application of that standards, through the medium of the provisions contained in Article 22 (3) (b). Howsoever much we would have liked to hold otherwise, we experience serious difficulty in taking the view that the procedure of the Advisory Boards in which the detenu is denied the right of legal representation is unfair, unjust or unreasonable. If Art. 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to hold that the detenu cannot be denied the right of legal representation in the proceedings before the Advisory Boards. It is unfortunate that courts have been deprived of that choice by the express language of Art. 22 (3) (b) read with Article 22 (1).

88. It is contended by Shri Jethmalani that the provision contained in Cl. (3) (b) of Article 22 is limited to the right which is specifically conferred by clause (1) of that article and therefore, if the right to legal representation is available to the detenu apart from the provisions of Art. 22 (1), that right cannot be denied to him by reason of the exclusionary provisions contained in Art. 22 (3) (b). Counsel says that the right of legal representation arises out of the provisions of Articles 19, 21 and 22 (5) and therefore, nothing said in Art. 22 (3) (b) can affect that right. In a sense we have already answered this contention because, what that contention implies is that the denial of the right of legal representation to the detenu in the proceedings before the Advisory Board is an unreasonable restriction, within the meaning of Art. 19 (1), on the rights conferred by that article. If the yardstick of reasonableness is provided by Art. 22 (3), which is as much a part of the Constitution as originally enacted, as Arts. 19, 21 and 22 (5), it would be difficult to hold that the denial of the particular right introduces an element of unfairness, unjustness or unreasonableness in the procedure of the Advisory Boards. It would be stretching the language of Arts. 19 and 21 a little too far to hold that what is regarded as reasonable by Article 22 (3) (b) must be regarded as unreasonable within the meaning of those articles. For illustrating this point, we may take the example of a law which provides that an enemy alien need not be produced before a Magistrate within twenty-four hours of his

arrest or detention in custody. If the right of production before the Magistrate within 24 hours of the arrest is expressly denied to the enemy alien by Art. 22 (3) (a), it would be impossible to hold that the said right is nevertheless available to him by reason of the provisions contained in Art. 21. The reason is, that the answer to the question whether the procedure established by law for depriving an enemy alien of his personal liberty is fair or just is provided by the Constitution itself through the provisions of Article 22 (3) (a). What that provision considers fair, just and reasonable cannot, for the purposes of Art. 21, be regarded as unfair, unjust or unreasonable.

89. To read the right of legal representation in Art. 22 (5) is straining the language of that article. Clause (5) confers upon the detenu the right to be informed of the grounds of detention and the right to be afforded the earliest opportunity of making a representation against the order of detention. That right has undoubtedly to be effective, but it does not carry with it the right to be represented by a legal practitioner before the Advisory Board merely because, by S. 10 of the National Security Act, the representation made by the detenu is required to be forwarded to the Advisory Board for its consideration. If anything, the effect of Section 11 (4) of the Act, which conforms to Art. 22 (3) (b), is that the detenu cannot appear before the Advisory Board through a legal practitioner. The written representation of the detenu does not have to be expatiated upon by a legal practitioner.

90. Great reliance was placed by Shri Jethmalani on the decision of the American Supreme Court in *Ozie Powell v. State of Alabama*, (1932) 77 L Ed 158, in which it was held that the right of hearing includes the right to the aid of counsel because, the right to be heard will in many cases be of little help if it did not comprehend the right to be heard by a counsel. Delivering the opinion of the Court, Sutherland, J. said :

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He re-

quires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense (p. 170)." The aforesaid decision in *Powell* is unique in more than one way and has to be distinguished. The petitioners therein were charged with the crime of rape committed upon two white girls. At the trial, no counsel was employed on behalf of the petitioners but the trial Judge had stated that "he had appointed all the members of the Bar for the purpose of arraigning the defendants and then of course anticipated that the members of the Bar would continue to help the defendants if no counsel appeared". The trial of the petitioners was completed within a single day, at the conclusion of which the petitioners were sentenced to death. That verdict was assailed on the ground, *inter alia*, that the petitioners were denied the right of counsel. It must be stated that the Constitution of Alabama provided that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel; and a State Statute required that the Court must appoint a counsel for the accused in all capital cases where the accused was unable to employ one. It is in the light of these provisions and as a requirement of the due process clause of the American Constitution that it was held that the right to hearing, which is a basic element of due process, includes the right to the aid of counsel. The patent distinction between that case and the matter before us is that our Constitution, at its very inception, regarded it reasonable to deny to the detenu the right to consult and be defended by a legal practitioner of his choice. Secondly, a criminal trial involves issues of a different kind from those which the Advisory Board has to consider. The rights available to an accused can, therefore, be of a different character than those available to the detenu, consistently with reason and fairplay.

91. Shri Jethmalani also relied upon another decision of the Supreme Court which is reported in *John J. Morrissey v. Lon B. Brewer*, (1972) 33 L Ed 2d 484. In that

case, two convicts whose paroles were revoked by the Iowa Board of Parole, alleged that they were denied due process because their paroles were revoked without a hearing. Burger, C. J., expressing the view of six members of the Court, expressly left open the question whether a parolee is entitled, in a parole revocation proceeding, to the assistance of counsel. The three other learned Judges held that due process requires that the parolee be allowed the assistance of counsel in the parole revocation proceeding. It must be appreciated that the American decisions on the right to counsel turn largely on the due process clause in the American Constitution. We cannot invoke that clause for spelling out a right as part of a reasonable procedure, in matters wherein our Constitution expressly denies that right.

92. In support of his submission that the detenu is entitled to appear through a legal practitioner before the Advisory Board, Shri Jethmalani relies on the decisions of this Court in *Madhav Hayawadanrao Hoskot v. State of Maharashtra*, (1979) 1 SCR 192: (AIR 1978 SC 1548); *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 98: (AIR 1979 SC 1369) and *Francis Coralie Mullin v. Administrator, Union Territory of Delhi, Writ Petn. (Crl.) No. 3042/1980* decided on Jan. 13, 1981: (reported in AIR 1981 SC 746). Speaking for the Court, Krishna Iyer, J. said in *Hoskot*:

"The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the Court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judiciary, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law (Page 204 of SCR): (at p. 1554 of AIR 1978 SC)."

In *Hussainara Khatoon*, one of us, Bhagwati, J. voiced the same concern by saying:

"It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the Court's process that he should have legal services available to him." (Page 103 of SCC): (at p. 1373 of AIR).

These observations were made in the context of rights available to an accused in a criminal trial and cannot be extended to the pro-

ceedings of Advisory Boards in order to determine the rights of detenus in relation to those proceedings. The question as regards the kind and nature of rights available in those proceedings has to be decided on the basis of the provisions contained in Art. 22 of the Constitution and Ss. 10 and 11 of the National Security Act.

93. In *Francis Coralie Mullin* (AIR 1981 SC 746), the petitioner, while in detention, wanted to have an interview with her lawyer, which was rendered almost impossible by reason of the stringent provisions of Cl. 3 (b) (i) of the 'Conditions of Detention' formulated by the Delhi Administration. In a petition filed in this Court to challenge the aforesaid clause, inter alia, it was held by this Court that the clause was void, since it violated Arts. 14 and 21 by its discriminatory nature and unreasonableness. The Court directed that the detenu should be permitted to have an interview with her legal adviser at any reasonable hour during the day after taking an appointment from the Superintendent of the Jail and that the interview need not necessarily take place in the presence of an officer of the Customs or Central Excise Department. The Court also directed that the officer concerned may watch the interview but not so as to be within the hearing distance of the detenu and the legal adviser. This decision has no bearing on the point which arises before us, since the limited question which was involved in that case was whether the procedure prescribed by clause (3), governing the interviews which a detenu may have with his legal adviser, was reasonable. The Court was not called upon to consider the question as regards the right of a detenu to be represented by a legal practitioner before the Advisory Board. We would, however, like to say that by this judgment we are neither affirming nor disapproving of the decision in *Francis Coralie Mullin* to the effect that the detenu has a right to consult a lawyer of his choice for the purpose of preparing his representation, advising him as to how he should defend himself before the Advisory Board and preparing and filing a habeas corpus petition or other proceedings for securing his release.

94. We must, therefore, hold regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Art. 22 (3) (b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advi-

sory Board for any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Art. 22. Permitting the detaining authority or the Govt. to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Art. 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the Govt. takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Government in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not "legal practitioners" or legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them. Serving or retired Judges of the High Court will have no difficulty in understanding this position. Those who are merely "qualified to be appointed" as High Court Judges may have to do a little home-work in order to appreciate it.

95. Another aspect of this matter which needs to be mentioned is that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. A detenu, taken straight from his cell to the Board's room, may lack the ease and composure to present his point of view. He may be "tongue-tied, nervous, confused or wanting in intelligence" (see *Pett v. Greyhound Racing Association*

Ltd., (1969) 1 QB 125), and if justice is to be done, he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts dishevelled. Just as a person who is dumb is entitled, as he must, to be represented by a person who has speech, even so, a person who finds himself unable to present his own case is entitled to take the aid and advice of a person who is better situated to appreciate the facts of the case and the language of the law. It may be that denial of legal representation is not denial of natural justice per se, and therefore, if a statute excludes that facility expressly, it would not be open to the Tribunal to allow it. Fairness, as said by Lord Denning M. R., in *Maynard v. Osmond*, (1977) 1 QB 240, 253, can be obtained without legal representation. But, it is not fair, and the statute does not exclude that right, that the detenu should not even be allowed to take the aid of a friend. Whenever demanded, the Advisory Boards must grant that facility.

96. Shri Jethmalani laid equally great stress on the need to give the detenu the right of cross-examination and in support of his submission in that behalf, he relied on the decisions of the American Supreme Court in *Jack R. Goldberg v. John Kelly*, (1970) 25 L Ed 2d 287, 300, 301; *Morrissey*, ((1972) 33 L Ed 2d 484); *Norval Goss v. Eileen Lopez*, (1975) 42 L Ed 2d 725 and *Powell* ((1932) 77 L Ed 158). In *Goldberg*, *Brennan, J.*, expressing the view of five members of the Court said that in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. The learned Judge reiterated the Court's observations in *Greene v. McElroy*, (1959) 3 L Ed 2d 1377, 1390, 1391 to the following effect:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of con-

frontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, ... but also in all types of cases where administrative actions were under scrutiny."

Welfare recipients whose aid was terminated or was about to be terminated were held entitled to be given an opportunity to confront and cross-examine the witnesses relied on by the department. The right to confront and cross-examine adverse witnesses was upheld in the other American cases also which counsel has cited.

97. For reasons which we have stated more than once during the course of this judgment, the decisions of the U. S. Supreme Court which turn peculiarly on the due process clause in the American Constitution cannot be applied wholesale for resolving questions which arise under our Constitution, especially when, after a full discussion of that clause in the Constituent Assembly, the proposal to incorporate it in Article 21 was rejected. In U. S. A. itself, Judges have expressed views on the scope of that clause, which are not only divergent but diametrically opposite. For example, in *Goldberg* ((1970) 25 L Ed 2d 287) on which Shri Jethmalani has placed considerable reliance, *Black, J.*, said in his dissenting opinion that "the majority was using the judicial power for legislative purposes and that "they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people". The dissenting opinion of Chief Justice *Burger* in that case is reported in *Mac Wheeler v. John Montgomery*, (1970) 25 L Ed 2d 307, 311, in the same volume. Describing the majority opinion as "unwise and precipitous" the learned Chief Justice said:

"The Court's action today seems another manifestation of the now familiar constitutionalizing syndrome: once some presumed flaw is observed, the Court then eagerly accepts the invitation to find a constitutionally "rooted" remedy. If no provision is explicit on the point, it is then seen as "implicit" or commanded by the vague and nebulous concept of 'fairness'."

It is only proper that we must evolve our own solution to problems arising under our Constitution without, of course, spurning the learning and wisdom of our counterparts in comparable jurisdictions.

98. The principal question which arises is whether the right of cross-examination is an integral and inseparable part of the principles of natural justice. Two fundamental principles of natural justice are commonly recognised, namely, that an adjudicator should be disinterested and unbiased (*nemo iudex in causa sua*) and that, the parties must be given adequate notice and opportunity to be heard (*audi alteram partem*). There is no fixed or certain standard of natural justice, substantive or procedural, and in two English cases the expression 'natural justice' was described as one 'sadly lacking in precision', (1914) 1 KB 160 at p. 199 and as 'vacuous', *Local Government Board v. Arlidge*, (1915) AC 120, 138. The principles of natural justice are, in fact, mostly evolved from case to case, according to the broad requirements of justice in the given case.

99. We do not suggest that the principles of natural justice, vague and variable as they may be, are not worthy of preservation. As observed by Lord Reid in *Ridge v. Baldwin*, (1964) AC 40, 64-65, the view that "natural justice is so vague as to be practically meaningless" is tainted by "the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist". But the importance of the realisation that the rules of natural justice are not rigid norms of unchanging content, consists in the fact that the ambit of those rules must vary according to the context, and they have to be tailored to suit the nature of the proceeding in relation to which the particular right is claimed as a component of natural justice. Judged by this test, it seems to us difficult to hold that a detenu can claim the right of cross-examination in the proceeding before the Advisory Board. First and foremost, cross-examination of whom? The principle that witnesses must be confronted and offered for cross-examination applies generally to proceedings in which witnesses are examined or documents are adduced in evidence in order to prove a point. Cross-examination then becomes a powerful weapon for showing the untruthfulness of that evidence. In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on facts proved either by applying the test of preponderance of probabilities or of reasonable doubt. The detention is based on the subjective satisfaction

of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceeding of the Advisory Board has therefore to be structured differently from the proceeding of judicial or quasi-judicial tribunals, before which there is a *lis* to adjudicate upon.

100. Apart from this consideration, it is a matter of common experience that in cases of preventive detention, witnesses are either unwilling to come forward or the sources of information of the detaining authority cannot be disclosed without detriment to public interest. Indeed, the disclosure of the identity of the informant may abort the very process of preventive detention because, no one will be willing to come forward to give information of any prejudicial activity if his identity is going to be disclosed, which may have to be done under the stress of cross-examination. It is, therefore, difficult in the very nature of things, to give to the detenu the full panoply of rights which an accused is entitled to have in order to disprove the charges against him. That is the importance of the statement that the concept of what is just and reasonable is flexible in its scope and calls for such procedural protections as the particular situation demands. Just as there can be an effective hearing without legal representation even so, there can be an effective hearing without the right of cross-examination. The nature of the inquiry involved in the proceeding in relation to which these rights are claimed determines whether these rights must be given as components of natural justice.

101. In this connection, we would like to draw attention to certain decisions of our Court. In *New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd.*, (1957) SCR 98 at p. 106 : (AIR 1957 SC 232 at p. 236), it was observed that "the question whether the rules of natural justice have been observed in a particular case must itself be judged in the light of the constitution of the statutory body which has to function in accordance with the rules laid down by the legislature and in that sense the rules themselves must vary". In *Nagendra Nath Bora v. Commr. of Hills Division*, (1958) SCR 1240 at p. 1261 : (AIR 1958 SC 398 at p. 409) the aforesaid statement was cited with approval by another Constitution Bench. In *State of Jammu & Kashmir v. Bakshi Ghulam Mohammad*, (1966) Supp SCR 401 at p. 415 : (AIR 1967 SC 122 at p. 131, 132), it was argued that the right to hearing included the right to cross-examine witnesses.

That argument was rejected by the Court by observing that the right of cross-examination depends upon the circumstances of each case and on the terms of the statute under which the matter is being enquired into. Citing with approval the passage in Nagnendra Nath Bora, the Court held that the question as to whether the right to cross-examine was available had to be decided in the light of the fact that it was dealing with a statute under which a Commission of Inquiry was set up for fact-finding purposes and that the report of the Commission had no force proprio vigore.

102. In support of his submission that the right of cross-examination is a necessary part of natural justice, Shri Jethmalani relies upon the decisions of this Court which are reported in *Union of India v. T. R. Varma*, (1958) SCR 499 at p. 507 : (AIR 1957 SC 882) and *Khem Chand v. Union of India*, (1958) SCR 1080 at page 1096 : (AIR 1958 SC 300 at pages 306, 307). It was observed in the first of these two cases that the rules of natural justice require that the party concerned should have the opportunity of adducing the relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, that "he should be given the opportunity of cross-examining the witnesses examined by" the other side and that no materials should be relied on against him without his being given an opportunity of explaining them. In *Khem Chand* it was held that if the purpose of Art. 311 (2) was to give the Government servant an opportunity to exonerate himself from the charge and if this opportunity is to be a reasonable one, he should be allowed to show that the evidence against him is not worthy of credence or consideration and, "that he can only do if he is given a chance to cross-examine the witnesses called against him" and to examine himself or any other witnesses in support of his defence. These observations must be understood in the context of the proceedings in which they are made and cannot be taken as laying down a general rule that the right of cross-examination is available as a part of natural justice in each and every proceeding. In both of these cases, the question which arose for consideration of the Court was whether a Government servant, who was dismissed from service, was given "a reasonable opportunity" of showing cause against the action proposed to be taken against him, within the meaning of Art. 311 (2) of the Constitution. It shall have been noticed that the emphasis in these cases is on the right to cross-examine the witnesses who are examined

by the opposite party. In *T. R. Varma* (AIR 1957 SC 882) the right of cross-examination is described as the right in regard to the witnesses examined by the other party while in *Khem Chand* (AIR 1958 SC 300), the right is described as an opportunity to defend oneself by cross-examining the witnesses produced by the other side. No witnesses are examined in the proceedings before the Advisory Board on behalf of the detaining authority and, therefore, the rule laid down in the two decisions on which Shri Jethmalani relies can have no application to those proceedings.

103. If the debates of the Constituent Assembly are any indication, it would appear that Dr. B. R. Ambedkar, at any rate, was of the opinion that the detenu should be given the right to cross-examine witnesses before the Advisory Board. In his reply to the debate on the procedure of the Advisory Board, he said on Sep. 16, 1949 that a "pointed question has been asked whether the accused person would be entitled to appear before the Board, cross-examine the witnesses, and make his own statement". Dr. Ambedkar's answer was that the Parliament should be given the power to prescribe the procedure to be followed by the Advisory Board. That is how clause 7 (c) came to be incorporated in Art. 22 of the Constitution, giving that power to the Parliament. Pandit Thakur Dass Bhargava thereafter asked as to what was the position regarding the safeguard of cross-examination. The reply of Dr. Ambedkar, significantly was :

"The right of cross-examination is already there in the Criminal Procedure Code and in the Evidence Act. Unless a provincial Government goes absolutely stark mad and takes away these provisions it is unnecessary to make any provision of that sort. Defending includes cross examination."

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"If you can give a single instance in India where the right of cross-examination has been taken away, I can understand it. I have not seen any such case." (See Constituent Assembly Debates, Vol. 9, pp. 1561, 1562, 1563). Dr. Ambedkar, unfortunately, was not prophetic and the authors of the various Preventive Detention Acts did not evidently share his view. In fact, the right of cross-examination under the Criminal Procedure Code and the Evidence Act, by which Dr. Ambedkar laid great store, has nothing to do with the detenu's right of cross-examination before the Advisory Board. With great respect, Dr. Ambedkar seems to have nodded slightly in referring to the provision for cross-examina-

on under those Acts. Whatever it is, Parliament has not made any provision in the National Security Act, under which the detenu could claim the right of cross-examination and the matter must rest there.

104. We are therefore of the opinion that, in the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority.

105. The last of the three rights for which Shri Jethmalani contends is the right of the detenu to lead evidence in rebuttal before the Advisory Board. We do not see any objection to this right being granted to the detenu, neither the Constitution nor the National Security Act contains any provision denying to the detenu the right to present his own evidence in rebuttal of the allegations made against him. The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. We would only like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any other tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the detenu must complete his evidence. We consider it necessary to make this observation particularly in view of the fact that the Advisory Board is under an obligation under section 11 (1) of the Act to submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned. The proceedings before the Advisory Board have therefore to be completed with the utmost expedition.

106. It is urged by Shri Jethmalani that the Advisory Board must decide two questions which are of primary importance to the detenu: One, whether there was sufficient cause for the detention of the person concerned, and two, whether it is necessary to keep the person in detention any longer after the date of its report. We are unable to accept this contention. Section 11 (2) of the Act provides specifically that the report of the Advisory Board shall specify its opinion as to whether or not there is sufficient cause for the detention of the person concerned. This implies that the question on which the Advisory Board has to apply its mind is whether on the date of its

report there is sufficient cause for the detention of the person. That inquiry necessarily involves the consideration of the question as to whether there was sufficient cause for the detention of the person when the order of detention was passed, but we see no justification for extending the jurisdiction of the Advisory Board to the consideration of the question as to whether it is necessary to continue the detention of the person beyond the date on which it submits its report or beyond the period of three months after the date of detention. The question as to whether there are any circumstances on the basis of which the detenu should be kept in detention after the Advisory Board submits its report and how long, is for the detaining authority to decide and not for the Board. The question as regards the power of the Advisory Board in this behalf had come up for consideration before this Court in *Puranlal Lakhanpal v. Union of India*, (1958) SCR 460 at p. 475 : (AIR 1958 SC 163 at p. 170). While rejecting the argument that the words "such detention" which occur in Art. 22 (4) (a) of the Constitution mean detention for a period longer than three months, the majority held that the Advisory Board is not called upon to consider whether the detention should continue beyond the period of three months. In coming to that conclusion the majority relied upon the decision in *Dattatraya Moreswar Pangarkar v. State of Bombay*, (1952) SCR 612 at p. 626 : (AIR 1952 SC 181 at p. 186) in which Mukherjee, J., while dealing with a similar question, observed :

"The Advisory Board again has got to express its opinion only on the point as to whether there is sufficient cause for detention of the person concerned. It is neither called upon nor is it competent to say anything regarding the period for which such person should be detained. Once the Advisory Board expresses its view that there is sufficient cause for detention at the date when it makes its report, what action is to be taken subsequently is left entirely to the appropriate Government and it can under S. 11 (1) of the Act 'confirm the detention order and continue the detention of the person' concerned for such period as it thinks fit."

The contention that the Board must determine the question as to whether the detention should continue after the date of its report must therefore fail. The duty and function of the Advisory Board is to determine whether there was sufficient cause for detention of the person concerned on the date on which the order of detention was passed and whether or not there is sufficient cause for

the detention of that person on the date of its report.

197. We are not inclined to accept the plea made by the learned counsel that the proceedings of the Advisory Board should be thrown open to the public. The right to a public trial is not one of the guaranteed rights under our Constitution as it is under the 6th Amendment of the American Constitution which secures to persons charged with crimes a public, as well as a speedy, trial. Even under the American Constitution, the right guaranteed by the 6th Amendment is held to be personal to the accused, which the public in general cannot share. Considering the nature of the inquiry which the Advisory Board has to undertake, we do not think that the interest of justice will be served better by giving access to the public to the proceedings of the Advisory Board.

198. This leaves for consideration the argument advanced by Shri Jethmalani relating to the post-detention conditions applicable to detenus in the matter of their detention. The learned counsel made a grievance that the letters of detenus are censored, that they are not provided with reading or writing material according to their requirements and that the ordinary amenities of life are denied to them. It is difficult for us to frame a Code for the treatment of detenus while they are held in detention. That will involve an exercise which calls for examination of minute details, which we cannot undertake. We shall have to examine each case as it comes before us, in order to determine whether the restraints imposed upon the detenu in any particular case are excessive and unrelated to the object of detention. If so, they shall have to be struck down. We would, however, like to say that the basic commitment of our Constitution is to foster human dignity and the well-being of our people. In recent times, we have had many an occasion to alert the authorities to the need to treat even the convicts in a manner consistent with human dignity. The judgment of Krishna Iyer, J. in *Sunil Batra v. Delhi Administration*, (1980) 2 SCR 557 : (AIR 1980 SC 1579) is an instance in point. It highlights that places of incarceration are "part of the Indian earth" and that, "the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority' ". We must impress upon the Government that the detenus must be afforded all reasonable facilities for an existence consistent with human dignity. We see no reason why they should not be permitted to wear their own clothes, eat their own food, have interviews with the

members of their families at least once a week and, last but not the least, have reading and writing material according to their reasonable requirements. Books are the best friends of man whether inside or outside the jail.

199. There is one direction which we feel called upon to give specifically and that is that persons who are detained under the National Security Act must be segregated from the convicts and kept in a separate part of the place of detention. It is hardly fair that those who are suspected of being engaged in prejudicial conduct should be lodged in the same ward or cell where the convicts whose crimes are established are lodged. The evils of "custodial perversity" are well-known and have even found a place in our law reports. As observed by Krishna Iyer, J. in *Sunil Batra*, (AIR 1980 SC 1579) the most important right of the person who is imprisoned is to the integrity of his physical person and mental personality. Even within the prison, no person can be deprived of his guaranteed rights save by methods which are fair, just and reasonable. "In a democracy, a wrong to some one is a wrong to every one" and care has to be taken to ensure that the detenu is not subjected to any indignity. While closing this judgment, we would like to draw attention to what Shah, J. said for the Court in *Sampat Prakash v. State of Jammu & Kashmir*, (1969) 3 SCR 574 at p. 580 : (AIR 1969 SC 1153 at p. 1157):

"The petitioner who was present in the Court at the time of hearing of his petition complained that he is subjected to solitary confinement while in detention. It must be emphasised that a detenu is not a convict. Our Constitution, notwithstanding the broad principles of the rule of law, equality and liberty of the individual enshrined therein, tolerates, on account of peculiar conditions prevailing, legislation which is a negation of the rule of law, equality and liberty. But it is implicit in the constitutional scheme that the power to detain is not a power to punish for offences which an executive authority in his subjective satisfaction believes a citizen to have committed. Power to detain is primarily intended to be exercised in those rare cases when the larger interest of the State demand that restrictions shall be placed upon the liberty of a citizen curbing his future activities. The restrictions so placed must consistently with the effectiveness of detention, be minimal."

If any of the persons detained under the National Security Act are at present housed in the same ward or cell where the convicts

are housed, immediate steps must be taken to segregate them appropriately. "The Indian human", whenever necessary, has of course "a constant companion — the Court armed with the Constitution", and informed by it.

110. In the result, the Writ Petitions shall stand disposed of in accordance with the view expressed herein and the orders and directions given above.

GUPTA, J.:— 111. I find myself unable to agree with the views expressed in the judgment of the learned Chief Justice on two of the points that arise for decision in this batch of writ petitions, one of them relates to the failure of the Central Government to bring into operation the provisions of S. 3 of the Constitution (Forty-fourth Amendment) Act, 1978 and the other concerns the question whether an Ordinance is 'law' within the meaning of Art. 21 of the Constitution.

112. The Constitution (Forty-fourth Amendment) Act, 1978 received assent of the President on April 30, 1979. Article 368 (2) says, inter alia, that after a Bill for the amendment of the Constitution is passed in each House of Parliament by the prescribed majority "it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill". Section 1 (2) of the Constitution (Forty-fourth Amendment) Act states that the Act "shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint", and that "different dates may be appointed for different provisions of this Act". Section 3 of the Amendment Act substitutes a new clause for the existing Clause (4) of Art. 22 of the Constitution which provides inter alia for the Constitution of Advisory Boards. The relevant part of S. 3 reads as follows:

"Amendment of Art. 22.— In Art. 22 of the Constitution,—

(a) for Clause (4), the following clause shall be substituted, namely:

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention:

Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving Judge of the appropriate High Court

and the other members shall be serving or retired Judges of any High Court."

The provision requiring the Advisory Board to be constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court and that the Chairman of the Advisory Board shall be a serving Judge of the High Court and the other members of the Board shall be serving or retired Judges of any High Court is absent in the existing Clause (4) under which persons who are only qualified to be appointed as Judges of a High Court are eligible to be members of the Advisory Board. Many of the provisions of the Act were brought into force on different dates in the year 1979 but the provisions of Section 3 were not given effect to for more than one year and seven months when the hearing of these writ petitions commenced on December 9, 1980. Now though more than two and a half years have passed the provisions of S. 3 have not yet been brought into force. The question is whether under S. 1 (2) the Central Government had the freedom to bring into force any of the provisions of the Amendment Act at any time it liked. I do not think that Section 1 (2) can be construed to mean that Parliament left it to the unfettered discretion or judgment of the Central Government when to bring into force any provision of the Amendment Act. After the Amendment Act received the President's assent, the Central Government was under an obligation to bring into operation the provisions of the Act within a reasonable time; the power to appoint dates for bringing into force the provisions of the Act was given to the Central Government obviously because it was not considered feasible to give effect to all the provisions immediately. After the Amendment Act had received the President's assent the Central Government could not in its discretion keep it in a state of suspended animation for any length of time it pleased. That Parliament wanted the provisions of the Constitution (Forty-fourth Amendment) Act, 1978 to be made effective as early as possible would appear from its Objects and Reasons. The following extract from the Objects and Reasons clearly discloses a sense of urgency:

"Recent experience has shown that the fundamental rights, including those of life and liberty, granted to citizens by the Constitution are capable of being taken away by a transient majority. It is, therefore, necessary to provide adequate safeguards against the recurrence of such a contingency in the future and to ensure to the people themselves an effective voice in determining the form of

government under which they are to live. This is one of the primary objects of this Bill.

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As a further check against the misuse of the emergency provisions and to put the right to life and liberty on a secure footing, it would be provided that the power to suspend the right to move the Court for the enforcement of a fundamental right cannot be exercised in respect of the fundamental right to life and liberty. The right to liberty is further strengthened by the provision that a law for preventive detention cannot authorise, in any case, detention for a longer period than two months, unless an Advisory Board has reported that there is sufficient cause for such detention. An additional safeguard would be provided by the requirement that the Chairman of an Advisory Board shall be a serving Judge of the appropriate High Court and that the Board shall be constituted in accordance with the recommendations of the Chief Justice of that High Court."

113. I have already said that Parliament must have taken into consideration the practical difficulties in the way of the executive in bringing into operation all the provisions of the Act immediately, and by enacting Section 1 (2) it relied on the Central Government to give effect to them. Now when more than two and a half years have passed since the Constitution (Forty-fourth Amendment) Act, 1978 received the assent of the President, it seems impossible that any such difficulty should still persist preventing the Government from giving effect to Section 3 of the Amendment Act. It is interesting to note that clause 9 of the National Security Ordinance, 1980 provided for the constitution of Advisory Boards in conformity with Article 22 of the Constitution as amended by Section 3 of the Constitution (Forty-fourth Amendment) Act, 1978. This makes it clear that non-implementation of the provisions of S. 3 was not due to any practical or administrative difficulty. However, the National Security Act, 1980 which replaced the Ordinance does not retain the provision of cl. 9 of the Ordinance and prescribes the constitution of the Advisory Boards in Section 9 in accordance with unamended Article 22 (4). I do not think it can be seriously suggested that a provision like S. 1 (2) of the Constitution (Forty-fourth Amendment) Act empowered the executive to scotch an amendment of the Constitution passed by Parliament and assented to by the President. That Parliament is competent to take appropriate steps if it considered that the execu-

tive had betrayed its trust does not make the default lawful or relieve this Court of its duty. I would therefore issue a writ of mandamus directing the Central Government to issue a notification under S. 1 (2) of the Constitution (Forty-fourth Amendment) Act, 1978 bringing into force the provisions of Section 3 of the Act within two months from this date.

114. On the other point, I find it difficult to agree that an Ordinance is 'law' within the meaning of Art. 21 of the Constitution. Article 21 reads:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

The National Security Ordinance, 1980 has been challenged on a number of grounds, one of which is that the life and liberty of a person cannot be taken away by an Ordinance because it is not 'law' within the meaning of Article 21. Normally it is the legislature that has the power to make laws. Article 123 of the Constitution deals with the President's power to promulgate ordinances and the nature and effect of an Ordinance promulgated under this article. Article 123 is as follows:

"(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation.—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

To show that there is no difference between a law passed by Parliament and an Ordinance promulgated by the President under

Article 123 reliance was placed on behalf of the Union of India on clause (2) of that article which says that an Ordinance shall have the same force and effect as an Act of Parliament. It was further pointed out that Chapter III of Part V of the Constitution which includes Art. 123 is headed "Legislative powers of the President". Reference was made to Art. 213 which concerns the power of the Governor to promulgate Ordinances; Art. 213 is in Chap. IV of Part VI of the Constitution which bears a similar description: "Legislative Power of the Governor". From these provisions it was contended that the President in promulgating an Ordinance under Art. 123 exercises his legislative power and therefore an Ordinance must be regarded as 'law' within the meaning of Art. 21. But the nature of the power has to be gathered from the provisions of Art. 123 and not merely from the heading of the Chapter. It is obvious that when something is said to have the force and effect of an Act of Parliament, that is because it is not really an Act of Parliament. Article 123 (2) does not say that an Ordinance promulgated under this Article shall be deemed to be an Act of Parliament to make the two even fictionally identical. The significance of the distinction will be clear by a reference to Arts. 356 and 357 which are in Part XVIII of the Constitution that contains the emergency provisions. The relevant part of Art. 356 reads:

"(1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by proclamation —

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament";

Article 357 provides:

(1) Where by a proclamation issued under clause (1) of Art. 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent —

(a) for Parliament to confer on the President the power of the Legislature of the

State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;

(b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;

(c) XX XX XX XX

(2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of Cl. (1) which Parliament or the President or such other authority would not, but for the issue of a proclamation under Art. 356, have been competent to make shall, after the proclamation has ceased to operate, continue in force until altered or repealed or amended by a competent Legislature or other authority."

It will appear that whereas an Ordinance issued under Art. 123 has the same force and effect as an Act of Parliament, under Article 357 (1) (a) Parliament can confer on the President the power of the Legislature of the State to make laws. Thus, where the President is required to make laws, the Constitution has provided for it. The difference in the nature of the power exercised by the President under Art. 123 and under Art. 357 is clear and cannot be ignored. Under Article 21 no person can be deprived of life and liberty except according to procedure established by law. Patanjali Sastri, J., in *A. K. Gopalan v. State*, (1950) SCR 88: (AIR 1950 SC 27) observed that the word "established" in Art. 21 "implies some degree of firmness, permanence and general acceptance". An Ordinance which has to be laid before both Houses of Parliament and ceases to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of the period resolutions disapproving it are passed by both Houses can hardly be said to have that 'firmness' and 'permanence' that the word 'established' implies. It is not the temporary duration of an Ordinance that is relevant in the present context, an Act of Parliament may also be temporary; what is relevant is its provisional and tentative character which is apparent from Cl. 2 (a) of Art. 123. On this aspect also the difference between a law made by the President under Art. 357 and an Ordinance promulgated by him under

Art. 123 should be noted. A law made under Art. 357 continues in force until altered, repealed or amended by a competent legislature or authority; an Ordinance promulgated under Art. 123 ceases to operate at the expiration of six weeks from the reassembly of Parliament at the latest. On behalf of the Union of India learned Attorney General referred to Art. 367 (2) to argue that the Constitution itself equates an Ordinance with an Act of Parliament. Article 367 (2) reads:

"Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, as the case may be."

Any reference in the Constitution to Acts of Parliament has to be construed as including a reference to an Ordinance made by the President as Art. 367 (2) provides because an Ordinance has been given the force and effect of an Act. But clearly an Ordinance has this force and effect only over an area where it can validly operate. An invalid ordinance can have no force or effect and if it is not 'law' in the sense the word has been used in Art. 21, Art. 367 (2) cannot make it so.

115. There is also another aspect of the matter. Article 21 not only speaks of a person's liberty but also of his life. It is difficult to think of a situation in normal times which left no time for the President to summon Parliament and required him to promulgate ordinances to take away the life or liberty of persons, unless one considered life and liberty as matters of no great importance. However, in view of the opinion of the majority upholding the validity of the Ordinance, it is unnecessary to dilate on this aspect.

116. On all the other points I agree with conclusions reached by the learned Chief Justice.

TULZAPURKAR, J.:— 117. On the question of bringing into force, S. 3 read with Section 1 (2) of the Constitution (Forty-fourth Amendment) Act, 1978 I am in agreement with the view expressed by my learned brother A. C. Gupta in his judgment. Barring this aspect, I am in agreement with the rest of the judgment delivered by my Lord the Chief Justice.

Order accordingly.

AIR 1982 SUPREME COURT 756

(From : Allahabad)

A. D. KOSHAL, V. BALAKRISHNA ERADI AND R. B. MISRA, JJ.

Civil Appeal No. 17 of 1970, D/- 5-8-1981.

Babu, Appellant v. Dy. Director of Consolidation, Respondent.

Constitution of India, Art. 133 (1) (a) — Interference by Supreme Court with finding of fact — Finding of Consolidation Authorities that appellant had not been proved to be in possession of land in dispute in the relevant year — Cogent reasons given by Consolidation Authorities to negative claim of appellant to be in possession of that land — Finding of fact not shown to be perverse or based on no evidence — Supreme Court would not interfere. (Para 2)

KOSHAL, J.:— This appeal by certificate granted under Art. 133 (1) (a) of the Constn. is directed against an order dated 9th Sept., 1969 passed by the High Court of Allahabad, dismissing in limine a petition under Art. 226 of the Constn.

2. It is common ground between the parties that the appellant can succeed only if he is shown to have been in possession of the land in dispute in Fasli year 1359 (which corresponds to the agricultural year 1951-52 reckoned according to the Gregorian calendar). The Deputy Director, Consolidation, who decided the case in second appeal gave a finding in his order dated 2nd June, 1969, that the appellant had not been proved to be in possession in that year. The finding was confirmed in revision by the Director of Consolidation on 22nd Aug. 1969, and it was that order which was under challenge before the High Court.

3. The finding above mentioned being one of fact is not open to challenge before us unless it can be shown that it is perverse or based on no evidence at all, which is not the case here. Both the Deputy Director and the Director have given cogent reasons to negative the claim of the appellant that he was in possession of the land in dispute in Fasli year 1359. Consequently, we see no reason for interference with the impugned order and dismiss the appeal with costs throughout.

Appeal dismissed.

AIR 1982 SUPREME COURT 757

— 1982 Tax. L. R. 311.

(From: 1975 Tax LR 96 (Delhi))

R. S. PATHAK AND**E. S. VENKATARAMIAH, JJ.**

Civil Appeal No. 1235 of 1974, D/- 12-1-1982.

Commissioner of Income-tax, Delhi, Appellant v. M/s. Delhi Safe Deposit Co. Ltd., Respondent.

Income-tax Act (43 of 1961), Ss. 37, 67, 75 — Expenditure, whether exclusively for business — Determination — Test — Assessee company, a partner of managing agency firm — Expenditure to protect managing agency — Held, deductible under S. 37.

The true test of an expenditure laid out wholly and exclusively for the purposes of trade or business is that it is incurred by the assessee as incidental to his trade for the purpose of keeping the trade going and of making it pay and not in any other capacity than of a trader. AIR 1964 SC 1722, Foll. (Para 8)

The assessee company was carrying on business as a partner of a managing agency firm and it also had other businesses. The managing agency agreement with the managed company was a profitable source of income and the assessee had continuously earned income from that source. But on account of the negligence on the part of one of its partners, there arose a serious dispute. The settlement arrived at between the parties prevented effectively the hazards involving in any litigation. The assessee consequently incurred the expenditure in question to avoid any adverse effect on its reputation, to protect the managing agency which was an income earning apparatus and for retaining it with the re-constituted firm in which the interest of the assessee was the same. In the circumstances, it could not be said that the expenditure incurred by the assessee was either gratuitous or one incurred outside the trading activities of the assessee. The expenditure was, therefore, deductible under S. 37. The fact that the firm had not claimed the expenditure as its own did not affect the right of the assessee to claim deduction in respect of the amount in question in its assessment proceedings. 1975 Tax LR 96 (Delhi), Affirmed.

(Paras 9, 10)

Cases Referred: Chronological Paras
AIR 1964 SC 1722: (1964) 7 SCR 693 8

AZ/AZ/A204/82/SSG

(1927) 1 KB 719: 137 LT 3: 11 Tax Cas 372, Mitchell v. B. W. Noble Ltd. 7
1926 AC 205: 134 LT 289: 10 Tax Cas 155, British Insulated & Helsby Cables Ltd. v. Atherton 6
1915 AC 433: 112 LT 651: 84 LJ KB 417, Usher's Wiltshire Brewery Ltd. v. Bruce 5, 6
(1914) 3 KB 674: 111 LT 848: 83 LJ KB 1721, Smith v. Incorporated Council of Law Reporting for England and Wales 6

Mr. S. C. Manchanda, Sr. Advocate, Mr. J. Ramamurthy and Miss A. Subhashini, Advocates with him, for Appellant; Mr. S. T. Desai, Sr. Advocate, Mr. Bishambar Lal, Advocate with him, for Respondent.

E. S. VENKATARAMIAH, J.:— This appeal by special leave is directed against the judgment and order dated March 22, 1973 of the Delhi High Court in Income-tax Reference No. 65 of 1968: (reported in 1975 Tax LR 96) made by the Income-tax Appellate Tribunal, Delhi pursuant to an order made by the High Court under S. 256 (2) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

2. The facts of the case are these: The assessee (the respondent herein) is a public limited company. The assessee was a partner of a firm of managing agents known as M/s. Morari Lal Batra & Co. (hereinafter referred to as 'the managing agency firm') which was managing another public limited company called M/s. Bharat Carbon & Ribbon Manufacturing Co. Ltd. (hereinafter referred to as 'the managed company'). There were in all three partners in the managing agency firm, the two other partners being V. K. Batra and Lal Balwant Roy who held 50% share and 25% share respectively in that firm. The assessee held the remaining 25% share. At the instance of V. K. Batra who held the major share in the managing agency firm, a large sum was advanced by the managed company to a firm known as M/s. H. K. Sinha & Sons at Calcutta. When a demand for repayment was made, M/s. H. K. Sinha & Sons repudiated the claim except to the extent of Rs. 11,409 and ultimately the managed company suffered a loss to the extent of Rs. 1,90,092 on account of the said transaction. Consequently it became necessary for the managing agency firm to make good the said loss. Thereupon the assessee and Lal Balwant Roy together undertook to pay to the managed company Rs. 95,092 out of which the share of the assessee was Rs. 47,500. The balance of the amount was undertaken to be paid

by R. K. Batra, brother of V. K. Batra. The managing agency firm was also re-constituted with the assessee, Lal Balwant Roy and R. K. Batra as partners, R. K. Batra taking the place of V. K. Batra. During the previous year corresponding to the assessment year 1962-63, the assessee paid a sum of Rs. 9,500 to the managed company in partial discharge of its liability of Rs. 47,500 referred to above and claimed it by way of deduction in the assessment year in question in the assessment proceedings under the Act before the Income-tax Officer. The Income-tax Officer disallowed the said claim on the ground that the assessee was not legally bound to make the payment and hence it was not a business expense that could be allowed under the Act. The Appellate Assistant Commissioner of Income-tax before whom the order of assessment was questioned by the assessee affirmed the order of assessment on the above question on three grounds: (a) The amount in question was actually the loss of a firm which was no more in existence; (b) the loss in question had been borne by the assessee on personal considerations and (c) the loss was the loss of the managing agency firm and not of the partners concerned and since the managing agency firm had not claimed that loss in its return, none of its partners could claim it. When the matter was taken up in appeal before the Income-tax Appellate Tribunal, the claim of the assessee was accepted. The Tribunal held *inter alia* that even if there was a change in the constitution of the managing agency firm, the liability of the assessee as a partner had not ceased the assessee being a company, the payment could not be treated as one made on personal considerations and that the assessee had made the payment in question purely on business considerations with the sole object of maintaining its business connection which was yielding profit. The Tribunal was also of the view that there was no bar to the assessee claiming the loss in question in its own assessment even though it could have been first claimed by the firm and then in the hands of the partner. An application under S. 256 (1) of the Act having been rejected by the Tribunal, the appellant moved the High Court under S. 256 (2) of the Act. The High Court thereupon passed an order directing the Tribunal to refer the following question for its consideration:

"Whether, on the facts and in the circumstances of the case, the assessee was

entitled to any allowance on account of the share of loss made good by it to the managed company?"

3. After the reference was made to it, the High Court answered the question in the affirmative and in favour of the assessee. Dissatisfied with the judgment of the High Court, the appellant has come up in appeal to this Court by special leave, as stated above.

4. The first question which needs to be examined is whether the amount in question can be treated as an expenditure laid out or expended wholly and exclusively for the purposes of the business of the assessee which is admissible as a deduction under S. 37 of the Act. It is no doubt true that the solution to a question of this nature sometimes is difficult to arrive at. But, however difficult the task may be, a decision on that question should be given having regard to the decisions bearing on the question and ordinary principles of commercial trading and of commercial expediency. The facts found in the present case are that the assessee was carrying on business as a partner of the managing agency firm and it also had other businesses. The managing agency agreement with the managed company was a profitable source of income and that the assessee had continuously earned income from that source. But on account of the negligence on the part of one of its partners, there arose a serious dispute which could have ordinarily resulted in a long drawn out litigation between the managing agency firm and the managed company affecting seriously the reputation of the assessee in addition to any pecuniary loss which the assessee as a partner was liable to bear on account of the joint and several liability arising under the law of partnership. The settlement arrived at between the parties prevented effectively the hazards involved in any litigation and also helped the assessee in continuing to enjoy the benefit of the managing agency which was a sound business proposition. It also assisted the assessee in retaining the business reputation unsullied which it had built up over a number of years. It is also material to notice here that it was not shown that the settlement was a gratuitous arrangement entered into by the assessee to benefit the defaulting partner exclusively even though he might have been benefitted to some extent. It is no doubt true that it was voluntary in character but on the facts and in the circum-

stances of the case whether it would make any difference at all is the point for consideration.

5. Dealing with the question whether an expenditure incurred by a brewery in aid of their tenants of tied houses as a necessary incident of the profitable working of the brewery business was an admissible expenditure in the computation of the income-tax liability of the brewery, Lord Sumner upholding the above claim observed in *Usher's Wiltshire Brewery Ltd. v. Bruce*, 1915 AC 433 thus:

"Where the whole and exclusive purpose of the expenditure is the purpose of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures, to a third party's benefit, say that of the publican, or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of the finding as to the whole and exclusive purpose."

6. In *British Insulated & Helsby Cables Ltd. v. Atherton*, 1926 AC 205, Lord Cave observed:

"It was made clear in the above cited cases of *Usher's Wiltshire Brewery v. Bruce*, 1915 AC 433 and *Smith v. Incorporated Council of Law Reporting for England and Wales*, (1914) 3 KB 674 that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on the business, may yet be expended wholly and exclusively for the purposes of the trade."

7. Rowlatt, J. in *Mitchell v. B. W. Noble Ltd.*, (1927) 1 KB 719 held that the money spent on getting rid of a director and saving the company from scandal was deductible. Affirming the above view, the Court of Appeal (whose judgment appears at page 731) held that as the payment was not made to secure an actual asset so as effectually to increase the capital of the company but was made in order to enable the directors to carry on the business of the company as they had done in the past unfettered by the presence of the retiring director, which might have had a bad effect on the credit of the company, it must be treated as the income and not as capital expenditure and was deductible as such for income-tax purposes.

8. The true test of an expenditure laid out wholly and exclusively for the purposes of trade or business is that it is incurred by the assessee as incidental to his trade for the purpose of keeping the trade going and of making it pay and not in any other capacity than of a trader. In *Commr. of Income-tax Kerala v. Malayalam Plantation Ltd.*, (1964) 7 SCR 693: (AIR 1964 SC 1722). Subba Rao, J. (as he then was) summarised the legal position at p. 705 (of SCR): (at p. 1728 of AIR) thus:—

"The aforesaid discussion leads to the following result: The expression "for the purpose of the business" is wider in scope than the expression "for the purpose of earning profits". Its range is wide: it may take in not only the day to day running of a business but also the rationalization of its administration and modernization of its machinery; it may include measure for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile titles; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business; it may comprehend many other acts incidental to the carrying on of a business. However wide the meaning of the expression may be, its limits are implicit in it. The purpose shall be for the purpose of the business that is to say, the expenditure incurred shall be for carrying on of the business; and the assessee shall incur it in his capacity as a person carrying on the business."

9. In the instant case, the assessee incurred the expenditure in question to avoid any adverse effect on its reputation, to protect the managing agency which was an income earning apparatus and for retaining it with the reconstituted firm in which the interest of the assessee was the same as before. It was likely that but for the expenditure, the fair name of the assessee would have been tarnished or rendered suspicious and the managing agency would have been terminated. The expenditure incurred on the preservation of a profit earning asset of a business has always been held to be a deductible expenditure by courts. In the circumstances, it is difficult to hold that the expenditure incurred by the assessee was either gratuitous or one incurred outside the trading activities of the assessee. The expenditure was, therefore, rightly held to be deductible under S. 37. We, therefore, reject the contention of the Revenue that

the amount in question could not be claimed as a deduction under Section 37 of the Act.

10. The next contention of the Department is that the payment in question should have been first assessed as a loss in the assessment proceedings of the firm and in the absence of any claim made in the course of such proceedings by the firm, it was not possible to allow its deduction in the assessment of the assessee. Reliance is placed on Sections 187 and 67 of the Act in support of this submission. It is seen that the expenditure in question had not been incurred by the firm. Even if the amount had been paid through the firm by the assessee, it would not be payment of the firm's funds. In the accounts of the firm, there would be a credit and debit entry cancelling each other showing a receipt from the assessee and a payment to the managed company, not in any way affecting the capital structure of the firm. If the amount had been paid by the assessee directly to the managed company which appears to be more probable then the expenditure is obviously one incurred by the assessee itself though on account of the firm. In any view of the matter, the fact that the firm has not claimed the expenditure as its own does not affect the right of the assessee to claim deduction in respect of the amount in question in its assessment proceedings which it is legitimately entitled to do. It is not shown how in the peculiar circumstances of the case there is any statutory bar to the claim made by the assessee.

11. We are satisfied that in the circumstances of the case the decision of the High Court does not call for interference.

12. For the foregoing reasons, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 760

= 1982 Tax. L. R. 314

(From: Allahabad)*

R. S. PATHAK AND

E. S. VENKATARAMIAH, JJ.

Civil Appeals Nos. 1370 of 1974 and 1768 of 1975, D/- 12-1-1982.

M/s. Kalloomal Tapeswari Prasad (HUF), Kanpur, Appellant v. The C.I.T., Kanpur, Respondent.

*Income-tax Reference No. 47 of 1971, D/- 29-9-1972 (All).

AZ/AZ/A214/82/DVT

And

The C.I.T., Kanpur, Appellant v. M/s. Kalloomal Tapeswari Prasad (HUF), Kanpur, Respondent.

(A) Income-tax Act (43 of 1961), S. 171 — Applicability and scope — Section contemplates both total and partial partition of H.U.F. — S. 25A of 1922 Act compared — Partial partition — Properties capable of division but not actually divided — Mere severance of status — Not sufficient to record finding of partial partition — Income from such properties is liable to be assessed as that of H.U.F. I.T. Ref. No. 47 of 1971, D/- 29-9-1972 (All) Partly Reversed. (Hindu Law — Joint family — Partition; Income-tax Act (1922), S. 25A; Hindu undivided family — Partial partition).

Section 171 of the Act applies to a case where there is a Hindu undivided family which had been assessed as such under the Act until a claim is made under Section 171 (2) that there has been a partition — total or partial — in it. Under S. 171 there is a departure made from Section 25-A of the 1922 Act which was concerned with a total partition only. A finding to the effect that partition had taken place has to be recorded under S. 171 by the Income-tax Officer. He can record such a finding only if the partition in question satisfies the definition of the expression 'partition' found in Explanation to S. 171. A transaction can be recognised as a partition under S. 171 only if, where the property admits of a physical division, a physical division of the property has taken place. In such a case mere physical division of the income without a physical division of the property producing income cannot be treated as a partition. Even where the property does not admit of a physical division then such division as the property admits of should take place to satisfy the test of a partition under S. 171. Mere proof of severance of status under Hindu Law is not sufficient to treat such a transaction as a partition. If a transaction does not satisfy the above additional conditions it cannot be treated as a partition under the Act even though under Hindu law there has been a partition — total or partial. The consequence will be that the undivided family will be continued to be assessed as such by reason of sub-sec. (1) of S. 171. (Paras 18, 19)

The Parliament enacted S. 171 after taking note of the Privy Council decision in (1942) 10 ITR 457 and several other de-

cisions following it which had taken the view that a partial partition did not fall within the scope of S. 25A of the 1922 Act. It expressly stated in S. 171 that the said provision was applicable to both kinds of partitions — total or partial. Section 171 virtually deals with all kinds of partitions the nature of which sometimes may be difficult to predicate correctly.

(Para 21)

After a partial partition as regards property, the property divided is held by the members of the undivided family as divided members with all the incidents flowing therefrom and the property not so divided as members of an undivided family. The fiction enacted in S. 171 (1) can, therefore, operate in such a case also because the family which has become divided as regards the property which is the subject matter of partial partition is deemed to continue as the owner of that property and the recipient of the income derived from it except where and in so far as a finding of partition has been given under S. 171. In such a case it is obvious the real state of affairs is in fact different from what is created by the fiction and it cannot be said that there is no occasion for the fiction to operate. That is the true meaning of S. 171 (1). In view of the substantial changes that are brought about in S. 171, it cannot be said that the fiction in S. 171 (1) does not operate in the case of partial partitions as regards property where the composition of the family has remained unchanged.

(Paras 22, 23)

In the instant case an assessee, a Hindu undivided family claimed partial partition in respect of a large number of immovable properties. It was asserted that the properties were not capable of division by metes and bounds.

Held that the properties belonging to H.U.F. involved in the instant case admitted of physical division into the required number of shares and such division would not have adversely affected their utility. If a large number of items of property are there, they are usually apportioned on an equitable basis having regard to all relevant factors and if necessary by asking the parties to make payments of money to equalise the shares. Such apportionment is also a kind of physical division of the properties contemplated in the Explanation to S. 171. Any other view will be one divorced from the realities of life. It was not shown that the members of the H. U. F. were not capable of making payment of any amount

for equalisation of shares. No serious attempt to divide the properties was made by the assessee. Therefore, the case clearly fell under sub-cl. (i) of Cl. (a) of the Explanation to S. 171 but did not satisfy the requirement of that sub-clause as no physical division of the properties was made even though they could be conveniently so divided. Sub-cl. (ii) thereof did not apply to this case at all. Thus in view of Cl. (a) (i) of the Explanation to S. 171, mere severance of status was not sufficient for recording a finding of partition. Consequently, the property which was the subject matter of partial partition would continue to be treated as belonging to the family and its income would continue to be included in its total income until such a finding is recorded. It could not be said on the analogy of the income from a family property alienated by a karta in favour of a stranger that the income which was not actually received by the family could not be taxed. (1963) 50 ITR 601 (Mad), Disting., I-T. Ref. No. 47 of 1971, D/- 29-9-1972 (All), Partly Reversed. (Paras 25, 26, 27)

(B) Income-tax Act (1922), S. 25A — Scope and applicability — Hindu undivided family — Assessment when partition is claimed — Procedure. (Income-tax Act (1961), S. 171).

Under S. 25-A of the 1922 Act a Hindu undivided family which had been assessed to tax could be treated as undivided and subjected to tax under the Act in that status unless and until an order was made under S. 25-A (1) and if in the course of the assessment proceedings it is claimed by any of the members of the Hindu undivided family that there has been total partition of the family property resulting in physical division thereof as it was capable of, the assessing authority should hold an enquiry and decide whether there had been such a partition or not. If he held that such a partition had taken place, he should proceed to make an assessment of the total income of the family as if no partition had taken place and then proceed to apportion the liability as stated in S. 25-A amongst the individual members of the family. If no claim was made or if the claim where it was made was disallowed after enquiry, the Hindu undivided family would continue to be liable to be assessed as such. This was the legal position under the 1922 Act. Case law discussed.

(Para 13)

(C) Hindu Law — Joint family — Partition — Modes of and procedure — Not

identical with conditions contemplated under S. 171 of Income-tax Act (1961). (Income-tax Act (1961), S. 171).

Under Hindu Law partition may be either total or partial. A partial partition may be as regards persons who are members of the family or as regards properties which belong to it. Where there has been a partition, it is presumed that it was a total one both as to the parties and property but when there is a partition between brothers, there is no presumption that there has been partition between one of them and his descendants. It is, however, open to a party who alleges that the partition has been partial either as to persons or as to property to establish it. The decision on that question depends on proof of what the parties intended — whether they intended the partition to be partial either as to persons or as to properties or as to both. When there is partial partition as to property, the family ceases to be undivided so far as properties in respect of which such partition has taken place but continues to be undivided with regard to the remaining family property. After such partial partition, the rights of inheritance and alienation differ accordingly as the property in question belongs to the members in their divided or undivided capacity. Partition can be brought about (1) by a father during his lifetime between himself and his sons by dividing properties equally amongst them, (2) by agreement or (3) by a suit or arbitration. A declaration of intention of a coparcener to become divided brings about severance of status. Hindu law does not require that the property must in every case be partitioned by metes and bounds or physically into different portions to complete a partition. Disruption of status can be brought about by any of the modes and it is open to the parties to enjoy their share of property as tenants-in-common in any manner known to law according to their desire. But Income-tax law introduces certain conditions of its own to give effect to the partition under Section 171 of the Act. (1866) 11 Moo Ind App 75 (PC), Rel. on. (Paras 16, 17)

Cases Referred: Chronological Paras

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Mr. S. T. Desai, Sr. Advocate, Mr. J. D. Dadachanji & Mr. K. J. John, Advocates with him, for Appellant in C. A. No. 1370 of 1974 and for Respondent in C. A. No. 1768 of 1975; Mr. V. S. Desai, Sr. Advocate, Miss A. Subhashini, Mr. K. C. Dua and Mr. S. P. Nayar, Advocates with him for Respondent in C. A. No. 1370 of 1974 and for Appellant in C. A. No. 1768 of 1975.

VENKATARAMIAH, J.:— These two appeals by certificate — one by the assessee and the other by the Commissioner of Income-tax, Kanpur are filed against the judgment and order dated Sept. 29, 1972 of the High Court of Judicature at Allahabad in Income-tax Reference No. 47 of 1971 under Section 256 (1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') made by the Income-tax Appellate Tribunal, Allahabad Bench, Allahabad (for short 'the Tribunal'). The two questions which were referred by the Tribunal for the opinion of the High Court were:

"(1) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the properties in dispute were capable of division in definite portions amongst the 10 coparceners as contemplated in Explanation (a) (i) to Section 171 of the Income-tax Act, 1961 and that even otherwise the mere severance of status was not sufficient to entitle the assessee to succeed in its claim for partial partition?

(2) Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the income from the properties in dispute which were accepted to have been partitioned under the Hindu law but with regard to which an order accepting the claim of partial partition was not made was liable to be included in the computation of the assessee's income?"

2. The assessee is a Hindu undivided family known as M/s. Kalloomal Tapeswari

wari Prasad and the year of assessment is 1964-65. The assessee is governed by the Mitakshara school of law. The following genealogical tree represents the relationship amongst the members of the family:

(See below Genealogical Table)

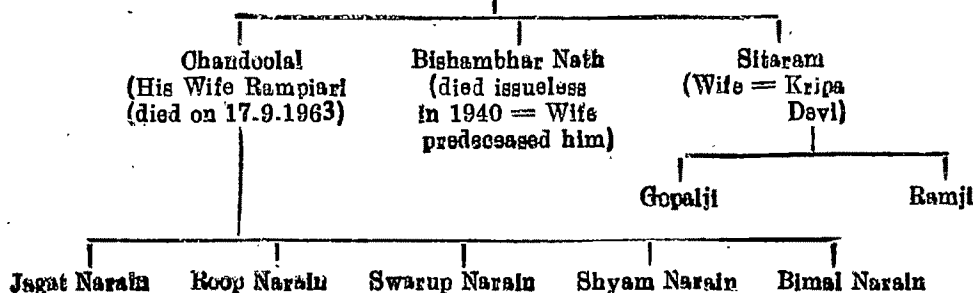
3. During the relevant previous year, the family consisted of Chandoolal, Sitaram and his wife Kripa Devi, Jagat Narain, Roop Narain, Swarup Narain, Shyam Narain and Bimal Narain who were the five sons of Chandoolal and Gopalji and Ramji, the two sons of Sitaram. The assessee (Hindu undivided family) was deriving income from various sources such as income from property, income from money lending business, income from speculation business and cloth business etc. There was a partial partition in the family in the year 1951 when a sum of Rs. 5,00,000 out of its total capital of Rs. 12,35,423 was divided amongst the coparceners at the rate of Rs 41,663/10/8 amongst members of Chandoolal's branch and at the rate of Rs. 83,333/5/4 amongst the members of Sitaram's branch. Kripa Devi did not receive any share at that partition. The said partial partition was accepted and acted upon by the Income-tax Department whereafter the cloth business was treated as the business of a firm consisting of most of the coparceners as partners. Again on December 11, 1963 which fell within the previous year relevant for the assessment year in question i.e. 1964-65, according to the assessee, there was another partial partition orally as a result of which its eighteen immovable properties were divided amongst the ten members of the family and that they held those properties as tenants-in-common from that date. It was claimed by the assessee in the course of the assessment proceedings that the members of the family had commenced to maintain separate accounts with regard to the income from the said eighteen properties and to divide the net profits

amongst themselves according to their respective shares at the end of each year. The eighteen immovable properties were situated in different places and their valuation was as follows:—

S. No.	Municipal number of the property.	Value.
1.	75/2	1,78,875/.
2.	76/162	27,000/.
3.	76/169	45,000/.
4.	47/110	13,500/.
5.	47/26	20,700/.
6.	48/203	16,200/.
7.	55/124	90,000/.
8.	55/36	41,400/.
9.	55/37	
10.	70/87	1,57,500/.
11.	71/150	8,100/.
12.	71/89	3,800/.
13.	71/112	19,800/.
14.	63/61	7,425/.
15.	51/68	17,100/.
16.	51/73	14,400/.
17.	86/37	20,520/.
18.	1/301A	45,000/.
		<u>7,26,120/.</u>

4. When required by the Income-tax Officer to explain as to why the properties were not divided in definite portions as required by S. 171 of the Act, the assessee stated that physical division of the properties in question amongst the ten members was impossible and the only possible way to partition those properties was to define their respective shares and to enjoy the income from them separately. In support of the above claim the assessee relied upon a copy of an award dated April 15, 1964 made by one S. B. Tandon which was made into a decree in Suit No. 60 of 1964 on the file of the Court of the First Civil Judge, Kanpur dated Sept. 21, 1964. In that award the arbitrator had stated that the properties did not admit of physical division. The

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Income-tax Officer did not agree with the assessee's contention that it was not possible to divide the properties in question in definite portions. Accordingly he rejected the claim of partial partition in respect of the eighteen immovable properties and proceeded to assess the income derived therefrom in the hands of the assessee. Against the order of the Income-tax Officer, the assessee filed an appeal before the Appellate Assistant Commissioner of Income-tax. During the pendency of that appeal the assessee appointed another arbitrator by the name Lakshman Swaroop, a retired Chief Engineer to examine the possibility of a physical division of each of the eighteen properties into ten portions and if that was not possible to suggest any other mode or modes to divide them into ten parts in accordance with the share allotted to each of the parties to the partition. By his award dated Feb. 3, 1965, Lakshman Swaroop stated that the aforesaid properties were "not capable of physical division into ten shares by metes and bounds and that any practical division is that of allocation of proportionate shares in all the 18 properties in question." It may be mentioned here that out of the ten shares, six shares were 1/12th each and four shares were 1/8th each. Chandoomal and his five sons had been allotted 1/12th each and Sitaram, his wife and his two sons had been allotted 1/4th each. Lakshman Swaroop was also examined as a witness before the Appellate Assistant Commissioner by the assessee and cross-examined by the Income-tax Officer. The Appellate Assistant Commissioner on a consideration of the material before him including the decree of the court referred to above and the evidence of Lakshman Swaroop held that the case of the assessee that it was not possible to divide the properties physically into ten shares referred to above was not tenable and dismissed the appeal. The assessee, thereafter took up the matter before the Tribunal in appeal. The Tribunal also was of the view that the contention of the assessee that if the properties had been divided into ten shares, they would have either been destroyed or would have lost in value was not correct. Accordingly the claim of the assessee under S. 171 of the Act that there was a partial partition was rejected. Thereupon on an application of the assessee made under S. 256 (1) of the Act, the two questions set out above were referred by

the Tribunal to the High Court for its opinion.

5. After hearing the parties, the High Court recorded its answer to the first question in the affirmative and in favour of the Department and in reaching that conclusion, it observed thus:

"We have seen the evidence of the arbitrator as well as the Chief Engineer, and it is apparent therefrom that even though the 18 properties could not individually be divided into 10 shares without destroying their utility but after assessing the value of the properties, they could be apportioned between the ten members and the difference in the allocations could be equalised by payment of cash amounts by one to the other. In our opinion, it cannot, in such a situation, be said that these 18 properties were incapable of physical division in 10 shares, and so, in view of clause (a) (i) of the Explanation, mere severance of status was not sufficient for recording a finding of partition."

6. The High Court answered the second question in favour of the assessee holding that the income accruing from the eighteen immovable properties after December 11, 1963 was however not liable to be included in the computation of the joint Hindu family's income. In recording this answer, the High Court observed thus:

"Section 171 of the 1961 Act in essence, is a re-enactment of S. 25A with the difference that it applies not only to cases of total partition but also to cases of partial partition. There are some incidental changes as well, e.g. Sec. 171 applies also for purposes of levying and collecting penalty, fine or interest and in addition requires the Income-tax Officer to record a finding as to the date on which total or partial partition took place. The fact that S. 171 applies to a partial partition (meaning a partition which is partial as regards the persons or as regards the properties of the family or both) as well shows that a finding of partial partition can be recorded and on such a finding being recorded under sub-section (4) the total income of the joint family in respect of the period up to the date of partition is to be assessed as if no partition had taken place and each member of the family was to be liable, notwithstanding anything contained in clause (2) of S. 10, jointly and severally for the tax on the income so assessed. Thus S. 171, like Section 25A, seeks to nullify the effect of S. 10 (2) under which a member was not

liable to be taxed on the income received as a member of Hindu undivided family. The section does not entitle the inclusion of income from an asset which has ceased to belong to the joint family, in the assessment of the joint Hindu family.

In the present case, on the finding the position is that the joint Hindu family stood disrupted in relation to the 18 immovable properties as a result of the oral partition dated 11th December, 1963. Thereafter the income of these properties belonged to the individual members and not to the joint family. It could not be included in the assessment of the family."

7. Aggrieved by the answer to the first question, the assessee has filed Civil Appeal No. 1370 of 1974 and aggrieved by the answer to the second question, the Revenue has filed Civil Appeal No. 1768 of 1975.

8. It is necessary to refer to the history of the relevant provisions in order to decide the questions raised before us. Under the Indian Income-tax Act, 1922 (for short 'the 1922 Act') a Hindu undivided family could be assessed on its income. S. 3 of the 1922 Act laid down that where any Central Act enacted that income-tax should be charged for any year at any rate or rates, tax at that rate or those rates should be charged for that year in accordance with and subject to the provisions of that Act in respect of total income of the previous year of every individual, Hindu undivided family etc. But S. 14 (1) of the 1922 Act provided that no tax was payable by an individual assessee in respect of any sum which he received as a member of a Hindu undivided family where such sum had been paid out of the income of the family. S. 25-A was inserted in the 1922 Act in the year 1928 providing for the machinery for assessment after partition of a Hindu undivided family. That section immediately before the repeal of the 1922 Act read as follows:

"25A. Assessment after partition of a Hindu undivided family.— (1) Where, at the time of making an assessment under Section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that the joint family property has been partitioned among the various members or groups

of members in definite portions, he shall record an order to that effect:

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place, and each member or group of members shall, in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of Section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of Section 23:

Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.

(3) Where such an order has not been passed in respect of Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family."

9. Section 25-A of the 1922 Act as it stood then (subsequent modifications in it being immaterial for the purposes of this case) came up for consideration by the Judicial Committee of the Privy Council in *Sir Sunder Singh Majithia v. Commr. of Income-tax, C. P. & U. P.*, 10 ITR 457: (AIR 1942 PC 57). The Privy Council held that S. 25-A of the 1922 Act provided that if it be found that the family property had been partitioned in definite portions, assessment might be made notwithstanding S. 14 (1) on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the tax. It was further held that if, however, though the joint Hindu family

had come to an end, it be found that its property had not been partitioned in definite portions then the family was to be deemed to continue—that is, to be an existent Hindu family upon which assessment could be made on its gains of the previous year. But it was of the view that S. 25-A had nothing to say about any Hindu undivided family which continued in existence never having been disrupted. Such a case was held to fall outside subsec. (3) of S. 25-A and in effect, it held that the said section did not apply to cases of partial partition.

10. In *Gordhandas T. Mangaldas v. Commr. of Income-tax, Bombay*, 11 ITR 183: (AIR 1943 Bom 116) Kania, J. (as he then was) who agreed with Beaumont, C. J. explained the scheme of Section 25-A of the 1922 Act (as it stood then) in his concurring judgment thus:

"It is material to bear in mind the scheme of the Income-tax Act, in the first instance. Under Sections 2 and 3 the different units stated therein are liable to be taxed as such. One of them is a joint Hindu family. In order to avoid double taxation, Section 14 lays down that when the individual member is being assessed, his income as a member of a joint family should not be assessed again. Then comes the stage, what happens when a family, which has once been so assessed, comes to a partition. To meet that contingency, Section 25-A has been enacted. In the section, as it existed before the amendment of 1939, in terms the Income-tax Officer required proof, (i) that a separation of the members of the joint family had taken place and (ii) that the joint family property had been partitioned amongst the various members or groups of members in definite portions. On being satisfied on those points he had to record an order to that effect. The effect of such a recording was that the joint family income would be assessed and recovered in terms of sub-section (2). In the absence of such order, under sub-section (3) the joint family continued to be assessed as before."

11. The same view was followed in *Waman Satwappa Kalghatgi v. Commr. of Income-tax*, 14 ITR 116: (AIR 1946 Bom 328) and in *Meyyappa Chettiar v. Commr. of Income-tax, Madras*, 18 ITR 586: (AIR 1951 Mad 506).

12. This Court had to consider the true meaning of S. 25-A of the 1922 Act in *Lakhmichand Bajinath v. Commr. of Income-tax, West Bengal*, 35 ITR 416:

(AIR 1959 SC 341). Venkatarama Aiyar, J. speaking for the Court observed in the above case thus (at p. 344 of AIR):—

"Now, when a claim is made under Section 25-A, the points to be decided by the Income-tax Officer are whether there has been a partition in the family, and if so, what the definite portions are in which the division had been made among the members or groups of members. The question as to what the income of the family assessable to tax under Section 23 (3) was would be foreign to the scope of any enquiry under Section 25-A. That section was, it should be noted, introduced by the Indian Income-tax (Amendment) Act, 1928 (3 of 1928) for removing a defect which the working of the Act as enacted in 1922 had disclosed. Under the provisions of the Act as they stood prior to the amendment, when the assessee was an undivided family, no assessment could be made thereon if at the time of the assessment it had become divided, because at that point of time, there was no undivided family in existence which could be taxed, though when the income was received in the year of account the family was joint. Nor could the individual members of the family be taxed in respect of such income as the same is exempt from tax under Section 14 (1) of the Act. The result of these provisions was that a joint family which had become divided at the time of assessment escaped tax altogether. To remove this defect, Section 25-A enacted that until an order is made under that section, the family should be deemed to continue as an undivided family. When an order is made under that section, the family should be deemed to continue as an undivided family. When an order is made under that section, its effect is that while the tax payable on the total income is apportioned among the divided members or groups, all of them are liable for the tax payable on the total income of the family. What that tax is would depend on the assessment of income in proceedings taken under Section 23, and an order under Section 25-A would have no effect on that assessment."

13. The above view was reiterated by this Court in *Kalwa Devadattam v. Union of India*, 49 ITR 165 (SC): (AIR 1964 SC 880), in *Addl. Income-tax Officer, Cuddapah v. A. Thimmayya*, 55 ITR 666: (AIR 1965 SC 1238) and in *Joint Family of Udayan Chinubhai v. Commr. of I.-T., Gujarat*, 63 ITR 416: (AIR 1967 SC 762).

The substance of all these decisions was that under S. 25-A of the 1922 Act a Hindu undivided family which had been assessed to tax could be treated as undivided and subjected to tax under the Act in that status unless and until an order was made under S. 25-A (1) and if in the course of the assessment proceedings it is claimed by any of the members of the Hindu undivided family that there has been total partition of the family property resulting in physical division thereof as it was capable of, the assessing authority should hold an enquiry and decide whether there had been such a partition or not. If he held that such a partition had taken place, he should proceed to make an assessment of the total income of the family as if no partition had taken place and then proceed to apportion the liability as stated in S. 25-A amongst the individual members of the family. If no claim was made or if the claim where it was made was disallowed after enquiry, the Hindu undivided family would continue to be liable to be assessed as such. This was the legal position under the 1922 Act.

14. The law relating to assessment of Hindu undivided family, however, underwent a change when the Act came into force. S. 171 of the Act which corresponds to S. 25-A of the 1922 Act reads thus:—

"171. (1) A Hindu family hitherto assessed as undivided shall be deemed for the purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the Hindu undivided family.

(2) Where, at the time of making an assessment under Section 143 or Sec. 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition, whether total or partial, has taken place among the members of such family, the Income-tax Officer shall make an inquiry thereinto after giving notice of the inquiry to all the members of the family.

(3) On the completion of the inquiry, the Income-tax Officer shall record a finding as to whether there has been a total or partial partition of the joint family property, and, if there has been such a partition, the date on which it has taken place.

(4) Where a finding of total or partial partition has been recorded by the In-

come-tax Officer under this section, and the partition took place during the previous year,—

(a) the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place; and

(b) each member or group of members shall, in addition to any tax for which he or it may be separately liable and notwithstanding anything contained in clause (2) of Section 10, be jointly and severally liable for the tax on the income so assessed.

(5) Where a finding of total or partial partition has been recorded by the Income-tax Officer under this section, and the partition took place after the expiry of the previous year, the total income of the previous year of the joint family shall be assessed as if no partition had taken place; and the provisions of cl. (b) of sub-section (4) shall, so far as may be, apply to the case.

(6) Notwithstanding anything contained in this section, if the Income-tax Officer finds after completion of the assessment of a Hindu undivided family that the family has already effected a partition, whether total or partial, the Income-tax Officer shall proceed to recover the tax from every person who was a member of the family before the partition, and every such person shall be jointly and severally liable for the tax on the income so assessed.

(7) For the purposes of this section, the several liability of any member or group of members thereunder shall be computed according to the portion of the joint family property allotted to him or it at the partition, whether total or partial.

(8) The provisions of this section shall, so far as may be, apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to the date of the partition, whether total or partial, of a Hindu undivided family as they apply in relation to the levy and collection of tax in respect of any such period.

Explanation— In this section,—

(a) "partition" means—

(i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or

(ii) where the property does not admit of a physical division then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition;

(b) "partial partition" means a partition which is partial as regards the persons constituting the Hindu undivided family, or the properties belonging to the Hindu undivided family, or both."

15. Section 4 (1) of the Act which levies the charge of income-tax states that where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, the Act in respect of the total income of the previous year or previous years, as the case may be, of every person. The expression 'person' is defined in Section 2 (31) of the Act as including within its meaning a Hindu undivided family. In order to avoid double taxation of the same income under the Act, any sum received by an individual as a member of a Hindu undivided family, where such sum has been paid out of the income of the family is required by S. 10 (2) of the Act not to be included in computing the total income of a previous year of any person. This requirement, however, is subject to S. 64 (2) of the Act with effect from April 1, 1971. Then follows S. 171 of the Act which provides for the assessment after partition of a Hindu undivided family.

16. Under Hindu law partition may be either total or partial. A partial partition may be as regards persons who are members of the family or as regards properties which belong to it. Where there has been a partition, it is presumed that it was a total one both as to the parties and property but when there is a partition between brothers, there is no presumption that there has been partition between one of them and his descendants. It is, however, open to a party who alleges that the partition has been partial either as to persons or as to property to establish it. The decision on that question depends on proof of what the parties intended — whether they intended the partition to be partial either as to persons or as to properties or as to both. When there is partial partition as to property, the family ceases to be undivided so far as properties in respect of which such partition has taken place but continues to be undivided with regard to the re-

maining family property. After such partial partition, the rights of inheritance and alienation differ accordingly as the property in question belongs to the members in their divided or undivided capacity. Partition can be brought about (1) by a father during his lifetime between himself and his sons by dividing properties equally amongst them, (2) by agreement or (3) by a suit or arbitration. A declaration of intention of a coparcener to become divided brings about severance of status. As observed by the Privy Council in *Appovier v. Rama Subba Aiyar*, (1866) 11 Moo Ind App 75:

"when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided".

A physical division of the property which is the subject-matter of partition is not necessary to complete the process of partition in so far as that item of property is concerned under Hindu law. The parties to the partition may enjoy the property in question as tenants-in-common. In *Appovier's case* (supra) the Privy Council further laid down that "if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time, be claimed by virtue of the separate right."

17. It is thus clear that Hindu law does not require that the property must in every case be partitioned by metes and bounds or physically into different portions to complete a partition. Disruption of status can be brought about by any of the modes referred to above and it is open to the parties to enjoy their share of property as tenants-in-common in any manner known to law according to their desire. But the income-tax law

introduces certain conditions of its own to give effect to the partition under Section 171 of the Act.

18. Section 171 of the Act applies to a case where there is a Hindu undivided family which had been assessed as such under the Act until a claim is made under S. 171 (2) that there has been a partition — total or partial in it. The partition contemplated under S. 171 of the Act may be either total or partial. Here there is a departure made from Section 25-A of the 1922 Act which was concerned with a total partition only. In sub-ss. (2) to (5) and (8) of S. 171 of the Act, the word 'partition' is qualified by words 'total or partial'. The Explanation to Section 171 of the Act to which we shall revert again also defines the expression 'partial partition' as meaning a partition which is partial as regards the persons constituting the Hindu undivided family, or the properties belonging to the Hindu undivided family, or both. Sub-sec. (2) of S. 171 provides that where at the time of making an assessment under S. 143 or S. 144 of the Act it is claimed by or on behalf of any member of a Hindu undivided family assessed as undivided that a partition, whether total or partial, has taken place among the members of such family, the Income-tax Officer shall make an inquiry into the said claim after giving notice to all the members of the family. On the completion of the inquiry, the Income-tax Officer is required by sub-sec. (3) of S. 171 to record a finding as to whether the claim of partition, total or partial is true or not and if there has been such a partition, the date on which it has taken place. Sub-sec. (4) of S. 171 states that when a finding of total or partial partition has been recorded by the Income-tax Officer and the partition had taken place during the previous year the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place and each member or group of members shall in addition to any tax for which he or it may be separately liable and notwithstanding anything contained in cl. (2) of S. 10 be jointly and severally liable to the tax on the income so assessed. Where the finding recorded is that the partition had taken place after the expiry of the previous year then the joint family has to be assessed under sub-section (5) of S. 171 as if no partition had taken place and the tax due shall be recoverable *mutatis mutandis* as provided in cl. (b) of sub-

sec. (4) thereof. The several liability of a member or a group of the undivided family has to be determined under sub-sec. (7) of S. 171 according to the share of family property allotted to him or to the group, as the case may be. Sub-s. (8) of S. 171 extends the above rules of assessment and liability to levy and collection of any penalty, interest, fine etc. payable by the family up to the date of partition. Sub-sec. (6) of S. 171 which contains a non obstante clause empowers the Income-tax Officer to recover the tax due from a family from every member of the family before the partition even if he finds after the completion of assessment, that the family has undergone a partition already. The true effect of this provision is discussed in *Govinddas v. Income-tax Officer*, 103 ITR 123: (1977 Tax LR 149).

19. Now we come to sub-section (1) of S. 171 of the Act which contains a 'deeming' provision. It says that a Hindu family hitherto assessed as undivided shall be deemed for the purposes of the Act to continue to be a Hindu undivided family except where and in so far as a finding of partition has been recorded in respect of it under S. 171. Partition referred to here can obviously include a partial partition also either as regards the persons constituting the undivided family or the properties belonging to it or both, in view of the provisions contained in the other sub-sections in and the Explanation to S. 171. Where there is no claim that a partition — total or partial — had taken place made or where it is made and disallowed a Hindu undivided family which is hitherto being assessed as such will have to be assessed as such notwithstanding the fact a partition had in fact taken place as per Hindu law. A finding to the effect that partition had taken place has to be recorded under S. 171 by the Income-tax Officer. He can record such a finding only if the partition in question satisfies the definition of the expression 'partition' found in Explanation to Section 171. A transaction can be recognised as a partition under S. 171 only if, where the property admits of a physical division, a physical division of the property has taken place. In such a case mere physical division of the income without a physical division of the property producing income cannot be treated as a partition. Even where the property does not admit of a physical division then such division as the property admits of should take place to satisfy the test of a parti-

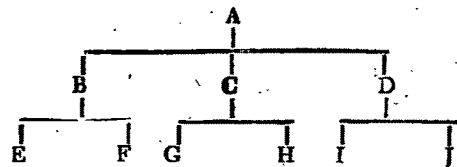
tion under S. 171. Mere proof of severance of status under Hindu law is not sufficient to treat such a transaction as a partition. If a transaction does not satisfy the above additional conditions it cannot be treated as a partition under the Act even though under Hindu law there has been a partition — total or partial. The consequence will be that the undivided family will be continued to be assessed as such by reason of sub-sec. (1) of Section 171.

20. At this stage one contention urged on behalf of the assessee needs to be considered. It is asserted on behalf of the assessee that the fiction contained in S. 171 (1) of the Act does not at all apply to an undivided family which continues to be in fact an undivided family even after a partial partition as regards some of its properties had taken place. The argument is that a 'deeming' provision can operate only where the real state of affairs is different from what the law deems as existing and it cannot where the real state of affairs is the same as the one which law by a fiction treats as existing. It is urged that since the undivided family in fact continues even after a partial partition as regards property, there is no need to enact a rule declaring that it shall be deemed to continue as an undivided family. Hence S. 171 (1) of the Act cannot be construed as being applicable to such a case. In other words, it is urged that where all the members of an undivided family continue to be members of such family owning the remaining properties which are yielding income after a partial partition as regards some properties has taken place, the undivided family is liable to be assessed as such only in respect of the income derived by it from the remaining items of property owned by it and the income derived from properties which have gone out of the ownership of the family by reason of the partial partition should be excluded from the total income of the family. Reliance is placed on the following observations of the Privy Council in the case of Sir Sunder Singh Majithia (AIR 1942 PC 57) (supra) where sub-sec. (3) of S. 25-A of the 1922 Act arose for consideration:

"The section has nothing to say about the Hindu undivided family which continues in existence never having been disrupted. Such a case is outside sub-section (3) because it is not within the section at all. No sub-section is required to enable an undivided family which has

never been broken up to be deemed to continue. But it need not have the same assets or the same income in each year and it can part with an item of its property to its individual members if it takes the proper steps."

21. It is not necessary to make any comment on these observations as they had held the field until the Act came into force with S. 171 inserted in it. The Parliament enacted S. 171 after taking note of the above decision and several other decisions following it which had taken the view that a partial partition did not fall within the scope of S. 25-A. It expressly stated in S. 171 of the Act that the said provision was applicable to both kinds of partitions — total or partial. It has also defined partial partition as one which is partial as regards persons constituting the undivided family or as regards the properties belonging to the undivided family or both. Virtually the present provision deals with all kinds of partitions the nature of which sometimes may be difficult to predicate correctly. Take a joint family consisting of a father, his sons and grandsons as shown in the following genealogical tree:



22. When a partition takes place in the above family there may be a partition when all of them— A, B, C, D, E, F, G, H, I and J become divided each of them taking his rightful share in the family property. In this case there is a total partition. The second kind of partition may be amongst four groups, the first consisting of A only, the second consisting of B, E and F, the third consisting of C, G and H and the fourth consisting of D, I and J — each group taking one-fourth share in all the properties and the branch of B, the branch of C, and the branch of D continuing as undivided families. The third kind of partition may be a partition where any one of the three branches — the branch of B, or the branch of C, or the branch of D separates from the rest of the family taking its share thus resulting in two undivided families — one family which has gone out of the family and the other consisting of the remaining members. In these cases the partition can be called partial both as regards persons and as regards

properties. The next kind of partition may be one where all the members divide amongst themselves only some of the family properties and continue as members of an undivided family owning the remaining family properties. This is called a partial partition as regards property. Even here the division of the property which is subject matter of partial partition may be groupwise also. In the case of a partial partition as regards property, one thing noticeable is that after such partition, the property which is the subject matter of partition is held by the members of the family as tenants-in-common and the rest of the family properties continue to be held by them as members of the undivided family. This is the very principle which is expounded by the Privy Council in *Appovier's case* (1866) 11 Moo Ind App 75 (supra) in the two passages extracted above.

23. After a partial partition as regards property, the property divided is held by the members of the undivided family as divided members with all the incidents flowing therefrom and the property not so divided as members of an undivided family. The fiction enacted in S. 171 (1) of the Act can, therefore, operate in such a case also because the family which has become divided as regards the property which is the subject matter of partial partition is deemed to continue as the owner of that property and the recipient of the income derived from it except where and in so far as a finding of partition has been given under S. 171. In such a case it is obvious the real state of affairs is in fact different from what is created by the fiction and it cannot be said that there is no occasion for the fiction to operate. That is the true meaning of S. 171 (1) of the Act. In view of the substantial changes that are brought about in S. 171, we find it impossible to accept the contention that the fiction in S. 171 (1) of the Act does not operate in the case of partial partitions as regards property where the composition of the family has remained unchanged.

24. The answer to the first question referred to the High Court by the Tribunal depends upon the true construction of sub-clause (i) of cl. (a) of the Explanation to S. 171 of the Act. The subject matter of partial partition, as mentioned earlier, consisted of eighteen items of immovable property. The value of each of

them is given in the earlier part of this judgment. Under the partial partition in question, six persons were allotted 1/12th share each in these eighteen properties and four persons were allotted 1/8th share each. The total value of the eighteen properties was Rs. 7,26,120. Six of the members were, therefore, entitled to properties of the value of Rs. 60,510 each and four of them were entitled to properties of the value of Rs. 90,765 each. Before the Tribunal two submissions were made on behalf of the assessee in support of the plea that the arrangement entered into amongst the parties providing for division of the income of the properties in question without resorting to physical division of the properties was a partition as defined by the Explanation to S. 171 of the Act. The first submission was that the word 'property' occurring in cl. (a) (i) of the Explanation to S. 171 referred to an individual item of property which is divided and not to all the properties which are divided at the partition — total or partial — and hence as it had been accepted by the Department that each of the eighteen items of property could not be divided conveniently into ten portions without destroying its utility, it had to be held that the properties did not admit of physical division. The second submission which was urged in the alternative was that even if it was possible to distribute the said properties equitably amongst the sharers by asking them to make necessary monetary adjustment to equalise the shares, as the Explanation to S. 171 did not contemplate any such monetary adjustment, the assessee could not be denied under S. 171 the recognition of the partial partition which had taken place as per Hindu law. In support of this plea the assessee depended upon the opinion of the arbitrator, Tandon, on the basis of whose award the decree had been passed and also the evidence of Lakshman Swaroop tendered before the Appellate Assistant Commissioner. Taking into consideration all the material before them and having regard to the shares allotted to each of the members, the market value, situation, size and the age of each of the items of the property in question, the tax payable in respect of each of them and also the fact whether an item of property is in the occupation of a tenant or not, the Tribunal came to the conclusion that it was possible to divide the properties in question physically into different lots so that each member could take his rightful share in

them. The High Court also has expressed the same opinion.

25. On the facts and in the circumstances of the case, we approve of the above view of the High Court. We feel that the properties involved in this case admitted of physical division into the required number of shares and such division would not have adversely affected their utility. It is common knowledge that in every partition under Hindu law unless the parties agree to enjoy the properties as tenants-in-common, the need for division of the family properties by metes and bounds arises and in that process physical division of several items of property which admit of such physical division does take place. It is not necessary to divide each item into the number of shares to be allotted at a partition. If a large number of items of property are there, they are usually apportioned on an equitable basis having regard to all relevant factors and if necessary by asking the parties to make payments of money to equalise the shares. Such apportionment is also a kind of physical division of the properties contemplated in the Explanation to S. 171. Any other view will be one divorced from the realities of life. The case before us is not a case where it was impossible to make such a division. Nor is it shown that the members were not capable of making payment of any amount for equalisation of shares. We are of the view that there is no material in the case showing that the assessee ever seriously attempted to make a physical division of the property as required by law. All that was attempted was to rely upon the arbitrator's award and Lakshman Swaroop's evidence which were rightly held to be insufficient by the Tribunal to uphold the claim of the assessee. The assessee cannot derive any assistance from the decision of this Court in *Charandas Haridas v. Commr. of Income-tax, Bombay North, Kutch and Saurashtra*, Ahmedabad, 39 ITR 202: (AIR 1960 SC 910). There the item of asset which had to be partitioned was the right in certain managing agency agreements. The Court upheld the arrangement of division of commission amongst the members among whom the said right was divided as a partition satisfying the test laid down by the income-tax law as it was of the view that any physical division of that right meant the dissolution of the managing agency firms and their reconstitution which was not altogether in the hands of the karta of

the family. The Court also was satisfied that the family took the fullest measure possible for dividing the joint interest into separate interests. In the present case we are satisfied that no such attempt to divide the properties was made. This case clearly falls under sub-cl. (i) of cl. (a) of the Explanation to S. 171 of the Act but does not satisfy the requirement of that sub-clause as no physical division of the properties was made even though they could be conveniently so divided. Sub-cl. (ii) thereof does not apply to this case at all. We, therefore, agree with the answer given by the High Court to the first question in the affirmative. The appeal of the assessee is, therefore, liable to be dismissed.

26. Having held that the assessee was not entitled to claim that a partial partition had taken place under S. 171, the High Court fell into an error in holding that the income of the properties which were the subject matter of partial partition could not be included in the total income of the assessee by relying upon the decisions which had been rendered on the basis of S. 25-A of the 1922 Act which had been construed as not being applicable to partial partitions. We have already held that S. 171 of the Act applies to all partitions — total and partial — and that unless a finding is recorded under S. 171 that a partial partition has taken place the income from the properties should be included in the total income of the family by virtue of sub-section (1) of S. 171 of the Act. To put it in other words what would have been the position of a Hindu undivided family which had claimed in an assessment proceedings under the 1922 Act that a total partition had taken place and had failed to secure a finding to that effect in its favour under S. 25-A thereof would be the position of a Hindu undivided family which has failed to substantiate its plea of partial partition as regards property under S. 171 of the Act. The property which is the subject matter of partial partition would continue to be treated as belonging to the family and its income would continue to be included in its total income until such a finding is recorded. That is the true effect of S. 171 (1). It was, however, urged on the analogy of the income from a family property alienated by a karta in favour of a stranger that the income which was not actually received by the family could not be taxed and in support of this plea reliance was placed on a decision of the Madras

High Court in *A. Kannan Chetty v. Commissioner of Income-tax, Madras*, (1963) 50 ITR 601. In that decision it is observed thus:

"For instance, if the karta of a family effects an alienation or even makes a gift, in so far as the taxing department is concerned it is the income of the members of the Hindu undivided family that can be assessed, and if by reason of an alienation, whether it is binding upon the members of the joint family or not, an item of property ceases to be in the hands of the joint family, it would not be open to the department to say that they would ignore such an alienation, notwithstanding that the possession of the properties and its income may pass into the hands of a stranger. It may be different in cases where the joint family deals with one or more items of property or converts it into a different estate retaining both possession and income in its own hands. That may properly be a case where the department may ignore such a transaction."

27. It is significant that in the passage extracted above the Madras High Court has distinguished the case of an alienation in favour of a stranger from the case where the joint family deals with one or more items of property or converts it into a different estate retaining both possession and income in its own hands. We do not consider that such a plea is available to the assessee because the acceptance of such a plea would lead to the nullification of the scheme of S. 171 of the Act itself. As long as a finding is not recorded under S. 171 holding that a partial partition had taken place the Hindu undivided family should be deemed for the purposes of the Act to be the owner of the property which is the subject matter of partition and also the recipient of the income from such property. The assessment should be made as such and the tax assessed can be recovered as provided in the Act. In the circumstances, the decision of the High Court on the second question has to be reversed. We accordingly record our answer to the second question in the affirmative and in favour of the Department.

28. In the result, Civil Appeal No. 1370 of 1974 is dismissed and Civil Appeal No. 1768 of 1975 is allowed. The assessee shall pay the costs of the Department. Hearing fee one set.

Order accordingly.

AIR 1982 SUPREME COURT 773

P. N. BHAGWATI, R. S. PATHAK AND
E. S. VENKATARAMIAH, JJ.

Civil Appeals Nos. 1855-57 of 1971, D/-
2-12-1981.

Union of India, Appellant v. Jagdish Prasad, Respondent.

Constitution of India, Art. 311 (2) — Promotion of respondents to post of Chief Ticket Inspector — Nothing to show on record that promotion was on officiating basis — No rule also to show that initial promotion is on officiating basis — Reversion of respondents — It could be held that the promotion was on permanent basis and in circumstances of case Article 311 (2) was violated. (Para 1)

JUDGMENT:— There is nothing on the record to show that the appointment of the respondent in each of these three appeals was made on an officiating basis. The order dated 7th May, 1964 upgrading the four posts to those of Chief Ticket Inspector does not show that the upgrading was of a temporary character nor does that order promoting the respondent in each of the three appeals to the post of Chief Ticket Inspector show that the promotion was on an officiating basis. The learned counsel appearing on behalf of the Union of India has also not been able to draw our attention to any rule which prescribes that the promotion of an employee to the post of Chief Ticket Inspector shall initially be on an officiating basis. He must, therefore, proceed on the basis that the promotion of the respondents in each of the three appeals to the post of Chief Ticket Inspector was on a permanent basis and if that be so the reversion of each of them must be held to be violative of Article 311 Clause (2) of the Constitution. This indeed was not disputed by the learned counsel appearing on behalf of the Union of India. His attempt was only to show that promotion of each respondent was on an officiating basis but for reasons given above that attempt cannot succeed.

2. We accordingly dismiss each of the three appeals with costs.

Appeal dismissed.

AZ/AZ/A115/82/MVJ

AIR 1982 SUPREME COURT 774

Y. V. CHANDRACHUD, C. J.,
O. CHINNAPPA REDDY AND
A. P. SEN, JJ.

Writ Petn. No. 8193A of 1981, D/- 20-1-1982.

Kuljit Singh alias Ranga, Petitioner v. Lt. Governor of Delhi and others, Respondents.

Constitution of India, Arts. 72, 161 — Power of President to commute sentence of death — Nature and scope. (Criminal P. C. (1974), S. 433).

The President has the power in an appropriate case to commute any sentence imposed by a court into a lesser sentence, and the administration of justice by the courts is not necessarily or certainly considerate of circumstances which may properly mitigate guilt. But the question as to whether the case is appropriate for the exercise of the power conferred by Art. 72 depends upon the facts and circumstances of each particular case. The necessity or the justification for exercising that power has therefore to be judged from case to case. (1924) 69 Law ed 527, Rel. on. (Para 1)

In the instant case, since the accused had committed cold-blooded murders with professional stamp, the only sentence which could possibly be imposed upon him was that of death and no circumstances existed for interference with that sentence. It could not, therefore, be said that in refusing to commute the sentence of death into a lesser sentence, the President has in any manner transgressed his discretionary power under Art. 72, whatever be the guidelines observed for the exercise of the power conferred by Art. 72. The question whether the Government of India has formulated any uniform standard or guidelines by which constitutional power under Art. 72 or 161 can be exercised, left open, General order of stay of execution of death sentence vacated. (Paras 1, 4)

Cases Referred: Chronological Paras

AIR 1981 SC 1572: (1981) 3 SCR 512: 1
1981 Cri LJ 1045 1
(1924) 69 Law ed 527: 267 US 86 1

CHANDRACHUD, C. J.:— The question as regards the scope of the power of the President under Art. 72 of the Constitution to commute a sentence of death into a lesser sentence may have to await examination on an appropriate

occasion. This clearly is not that occasion because in so far as this case is concerned, whatever be the guidelines observed for the exercise of the power conferred by Art. 72, the only sentence which can possibly be imposed upon the petitioner is that of death and no circumstances exist for interference with that sentence. Therefore we see no justification for saying that in refusing to commute the sentence of death imposed upon the petitioner into a lesser sentence, the President has in any manner transgressed his discretionary power under Art. 72. Undoubtedly, the President has the power in an appropriate case to commute any sentence imposed by a court into a lesser sentence and as said by Chief Justice Taft in *James Shewan & Sons v. United States*, (1924) 69 Law ed 527 at p. 535, the "executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law" and that the administration of justice by the courts is not necessarily or certainly considerate of circumstances which may properly mitigate guilt. But the question as to whether the case is appropriate for the exercise of the power conferred by Art. 72 depends upon the facts and circumstances of each particular case. The necessity or the justification for exercising that power has therefore to be judged from case to case. In fact, we do not see what useful purpose will be achieved by the petitioner by ensuring the imposition of any severe, judicially evolved constraints on the wholesome power of the President to use it as the justice of a case may require. After all, the power conferred by Art. 72 can be used only for the purpose of reducing the sentence, not for enhancing it. We need not, however, go into that question elaborately because in so far as this case is concerned, we are quite clear that not even the most liberal use of his mercy jurisdiction could have persuaded the President to interfere with the sentence of death imposed upon the petitioner, in view particularly of the considerations mentioned by us in our judgment in *Kuljeet Singh alias Ranga v. Union of India*, (1981) 3 SCR 512: (AIR 1981 SC 1572). We may recall what we said in that judgment that "the death of the Chopra children was caused by the petitioner and his companion Billa after a savage planning which bears a professional stamp", that the "survival of an orderly society demands the extinction of the life of persons like Ranga and Billa

who are a menace to social order and security", and that "they are professional murderers and deserve no sympathy even in terms of the evolving standards of decency of a mature society."

2. The petition is accordingly dismissed.

3. We have heard Shri R. K. Jain as amicus on behalf of the accused Billa. We see no substance in Shri Jain's contentions also.

4. The order of stay of execution of the death sentence which we had passed in favour of the accused Ranga and Billa as also the general order of stay are hereby vacated. If in any specific case or cases there is an express order of stay, it will not be affected by the order which we are passing today.

Petition dismissed.

AIR 1982 SUPREME COURT 775

(From: Patna)

Y. V. CHANDRACHUD, C. J. AND
E. S. VENKATARAMIAH, J.

Civil Appeal No. 1936 of 1981, D/- 14-8-1981.

State of Bihar and another, Appellants
v. Madan Lal Jain, Respondent.

Mines and Minerals (Regulation and Development) Act (1957), S. 5 — Mining licence — Grant of — State refusing to grant licence on ground that applicant was in arrears of rent — In writ petition by applicant, High Court observing arrears "seem" to be for a period subsequent to petition for grant of licence and that Govt. has ample powers to recover arrears and that cannot be a ground for refusing to grant lease — Supreme Court remanded the case as it was not possible to ascertain as to for which period, the applicant was in arrears — It also observed that if applicant was in arrears on the date of application, he was not entitled to grant of lease and further observed that if the arrears are for subsequent period, it would have to be decided whether the State Govt. could refuse lease on the ground of arrears. Decision of Patna High Court, D/- 7-12-1979 Reversed. (Constitution of India, Art. 136)

(Para 6)

JUDGMENT:— Heard counsel. Special leave granted.

2. The respondent Madan Lal Jain, filed an application for grant of a lease of laterite deposits in the village Bodda,

AZ/AZ/A118/82/PGS/SNV.

district Palamau. That application was rejected by the State Government on Nov. 21, 1972. The respondent filed a revision application to the Central Government, which, by an order dated Nov. 8, 1974 directed the State Government to grant the lease in conformity with its order. Even after the order of Central Government, the State Government did not grant the lease to the respondent.

3. The case of the State Government is that the lease was not granted to the respondent because he was in large arrears of rent. So far as this question is concerned, the High Court has observed in its judgment dated Dec. 7, 1979 in the writ petition filed by the respondent, that the arrears "seem to be of a period subsequent to 1972 when the petitioner had filed a petition for grant of a lease," the State Government has ample powers to recover the arrears and that the fact that the respondent is in arrears cannot stand in the way of the State granting a lease to the respondent. Aggrieved by the judgment of the High Court the State of Bihar has filed this petition for special leave.

4. A notice was issued to the respondent to show cause why the special leave should not be granted. Having heard Mrs. Gyan Sudha Misra for the respondent we consider that this is a proper case for granting leave, which we hereby do.

5. The High Court has not recorded any clear or positive finding on the question as to whether the respondent is in arrears of rent and if so, whether the arrears are due for a period prior or subsequent to the date on which he applied for a mining lease. The High Court says that the arrears "seem" to be of a period subsequent to 1972. But the High Court then observes that the State has ample powers to recover the arrears "if any". It is not possible to ascertain from the judgment of the High Court whether the respondent is in fact in arrears and if so for which period. The High Court has also not considered the question as to what is the effect of the respondent being in arrears of rent for a period subsequent to the date on which he applied for the mining lease in question.

6. This makes it necessary to set aside the judgment of the High Court and remand the matter to it. The High Court will consider the question whether the respondent was in arrears of rent on the date on which he applied for the mining lease. If the finding on that question is in the affirmative, the respondent will not

be entitled to the mining lease. The High Court will then consider the question whether the respondent was in arrears for the period subsequent to his application for the mining lease. If the finding on that question is in the affirmative, the High Court will have to consider whether the State Government can refuse to grant the lease to the respondent for that reason.

7. Since the matter is pending for quite some time, we direct that the High Court will dispose of the writ petition expeditiously.

8. There will be no order as to costs.
Order accordingly.

AIR 1982 SUPREME COURT 776

(From: Delhi)*

A. C. GUPTA AND A. P. SEN, JJ.

Special Leave Petn. (Civil) No. 1879 of 1981, D/- 28-7-1981.

T. D. Subramanian, Petitioner v. Union of India and others, Respondents.

Constitution of India, Arts. 32, 226 and 311 — Compulsory retirement of Director of Posts and Telegraphs — Validity — Petitioner though a competent officer with a zeal to root out malpractices, found to be lacking in tact in dealing with subordinates — Hence transferred — Held, order of transfer was not mala fide as it was made in exigencies of service — Order of compulsory retirement passed on ground of deliberately disobeying transfer order was valid. (Paras 3, 4)

GUPTA J.:— This is a somewhat extraordinary case. The special leave petition is directed against an order of a Division Bench of the Delhi High Court affirming an order passed by a single Judge of that Court dismissing a writ petition filed by the petitioner before us. In the writ petition the petitioner questioned the validity of an order of compulsory retirement made against him. He was posted as Director of Posts and Telegraphs, Orissa Circle, with headquarters at Cuttack, in Jan. 1964 when he was asked to go to Ambala as Director of Posts and Telegraphs. The order of compulsory retirement appears to have been made because the petitioner disobeyed the order of transfer. The petitioner took leave up to Aug. 2, 1964 and even thereafter he did not report for duty

at Ambala. The charges against the petitioner were that he had overstayed leave without permission and that he deliberately disobeyed the order of transfer. According to the petitioner the order of transfer was mala fide as it was made under pressure from the Posts and Telegraphs Employees' Unions and political leaders associated with them.

2. The respondents in their affidavit before the High Court asserted that the transfer was made in the exigencies of service. It appears from the impugned judgment of the High Court that even according to the respondents the petitioner was "a competent and zealous officer who was responsible for bringing to an end a lot of malpractices particularly with regard to medical bills submitted by subordinate staff in the Orissa Circle". It was also not disputed that the "trade unions got rather worked up on the stiff action" taken by the petitioner. A Deputy Director General of Posts and Telegraphs was sent to Orissa to make an enquiry into the state of affairs there and he submitted a report. In this report also it was acknowledged that the petitioner was "a competent officer with a zeal to root out mal-practices". It was however added that he was "lacking in tact in dealing with his subordinates". It was suggested by the Deputy Director General of Posts and Telegraphs that in the exigencies of the situation it was advisable to transfer the petitioner. A member of the Posts and Telegraphs Board wrote to the petitioner on Dec. 3, 1963 that while the Board appreciated the measures taken by the petitioner to curb malpractices in the claims, the action taken by him which was rather "stiff" had led to deterioration of relation between the trade unions on the one hand and the officers of the Posts and Telegraphs Department on the other, and the petitioner was advised to be tactful with the staff. At about the same time, two posts of Director, Postal Services, were required to be filled and the Board appointed the petitioner to the post at Ambala.

3. Both the learned single Judge and the Division Bench of the High Court found that the order of transfer was not made as a result of pressure from the trade unions. We find no material on which we can take a different view. It was also found that the relations between the trade unions and the officers of the Posts and Telegraphs Department had deteriorated at Cuttack. The Division Bench of the High Court has described the situa-

*L. P. A. No. 99 of 1973, D/- 25-11-1980 (Delhi).

tion as follows: "The Government had problem. On the one hand was a competent and strict officer, though somewhat lacking in tact. On the other hand were a large number of employees who had not been handled tactfully by the appellant when he had tried to put things right..... A certain situation existed and a solution had to be found. The solution was found in a particular manner." In the facts of the case we are inclined to agree with the High Court that the order of transfer was made in the exigencies of service.

4. The petitioner has been found to be lacking in tact. It seems exercising tact when according to the petitioner firmness was called for was against his principles. Apparently "tact" is also one of the qualities that a Government officer is required to possess, and in the situation described above the petitioner left no option to the authorities. However in these circumstances we do not think any stigma in the sense in which the word is ordinarily understood attaches to the petitioner because of the order of compulsory retirement passed against him. The special leave petition is dismissed.

Petition dismissed.

AIR 1982 SUPREME COURT 777

(From: AIR 1976 Delhi 256)

A. D. KOSHAL, V. BALAKRISHNA
ERADI AND R. B. MISRA, JJ.

Civil Appeal No. 966 of 1976, D/- 14-1-1982.

Smt. Anand Kaur, Appellant v. Pritam Lal, Respondent.

Delhi Rent Control Act (59 of 1960), S. 14 (1) (a) — Notice under — Construction of — Statutory tenant — Demand for damages for use and occupation at rate equivalent to agreed rent — Demand is one for rent — Notice is valid. AIR 1976 Delhi 256, Reversed.

Where the notice which was purported to be under S. 14 (1) (a) was served by the landlady on the tenant, specifically stated that on account of the termination of the tenancy by an earlier notice the tenant had become a statutory tenant and therefore a claim was made for damages for use and occupation at a rate equivalent to the agreed rent, the demand so made could not be construed as anything but demand for rent. It could not

be said that the word 'rent' and the expression damages could not be taken to be synonymous and that there was no demand of rent in the notice. Consequently the notice under S. 14 (1) (a) served by the landlord satisfied the requirements of Sec. 14 (1) (a) and was valid. AIR 1976 Delhi 256 Reversed.

(Para 4)

JUDGMENT:— The short point arising for determination in this appeal concerns the validity of a notice served by the landlady-appellant on the tenant-respondent and purporting to be one issued in accordance with the provisions contained in cl. (a) of sub-sec. (1) of S. 14 of the Delhi Rent Control Act (hereinafter called the Act), and we may at the very outset reproduce the relevant provisions of that section:

"14. (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any court or Controller in favour of the landlord against a tenant;

Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely:—

(a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the manner provided in Section 106 of the Transfer of Property Act, 1882;.....

14. (2) No order for the recovery of possession of any premises shall be made on the ground specified in clause (a) of the proviso to sub-section (1), if the tenant makes payment or deposit as required by Section 15:

Provided that no tenant shall be entitled to the benefit under this sub-section, if having obtained such benefit once in respect of any premises, he again makes a default in the payment of rent of those premises for three consecutive months."

2. The tenant-respondent has remained absent and unrepresented at the hearing and we have had the advantage of being addressed by Mr. Vinoo Bhagat, learned counsel for the appellant only.

3. It was not disputed before the High Court that in an earlier proceeding the tenant had taken advantage of the provisions contained in sub-section (2) of Sec-

tion 14 of the Act, that he committed another default in the payment of rent which covered the period from 1-6-1973 to 30-11-1973 and that it was then that a notice dated 14-12-1973 was served on him. The notice stated:

"Your contractual tenancy in respect of House No. A-54 (double-storey) Kalkaji, New Delhi-19 had already been terminated whereafter you are a statutory tenant liable to pay damages for use and occupation at the rate of Rs. 15 (Rupees fifteen per month) to me. That you have not paid the said damages after May, 1973. In case you do not clear the arrears up to date within two months from the date of this notice, I shall be compelled to issue instructions to my legal adviser to file an application for your eviction....."

No attempt to pay the rent was made in spite of the notice till the end of February, 1974. Although thereafter rent was remitted to the landlady through money orders but she refused to accept the same and made an application to the Controller for eviction of the tenant on the sole ground of a second default in the payment of rent. Both the Controller and the Tribunal in the appeal held that the notice was a valid one and that the expression "damages for use and occupation" contained therein meant nothing more or less than rent. In a second appeal, a learned single Judge differed from the Courts below and was of the opinion that the word 'rent' and the said expression could not be taken to be synonymous and that there was no demand of rent in the notice in question which did not, therefore, satisfy the requirements of the provisions contained in cl. (a) above extracted. It is the judgment of the learned single Judge which is assailed in the present appeal.

4. After hearing Mr. Vinoo Bhagat, learned counsel for the appellant, we are of the opinion that the learned single Judge has taken an unnecessarily hyper-technical view of the contents of the notice. It is significant that the notice specifically stated that on account of the termination of the tenancy by an earlier notice the tenant had become what is popularly known as a 'statutory tenant' and it was in this context that a claim was made for damages for use and occupation at a rate equivalent to the agreed rent. We are of the opinion that in the circumstances of the case the demand so made could not be construed as anything but a demand for rent. Consequently the

notice must be held to satisfy the requirements of cl. (a) of sub-sec. (1) of S. 14 of the Act.

5. For the reasons stated above, we accept the appeal, set aside the impugned judgment and restore the orders of the Controller and the Tribunal. The case is remitted for further proceedings to the Controller who shall dispose of it within three months from the receipt of records from this Court. No costs.

Appeal allowed.

AIR 1982 SUPREME COURT 778

D. A. DESAI AND R. B. MISRA, JJ.

Transfer Petn. No. 140 of 1981, D/- 17-8-1981.

National Insurance Co. Ltd. and another, Petitioners v. K. M. Shah, Respondent.

Constitution of India, Art. 139A — Writ appeal of Kerala H. C. transferred to Supreme Court — Letters Patent Appeal pending in Gujarat H. C. ordered to be transferred to S. C. on application of appellant to be heard along with writ appeal as the same question directly and substantially arose in both the appeals — Applicant-appellant however ordered to deposit Rs. 2,000 in S. C. as a condition.
(Paras 2, 3)

ORDER:— This is a petition for transfer of Letters Patent Appeal No. 147/79 pending in the High Court of Gujarat at Ahmedabad on the ground that the question that goes to the root of the matter and raised in the appeal also arises in T. P. No. 153 of 1981 (Writ Appeal No. 1/79) between National Insurance Co. Ltd. v. Mrs. Padma S. Menon which stood transferred to this court under the orders of this court dated August 10, 1981 under Art. 139A of the Constitution.

2. As the matter which has been transferred to this Court and is pending in this Court involves a question which would directly and substantially arise in Letters Patent Appeal pending before the High Court of Gujarat, in order to avoid conflict of decisions it is but meet that Letters Patent Appeal No. 147/79 be withdrawn from the file of High Court of Gujarat at Ahmedabad and stand transferred to this Court, to be heard along with Transfer Petition No. 153/81 transferring Writ Appeal No. 1 of 1979 of the Kerala High Court.

3. The transfer is granted on the condition that the appellant shall deposit

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Rs. 2,000 in this Court within four weeks from today and the same shall be withdrawn immediately thereafter by the learned advocate-on-record for the respondent for the costs of the respondent. Whatever be the final decision in the matter the respondent will not be liable to refund the same nor would the appellant be entitled to recover costs from the respondent in the event of its being entitled to costs.

4. Liberty to respondent to take out a notice of motion for seeking interim relief which was discussed and cannot be finalised here.

Order accordingly.

AIR 1982 SUPREME COURT 779

(From: Punjab and Haryana)

A. D. KOSHAL, V. B. ERADI AND
R. B. MISRA, JJ.

Criminal Appeal No. 199 of 1977, D/-6-2-1981.

Bhappa Singh, Appellant v. Rampal Singh and others, Respondents.

Constitution of India, Article 136 — Appeal by special leave — Quashing of complaint by High Court — Interference under Article 136 refused even though evidence before High Court did not fully justify quashing the complaint. (Gold (Control) Act (1968), Section 108).

Raid by Custom Officials on jewellery shop — Complaint by shop-owner for prosecution of raiding officials for offences under Ss. 307, 452, 504, 342 and 148 r/w S. 149, I.P.C., alleged to be committed during raid — Customs party man-handled by shop-owner before they resorted to violence — Complaint, quashed by High Court by giving custom officials benefit of S. 108, Gold (Control) Act — Held, case did not call any interference under Art. 136 even though further evidence might have been necessary before quashing the complaint. (Paras 4, 6)

KOSHAL, J.:— This appeal by special leave is directed against a judgment of a learned single Judge of the High Court of Punjab and Haryana quashing a complaint dated the 16th July, 1975 made by Bhappa Singh appellant with a prayer that respondents Nos. 1 to 9, who are admittedly officials of the Excise and Customs Department, be convicted of offences under Ss. 307, 452, 504, 342 and 148 read with S. 149 of the Penal Code.

2. Briefly the charge made in the complaint was that the accused-respondents had raided a jewellery shop of the complainant on the 12th June, 1975 and had simultaneously trespassed into the Chaubara of an adjoining shop in which Gurdev Singh, son of the appellant, was carrying on cloth business, that the respondents came in two groups and that the group which had entered the shop had hurled abuses at the appellant and his people and had demanded a bribe, while the other group entered the cloth shop and rushed into the Chaubara upstairs, where they fired shots in order to commit dacoity.

3. In quashing the complaint the learned single Judge gave the respondents the benefit of S. 108 of the Gold (Control) Act, 1968, which runs thus:

"No suit, prosecution or other legal proceedings shall lie against the Central Government, Administrator, any Gold Control Officer or any person authorised by the Central Government or the Administrator for performing any functions under this Act, for anything which is in good faith done or intended to be done under this Act or any rule or order made thereunder."

and in doing so remarked:

"When a raiding party consisting of officers of the Central Excise and Customs Department enters any shop or building for performing duties under the Act and uses force for removing obstructions against the performance of their duties, the protection of S. 108 of the Act would be available to them."

4. Learned counsel for the appellant has vehemently contended that while the incident which took place in the shop may not be of any consequence, the occurrence in the Chaubara cannot be brushed away as of minor importance and that what the Customs party did there amounted to nothing short of an attempt to murder for which there was no valid excuse. The argument at first sight appears to be attractive, but after being taken through material documents forming part of the record and hearing learned counsel for both parties we find that this is not a case which calls for our interference under Art. 136 of the Constitution of India.

5. Certain facts which are not in dispute may here be stated. The appellant was issued a licence to work as a certified goldsmith in the year 1963 and so was his son Gurdev Singh. The appellant's brother Om Prakash carried on his busi-

ness as a gold-dealer in the jewellery shop above mentioned under another licence. At the time when violence is said to have been used by the Customs party, Bhappa Singh and Gurdev Singh were admittedly inside the Chaubara. During the occurrence, three men of the Customs party received injuries caused by blunt weapons and at least three of those injuries were in the head region. Gurdev Singh son of the appellant received a gun-shot wound on the dorsal aspect of right fore-arm which was ascribed to indiscriminate shooting on the part of respondent No. 2.

6. In view of the circumstances mentioned in the first paragraph, there is little room for doubt that the Customs party was not due to commit dacoity either in the jewellery shop or the Chaubara, that they also committed no trespass into either of those places but that the purpose of the raid was to find out if any illegal activity was being carried on therein. The presence of the licenced gold-smith in the Chaubara speaks volumes in that behalf. It may further be taken for granted that the Customs party was man-handled before they themselves resorted to violence, because there was no reason for them to open fire unless they were resisted in the carrying out of the raid peacefully.

Even though what we have just stated is a general prima facie impression that we have formed at this stage on the materials available to us at present, it may not be possible to come to a conclusive finding about the falsity or otherwise of the complaint. But then we think that it would amount to giving a go-bye to Section 108 of the Gold (Control) Act, if cases of this type are allowed to be pursued to their logical conclusion, i.e., to that of conviction or acquittal. In this view of the matter we do not feel inclined to up-set the impugned order, even though perhaps the matter may have required further evidence before quashing of the complaint could be held to be fully justified. The appeal is accordingly dismissed.

7. Before parting with the judgment we deem it only fair to indicate that no expression of opinion herein shall be taken into consideration in the cross case which is pending against the appellant at the instance of the Customs authorities.

Appeal dismissed.

AIR 1982 SUPREME COURT 780

(From: Allahabad)

A. D. KOSHAL, V. BALAKRISHNA
ERADI AND R. B. MISRA, JJ.

Civil Appeals Nos. 352 and 353 of 1970,
D/- 18-8-1981.

State of U. P., Appellant v. Arshad Ali Khan, Respondent.

And

State of U. P., Appellant v. Abdul Ghaffar, Respondent.

U. P. Public Lands (Eviction and Recovery of Rent and Damages) Act (13 of 1959), Pre. — Constitutional validity — Act does not suffer from any unconstitutionality, AIR 1974 SC 2009, Applied; Judgment of Allahabad High Court, D/- 30-7-1969, Reversed. AIR 1968 All 369 (FB) No longer good law in view of AIR 1974 SC 2009. (Constitution of India, Arts. 14 and 245). (Para 2)

Cases Referred: Chronological Paras
AIR 1974 SC 2009: (1975) 1 SCR 1 2
AIR 1968 All 369: 1968 All LJ 595 (FB) 1

KOSHAL, J.:— An order of eviction from certain plots of land passed under the U. P. Public Lands (Eviction and Recovery of Rent and Damages) Act, 1959 (hereinafter referred to as the Act) was confirmed in appeal by the Additional District Judge, Kumaon. The appellate order was sought to be revised through an application filed in the Allahabad High Court, a learned single Judge of which held, following a judgment of a Full Bench of that Court in Raja Ram Verma v. State of U. P., 1968 All LJ 595: (AIR 1968 All 369), that the Act was ultra vires of the Constitution in its entirety and that, therefore, the eviction order had to be set aside. The application made by the respondent to the High Court was accepted solely on that ground. The order of the High Court is dated the 30th July, 1969 and it is that order which is impugned in this appeal by special leave.

2. Learned counsel for the parties are agreed that in view of the dictum of this Court in Maganlal Chhaganlal (P.) Ltd. v. Municipal Corporation of Greater Bombay, (1975) 1 SCR 1: (AIR 1974 SC 2009), the Act cannot be deemed to suffer from any unconstitutionality. We hold accordingly, accept the appeal, set aside the impugned judgment and remand the case to the High Court for deciding the other points arising in the petition filed before it for revision of the order of the

learned Additional District Judge. There will be no order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 781

(From : Gujarat)

**V. BALAKRISHNA ERADI AND
R. B. MISRA, JJ.**

Civil Appeals Nos. 1447, 1453 and 1449 of 1970, D/- 18-11-1981.

State of Gujarat, Appellant v. Dharamdas Viranand and another, Respondents,
And

State of Gujarat, Appellant v. Laxmandas Hotchand and another, Respondents.

And

State of Gujarat, Appellant v. Shaikh Abdul Rahim Hajimohammed and another, Respondents.

(A) Gujarat Municipalities Act (34 of 1964), S. 233 (1) Cl. (b) — Eviction of person in unauthorised occupation of premises belonging to municipality — Section is not ultra vires Art. 19 (1) (f) or Art. 14. Decision of Gujarat High Court, D/- 15-11-1969 Reversed; AIR 1980 SC 1144, Referred. (Constitution of India, Arts. 14, 19 (1) (f)). (Para 5)

(B) Gujarat Panchayats Act (6 of 1962), S. 193-A — Eviction of person in unauthorised occupation of premises belonging to panchayat — Section is not ultra vires Art. 19 (1) (f) or Art. 14. Decision of Gujarat High Court D/- 15-11-1969 Reversed; AIR 1980 SC 1144 Rel. on. (Constitution of India, Arts. 14, 19 (1) (f)). (Para 5)

Cases Referred : Chronological Paras

AIR 1980 SC 1144	5
AIR 1974 SC 2009: (1975) 1 SCR 1	5
(1970) 11 Guj LR 1	4, 5
AIR 1967 SC 1581: (1967) 3 SCR 399	5

MISRA, J.— These three appeals by certificate are directed against a common judgment of the Gujarat High Court dated 15th of Nov. 1969. By the said judgment the High Court allowed three petitions under Art. 226 of the Constitution, two of them challenging S. 233 of the Gujarat Municipalities Act, 1963, and the third one challenging S. 193-A of the Gujarat Village Panchayats Act, 1961.

2. The provisions of S. 233 of the Gujarat Municipalities Act are identical with provisions of S. 193-A of the Gujarat Village Panchayats Act. To appreciate

the point involved in the case it is necessary to read S. 233:

"233. (1) If the Chief Officer is satisfied—
(a) that the person authorised to occupy any premises belonging to the municipality (hereinafter referred to as "the municipal premises") as a tenant or otherwise has—

(i) not paid rent lawfully due from him in respect of such premises for a period of more than two months, or

(ii) sublet without the permission of the municipality, the whole or any part of such premises, or

(iii) otherwise acted in contravention of any of the terms, express or implied, under which he is authorised to occupy such premises, or

(b) that any person is in unauthorised occupation of any municipal premises, the Chief Officer may, notwithstanding anything contained in any law for the time being in force, by notice served (i) by post or (ii) by affixing a copy of it on the outer door or some other conspicuous part of such premises, or (iii) in such other manner as may be provided in the rules made by the State Government, order that that person as well as any other person who may be in occupation of the whole or any part of the premises, shall vacate them within one month of the date of the service of the notice.

(2) Before an order under sub-section (1) is made against any person the Chief Officer shall inform the person by notice in writing of the grounds on which the proposed order is to be made and give him a reasonable opportunity of tendering an explanation and producing evidence, if any, and to show cause why such order should not be made, within a period to be specified in such notice. If such person makes an application to the Chief Officer for extension of the period specified in the notice the Chief Officer may grant the same on such terms as to payment and recovery of the amount claimed in the notice as it deems fit. Any written statement put in by such person and documents produced in pursuance of such notice shall be filed with the record of the case and such person shall be entitled to appeal before the authority proceeding in this connection by advocate, attorney or pleader. Such notice in writing shall be served in the manner provided for service of notice under sub-section (1).

3. The pattern of facts in all these appeals is similar. We, therefore, propose

to give the facts of Appeal No. 1447 of 1970. Dharamdas Viranand, respondent No. 1, had erected a cabin on municipal footpath near sub-station on public road. A resolution was passed on 5th of Feb., 1966 by the Upleta Municipality to get the said premises vacated. Pursuant to the resolution respondent No. 1 was served with a notice dated 4th Dec., 1967 showing cause why he should not be evicted from the premises. In reply thereto respondent No. 1 sent a letter dated 6th Jan., 1968 stating therein that he was not in unauthorised occupation and he should be allowed to retain the cabin on the said premises. As respondent No. 1 failed to vacate the said premises and handover the same to the municipality, the Chief Officer of the Upleta Municipality by his order dated 28th of May, 1968 directed respondent No. 1 to vacate the same and hand over possession to the Municipality by 30th of June, 1968. Feeling aggrieved, respondent No. 1 filed a petition under Art. 226 of the Constitution challenging the notices.

4. The main ground of challenge is that S. 233 of the Act is violative of the equal protection clause contained in Art. 14 of the Constitution in that it discriminates amongst those in occupation of municipal premises inter se by leaving it open to the Municipality at its own sweet will to adopt either the ordinary remedy by civil suit or the drastic summary remedy under the section without there being any guiding policy or principle to control the exercise of the discretion, and that S. 233 imposed unreasonable restrictions on the occupant's fundamental right to hold property under Article 19 (1) (f) inasmuch as the machinery provided in the section for determining the liability to eviction under both the clauses of sub-sec. (1) was unreasonable. The High Court relying on its earlier decision in Ramanlal Govindram v. Ahmedabad Municipal Corporation, (1970-11 Guj LR 1) and related matters declared S. 233 ultra vires Art. 19 (1) (f) and Section 233, sub-sec. (1), cl. (b) ultra vires Art. 14 of the Constitution and issued a writ of certiorari quashing the notices issued under S. 233, sub-sec. (1). In Ramanlal Govindram's case (supra) relied upon by the High Court the vires of Section 437-A of the Bombay Provincial Municipal Corporations (Gujarat Amendment) Act, 1963 was challenged. Sec. 437A was in identical terms as Section 233 of the Gujarat Municipalities Act or Sec-

tion 193-A of the Gujarat Village Panchayats Act, 1961.

5. It appears that in Northern India Caterers Pvt. Ltd. v. State of Punjab, (1967) 3 SCR 399: (AIR 1967 SC 1581) this Court while considering S. 5 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959, which was almost similar to S. 233 of the Gujarat Municipalities Act, had taken the same view as the Gujarat High Court and struck down the statute. This decision held the field until it was overruled in the case of Maganlal Chhaganlal (P.) Ltd. v. Municipal Corporation of Greater Bombay, (1975) 1 SCR 1: (AIR 1974 SC 2009). The case of Ramanlal Govindram (supra) on the basis of which the High Court declared S. 233 of the Gujarat Municipalities Act and S. 193-A of the Gujarat Village Panchayats Act ultra vires, itself came for consideration before this Court in Ahmedabad Municipal Corporation v. Ramanlal Govindram, and it reversed the judgment holding S. 437A of the Bombay Provincial Municipal Corporations (Gujarat Amendment) Act, 1963, which was in pari materia with S. 233 of the Gujarat Municipalities Act, as intra vires. The result is that the case on the basis of which the High Court of Gujarat held S. 233 of the Gujarat Municipalities Act and S. 193-A of the Gujarat Village Panchayats Act as ultra vires, itself has been overruled by this Court. Again the same view has been taken in Civil Appeal No. 1596 of 1970, State of Gujarat v. Patel Bava Karsan, decided on Feb. 22, 1980: (reported in AIR 1980 SC 1144).

6. In view of the law laid down in the aforesaid cases by this Court, we allow these appeals and set aside the judgment of the High Court. In the circumstances of the case we direct the parties to bear their own costs.

Appeals allowed.

AIR 1982 SUPREME COURT 782

A. C. GUPTA AND BAHARUL
ISLAM, JJ.

S. L. P. (Crl.) No. 3467 of 1979, D/- 2-3-1981.

Amathabhai Arjanbhai, Petitioner v. C. D. Patel and another, Respondents.

Prevention of Food Adulteration Act (37 of 1954), Ss. 7, 16 — Conviction for adulteration of milk — Finding by Public Analyst that milk was deficient in fat

KY/KY/F165/81/DVT

by 0.5% — Special leave petition before Supreme Court — Plea that it is not possible to detect 0.5% deficiency of fat — Question not put to Food Inspector or Public Analyst nor raised in courts below — Special leave refused — (Constitution of India, Art. 136). (Para 1)

BAHARUL ISLAM, J.— The Public Analyst found the sample of milk deficient in fat content to the extent of 0.5%. The appellant submits that it was not possible to detect 0.5% deficiency of fat content in the milk. It was not put to the Food Inspector or to the Public Analyst who would have been the proper person to answer the question. The point also does not appear to have been taken in any of the three courts below.

2. The petition is rejected.

Petition dismissed.

AIR 1982 SUPREME COURT 783 (1)

R. S. PATHAK AND R. B. MISRA, JJ.
Civil Appeal No. 845 of 1981, D/- 25-2-1981.

Krishnadeo Narayan Agarwal, Appellant v. Ram Krishan Rai, Respondent.

Transfer of Property Act (4 of 1882); S. 106 — Notice under — Decree for eviction passed under Rent Control Act — Failure by landlord to serve notice under S. 106 — Does not preclude him from claiming a decree for eviction of tenant. Decision of High Court, Reversed. AIR 1979 SC 1745, Rel. on. (Para 2) Cases Referred: Chronological Paras AIR 1979 SC 1745: (1979) 4 SCC 214 2

PATHAK, J.— Special leave granted.

2. The only point agitated before the learned District Judge related to the service of notice issued under S. 106 of the Transfer of Property Act. The learned District Judge held that the notice had not been served on the respondent. The High Court dismissed the plaintiff's second appeal in limine, on the ground that the case was concluded by findings of fact. In this appeal before us, the only question which can conceivably be considered is whether the failure to serve notice precludes the appellant from claiming a decree for eviction. In view of the opinion of this Court in *Dhanpal Chettiar v. Yesodai Ammal*, AIR 1979 SC 1745 no notice is necessary under S. 106 of the T. P. Act in cases where the possession of the tenant is protected by the

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. In the circumstances, the finding rendered by the learned District Judge can be of no avail to the respondent.

3. In the result, the appeal is allowed, the decree of the High Court is set aside and the suit is decreed for ejectment. However, a period of nine months from today is allowed to the respondent to vacate the premises on furnishing an undertaking in the usual terms within three weeks from today. There is no order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 783 (2)

(From: Madhya Pradesh)

**P. N. BHAGWATI AND
A. VARADARAJAN, JJ.**

Criminal Appeal No. 441 of 1981, D/- 10-4-1981.

Om Prakash and others, Appellants v. State of Madhya Pradesh, Respondent.

Criminal P. C. (2 of 1974), S. 360 (1) — Conviction under S. 323, I.P.C. — Sentence — It would meet ends of justice if accused are not sent to jail but are released on probation under S. 360 (1), Cr. P. C. (Para 1)

P. N. BHAGWATI, J.— We think that having regard to the facts and circumstances of the present case and particularly in view of the fact that the offence of which the appellants have been convicted is one under Section 323, I.P.C., it would meet the ends of justice if the appellants are not sent to jail but are released on probation under Section 360 (1) of the Code of Criminal Procedure, 1973. We accordingly allow the appeal on the question of sentence, set aside the sentence of imprisonment imposed on the appellants and direct that each of the appellants be released on his entering into a bond in the sum of Rs. 500 with one surety for the like amount to appear and receive sentence when called upon during a period of six months and in the meantime, to keep the peace and be of good behaviour.

Sentence modified.

KY/LY/F258/81/MVJ

KY/LY/F298/81/VNP

AIR 1982 SUPREME COURT 784 (1)

(From: Gujarat)

S. MURTAZA FAZAL ALI, BAHARUL ISLAM AND A. VARADARAJAN, JJ.**Criminal Appeal No. 259 of 1976, D/- 26-3-1981.****Roshanali Burhanali Syed, Appellant v. State of Gujarat, Respondent.****Probation of Offenders Act (20 of 1958), S. 4 (1) — Release on probation — Accused above 21 years of age — He could still be released on probation in view of S. 4 (1). (Para 1)**

JUDGMENT:— This appeal by special leave is confined only to the question of sentence and probation. The learned Sessions Judge was requested to release the appellant on probation having regard to the petty nature of the offence. The Sessions Judge would have accepted the request of the appellant but he was under the impression that under the provisions of the Probation of Offenders Act, 1958 a person who was above 21 years of age could not be released on probation. The learned Sessions Judge seems to have overlooked the provisions of S. 4 (1) of the Act which does not contain any restriction that the offender must be 21 or below that age although this restriction is to be found in S. 6.

2. We, therefore, allow this appeal to the extent that instead of sentencing the appellant at once to imprisonment, we direct that he may be released on executing a bond of good behaviour for a period of one year and on furnishing two sureties of Rs. 500 each and a personal recognisance bond of the same amount. In case he is found to commit some offence during this period, he will be directed to appear and receive the sentence which has been imposed on him.

Order accordingly.

KY/LY/F403/81/SMA/SNV

AIR 1982 SUPREME COURT 784 (2)

(From: Allahabad)

Y. V. CHANDRACHUD, A. D. KOSHAL AND R. S. VENKATARAMIAH, JJ.**Special Leave Petn. No. 496 of 1981 (Crl.), D/- 23-2-1981.****Khacheru Singh, Petitioner v. State of U. P. and another, Respondents.****Criminal P. C. (2 of 1974), Ss. 204 and 397 — Magistrate issuing summons to**

LY/LY/G70/81/AAJ/SNV

accused — High Court affirming quashing the order directing issue of summons — If, eventually Magistrate comes to conclusion that no offence was made out against accused, he himself can discharge or acquit the accused, as the case may be — High Court's order set aside. Decision of Allahabad High Court, D/- 7-8-1980, Reversed. (Para 2)

JUDGMENT:— Heard counsel. Special leave granted.

2. We do not see any justification, though we are not expressing any opinion on the merits of the case, for the order passed by the learned Additional Sessions Judge, Meerut in Criminal Revision No. 83 of 1979, which was affirmed by the High Court of Allahabad by its order dated 7-5-80. All that the learned Magistrate had done was to issue a summons to respondent No. 2-Satyavir Singh. If, eventually, the learned Magistrate comes to the conclusion that no offence was made out against Satyavir Singh, it will be open to him to discharge or acquit him, as the case may be. But it is difficult to appreciate why the order issuing "summons" to the accused should be quashed. We, therefore, set aside the orders passed by the Sessions Court and the High Court, restore that of the learned Special Judicial Magistrate, First Class, Meerut, dated February 2, 1979 and remit the matter to the trial Court for disposal in accordance with law.

3. The appeal shall stand disposed of in terms of this order.

Order accordingly.

AIR 1982 SUPREME COURT 784 (3)

(From: 1981 All LJ 795)

P. N. BHAGWATI AND**O. CHINNAPPA REDDY, JJ.****Civil Appeal No. 1877 of 1981, D/- 10-8-1981.****Smt. (Dr.) D. Kaur, Appellant v. Smt. Kanti Khare and others, Respondents.**

Constitution of India, Art. 226 — Case under U. P. Act 13 of 1972 — Question whether suit premises are residential or non-residential — Remanding the case to Rent Control and Eviction Officer, held improper — High Court should have decided the question on basis of evidence already on record. 1981 All LJ 795, Reversed. (Para 1)

Cases Referred: Chronological Paras 1979 All Rent Cas 334

TY/IY/D954/81/CWM

JUDGMENT:— Special leave granted.

2. Two principal questions were debated before the High Court in this case and they were whether it is necessary to give notice of the hearing to an applicant for allotment of accommodation under Section 16 of the U. P. Act 13 of 1972 before the Rent Control and Eviction Officer decides whether a deemed vacancy has arisen and if it has so arisen to whom the allotment should be made and what is the test for determining whether accommodation is residential or non-residential within the meaning of that Act. The learned single Judge of the High Court has taken the view that an applicant for allotment of accommodation on the ground of deemed vacancy is entitled to be heard before an order is made by the Rent Control and Eviction Officer but this view taken by the learned Judge seems to be contrary to the decision of another single Judge of the High Court in *Munu Lal v. District Judge* decided on April 6, 1979 (reported in 1979 All Rent Cas. 334). It is, therefore, necessary that so far as this particular question is concerned the conflict between the decisions of two Judges of the High Court should be resolved by a Division Bench of the High Court. Moreover, we find that the High Court has laid down certain guidelines for the purpose of deciding the question whether the accommodation in the present case is residential or non-residential and remanded the case to the Rent Control and Eviction Officer for the purpose of deciding that question, in accordance with rules and guidelines. We are of the view that the High Court need not have remanded the case to the Rent Control and Eviction Officer but should have decided the question itself on the basis of evidence which was already led by the parties. We would, therefore, set aside the decision of the High Court and remand the case to the High Court with a direction that the matter may be disposed of anew by a Division Bench of the High Court according to law in the light of the observations contained in this judgment. Since the case is an old one the Division Bench of the High Court will dispose it of at an early date. There will be no order as to costs.

Order accordingly.

AIR 1982 SUPREME COURT 785

S. MURTAZA FAZAL ALI

AND V. B. ERADI, JJ.

Criminal Appeal No. 408 of 1981, D/-14-4-1981.

Lalit Mohan Mondal and others, Appellants v. Benoyendra Nath Chatterjee, Respondent.

Criminal P. C. (2 of 1974), Ss. 482, 397 (2), 341 — Order in appeal under S. 341 — Remedy against S. 482 expressly overrules bar in S. 341 — Decision of High Court Reversed.

Although against an order passed in appeal under Sec. 341 of the Criminal P. C., the order would not be revisable by the High Court under S. 397 (2), but High Court is entitled to examine the matter under S. 482 which expressly overrules the bar contained in S. 341 of the Code. Mere indication by High Court that this is not a fit case for invoking the inherent power under Section 482, is not sufficient. The High Court must be itself satisfied whether the order directing complaint to be filed is expedient in the interest of justice, so as to attract its inherent jurisdiction under S. 482 of the Code. Decision of High Court reversed. (Paras 1, 2)

JUDGMENT:— We have heard counsel for the parties and have gone through the judgment of the High Court. We agree with the High Court that against an order passed in appeal under S. 341 of the Criminal P. C., the order would not be revisable by the High Court under S. 397 (2) of the Criminal P. C., but there can be no doubt that the Court is entitled to examine the matter under Sec. 482 of the Criminal P. C. which expressly overrules the bar contained in S. 341 of the Code. In the instant case, the High Court has merely indicated that this is not a fit case for invoking the inherent power without at all applying its mind whether or not in the circumstances, it was a fit case for filing a complaint, particularly when the matter rested merely on oath against oath.

2. For this reason, therefore, we allow this appeal and remit the case to the High Court to send for the records

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and satisfy itself whether the order directing complaint to be filed is expedient in the interest of justice, so as to attract its inherent jurisdiction under S. 482 of the Code. Meanwhile, further proceedings will be stayed.

Order accordingly.

AIR 1982 SUPREME COURT 786

S. MURTAZA FAZAL ALI AND

R. B. MISRA, JJ.

Writ Petn. No. 391 of 1980 and Civil Appeal No. 651 of 1980, D/- 27-1-1982.

M/s. Lingo Sulphite Corporation of India Ltd. and others, Petitioners v. U. P. State Sugar Corporation Ltd. Unit Bijnor and others, Respondents.

And

United Commercial Syndicate, Allahabad, Appellant v. U. P. State Sugar Corporation Ltd., Unit Bijnor and others, Respondents.

U. P. Sheera Nyantran Adhiniyam (24 of 1964), Ss. 8 and 10 — U. P. Sheera Nyantran Niyamavali 1974, Rr. 12, 13, 22, 23 and 24 — Sale of molasses — Molasses released in favour of occupier of sugar factory by Controller under R. 22 (2) — Occupier is entitled to sell it at market rate — He is not required to sell it at controlled rate. (Constitution of India, Art. 14).

The molasses released in favour of the occupier of a Sugar factory by the Controller can be sold at the market price as a free commodity and the occupier is not bound to sell it at the controlled rate. (Paras 16, 17)

A perusal of relevant provisions of the Act and the Rules makes it clear that the occupier of a sugar factory can sell molasses to a person specified in the order of the Controller at the controlled price. The occupier of every sugar factory has to give an estimate of the molasses to be produced in the sugar factory as also the estimate of requirement of molasses for distillation and industrial purposes. If there is any surplus after meeting the requirements of the persons in whose favour there is an order of the Controller, the same will be released in favour of the occupier. (Para 12)

S. 10 of the Act enjoins the occupier of a sugar factory to sell molasses in respect of which an order under S. 8 has

been made at a price not exceeding that prescribed in the schedule. A plain reading of the section makes it clear that the occupier of a sugar factory is obliged to sell molasses at the price not exceeding that prescribed in the schedule only in respect of which an order under S. 8 has been made. But sub-cl. (2) of Rule 22 authorises the Controller to release any stock of molasses in favour of an occupier of a sugar factory only when the same is not required for distilleries or for other purposes of industrial development. If a certain quantity of molasses has been released in favour of the occupier, because the same was not required for distilleries or for other purposes of industrial development, it is open to the occupier to sell that quantity of molasses in free market to any person at a price prevalent in the market. (Para 16)

It could not be contended that the classification made with regard to molasses covered under R. 22 (1) or R. 22 (2) is an unreasonable classification. There have been other enactments in which similar provision has been made, for example, the levy sugar was to be sold only at the controlled rate but free sugar was to be sold by the factories at a free market price and that has been always accepted as a valid classification. (Para 17)

In the instant case the purchaser had entered into an agreement with the occupier to pay a price higher than the controlled price. It is true that the parties cannot be allowed to contract themselves out of law. If the law was that no molasses released in favour of the occupier of the sugar factory could be sold at a price higher than the controlled one then the purchaser could have contended that he was liable to pay only the statutory price or the controlled price. (Para 17)

MISRA, J.:— Writ petition No. 391 of 1980 under Art. 32 of the Constitution and civil appeal No. 651 of 1980 by special leave raise common question of law and, therefore, we propose to dispose them of by a common judgment.

2. The circumstances leading to the writ petition and the appeal lie in a narrow compass. The appellant, United Commercial Syndicate, is the purchasing agent of M/s. Lingo Sulphite Corporation, the petitioner in writ petition No. 391 of 1980 and M/s. Audubon Trading and Export Corporation of Allahabad and Cal-

cutta, who are the manufacturers of lingo sulphite in India.

3. Molasses is the basic raw material for the manufacture of lingo-sulphite which is an essential raw material for all basic refractories, steel plants, cement factories, carbon-back plants and many other important industries. Molasses is also used for distillation. Over the years molasses has become a valuable commodity on account of its multi-use. The preservation, distribution and prices of the molasses were, therefore, controlled by a legislation, the Uttar Pradesh Sheera Niyantaran Adhiniyam, 1964 (U. P. Act No. 24 of 1964), hereinafter referred to as the Act.

4. United Commercial Syndicate used to purchase molasses for their principals from the open market. Later on it decided to make direct purchase from the U. P. State Sugar Corporation Ltd., Unit Bijnor (A State Government Undertaking). It entered into an agreement with respondent No. 1, the U. P. State Sugar Corporation Ltd., whereunder respondent No. 1 agreed to sell 28,300 quintals of molasses of 1977-78 production at the statutory price of Rs. 9/- per quintal and duties etc. provided the appellant agreed to pay the total amount of Rs. 3 lakhs, being the total cost of molasses as estimated at the above statutory price. It was further stipulated that in case the above price was not valid in law, the appellant will have to pay the price at the rate of Rs. 25.10 per quintal inclusive of administrative charges and other taxes and duties etc., as agreed to by the appellant. There were other terms of the agreement but it is not necessary for the purposes of disposal of these cases to refer to them. A sum of Rs. 2 lakhs had been paid in pursuance of the agreement and the balance of Rs. 1 lakh was to be paid at the earliest. The respondent No. 1, however, sought to calculate the price of the molasses in question at the rate of Rs. 25.10 per quintal. The appellant felt aggrieved and it took the stand that the respondent No. 1 could not charge more than the statutory price in spite of the fact that the appellant had offered the price of Rs. 25.10 per quintal to respondent No. 1. The appellant filed two petitions in the High Court for a writ of mandamus or any other appropriate writ or direction declaring that respondent No. 1 was not entitled to charge the price for the molasses in excess of the price fixed by the Act. The High Court

by its order dated 31st of October, 1979 dismissed the petitions in limine. The appellant has come up in appeal by special leave to challenge the order of the High Court. M/s. Lingo Sulphite Corporation of India Ltd. has also filed a petition under Art. 32 of the Constitution for the same relief on the same grounds as in the aforesaid appeal.

5. In order to appreciate the points involved in the case it would be appropriate to refer to the material provisions of the Act and the rules framed thereunder.

6. S. 3 of the Act authorises the State Government to constitute an Advisory Committee to advise on matters relating to the control of storage, preservation, gradation, price, supply and disposal of molasses. S. 4 provides for the appointment of a person as Controller of Molasses for the purpose of exercising the powers and performing the duties of the Controller of Molasses. S. 5 enjoins every occupier of a sugar factory to take precautions for preservation of molasses. S. 6 prohibits the occupier of a sugar factory to adulterate or allow to be adulterated any molasses produced or held in stock by him. S. 7A (1) enjoins any person, who requires molasses for his distillery or for any purpose of industrial development to apply in the prescribed manner to the Controller specifying the purpose for which it is required. Sub-sec. (2) of S. 7A authorises the Controller to make enquiries in the matter as he may think fit and to pass an order under S. 8 with due regard to the factors enumerated in sub-sub-sec. (3) of S. 7A.

7. S. 8 (1) authorises the Controller to direct the occupier of any sugar factory to sell and supply in the prescribed manner such quantity of molasses to such persons as may be specified in the order and the occupier shall, notwithstanding any contract, comply with the order. Sub-sec. (2) (a) of S. 8 enjoins that the occupier shall supply molasses only to a person who requires it for his distillery or for any purpose of industrial development and sub-clause (aa) of sub-sec. (2) directs the person specified in the order of the Controller to utilise the molasses supplied to him in pursuance of an order of the Controller for the purpose specified in the application made by him under sub-sec. (1) of S. 7A and to observe all the restrictions and conditions as may be prescribed. S. 10 provides that the occupier of a sugar factory shall sell

molasses in respect of which an order under S. 8 has been made at a price not exceeding that prescribed in the schedule attached to S. 10.

8. Rule 12 of the U. P. Sheera Niyantaran Niyamavali, 1974 enjoins the occupier of every sugar factory to submit to the Controller by Aug., 31 each molasses year a statement in form M. F. 9 specifying an approximate estimate of the quantity of molasses to be produced in a sugar factory during the molasses year following, along with such other information as is required under that form. Rule 13 (1) provides that every distillery in U. P. shall by Aug., 31 each year submit to the Controller a statement in form M. F. 8 specifying its estimated requirement of molasses for the purposes of distillation during the molasses year following along with such other information as may be required under that form. Likewise, Rule 13 (2) requires the Director of Industries to furnish the Controller by Aug., 31 each year with the estimated requirement of molasses for industrial purposes within the State relating to the molasses year following.

9. Rule 22 provides:

"(1) All stock of molasses produced in a sugar factory shall be deemed to have been reserved for supply to distilleries or other persons requiring it for purposes of industrial development and no stock of molasses produced in a sugar factory shall be sold or otherwise disposed of by the occupier of any sugar factory except in accordance with an order in writing from the Controller.

(2) The Controller shall release any stock of molasses in favour of occupier of a sugar factory only when the same is not required for distilleries or for other purposes of industrial development."

10. Rule 23 (1) provides:

"(1) The State Government may levy administrative charges exclusive of the price payable to a sugar factory on the molasses released for sale by the Controller towards meeting the cost of establishment for supervision of control over molasses at such rate or rates as may be notified from time to time."

11. Rule 24 (1) provides:

"(1) Save in pursuance of an order of the Controller, no person shall purchase any molasses from any sugar factory, or transport or possess any molasses purchased from such sugar factory, unless the

said molasses has been released by order of the Controller as not required for distilleries or other purposes of industrial development and a declaration to that effect in form M. F. 13 has been obtained from the occupier of the sugar factory concerned."

12. A perusal of the relevant provisions of the Act and rules aforesaid makes it clear that the occupier of a sugar factory can sell molasses to a person specified in the order of the Controller at the controlled price. The occupier of every sugar factory has to give an estimate of the molasses to be produced in the sugar factory as also the estimate of requirement of molasses for distillation and industrial purposes. If there is any surplus after meeting the requirements of the persons in whose favour there is an order of the Controller, the same will be released in favour of the occupier.

13. The question for consideration in the instant case is whether the molasses released in favour of the occupier by the Controller is also to be sold at the controlled rate or it can be sold at the market price as a free commodity.

14. Shri Garg, senior counsel contends that from the scheme of the Act and the rules it is evident that the entire production of molasses is to be controlled by the Controller appointed under the Act, at every stage. He is to take into account the estimated supply and the estimated demand of the commodity. Thereafter, he is to allot the commodity to a particular person for a particular purpose at the controlled statutory price fixed by the schedule to the Act. The Act and the rules further provide that nobody will store, sell, transport or use the said commodity without the order of the Controller and the price and distribution of molasses both are controlled by the Act and the contravention of the provisions of the Act have been made penal and the High Court has gone wrong in assuming that certain quantity of molasses which are covered by Rule 22 (2) are immune from the restrictions and fetters of the Act and the said rules, which is erroneous and indefensible in law inasmuch as such a construction as has been put by the High Court will defeat the very purpose and object of the said Act and the rules. As a second limb to this argument it was contended that the classification made between molasses covered by

Rule 22 (1) on the one hand and R. 22 (2) on the other is wholly irrational and the very purpose of the Act is defeated. According to the learned counsel, it makes no difference whether the molasses are covered by Rule 22 (1) or 22 (2) inasmuch as the object of the present legislation is to ensure that the sale and distribution of molasses is controlled in an equitable manner and, therefore, to hold that S. 8 is applicable to R. 22 (1) and not to R. 22 (2) is arbitrary and violative of Art. 14.

15. Shri Rana appearing for respondent No. 1 on the other hand has contended that on a correct interpretation of the relevant provisions of the Act and the rules the interpretation put by the High Court is fully warranted.

16. Section 10 of the Act which has been referred to above enjoins the occupier of a sugar factory to sell molasses in respect of which an order under S. 8 has been made at a price not exceeding that prescribed in the schedule. A plain reading of the section makes it clear that the occupier of a sugar factory is obliged to sell molasses at the price not exceeding that prescribed in the schedule only in respect of which an order under S. 8 has been made. But sub-cl. (2) of Rule 22 authorises the Controller to release any stock of molasses in favour of an occupier of a sugar factory only when the same is not required for distilleries or for other purposes of industrial development. If a certain quantity of molasses has been released in favour of the occupier, because the same was not required for distilleries or for other purposes of industrial development, it is open to the occupier to sell that quantity of molasses in free market to any person at a price prevalent in the market. Section 10 of the Act requires an occupier of a sugar factory to sell molasses at a price not exceeding that prescribed in the schedule only in respect of which an order under S. 8 has been made. No limitation or fetter has been put on the occupier of a sugar factory to sell molasses which was released in his favour. It was, therefore, open to him to sell the molasses released in his favour at the free market price.

17. The contention that the classification made with regard to molasses covered under Rule 22 (1) or Rule 22 (2) is an unreasonable classification cannot be accepted. There have been other enact-

ments in which similar provision has been made, for example, the levy sugar was to be sold only at the controlled rate but free sugar was to be sold by the factories at a free market price and that has been always accepted as a valid classification. The appellant entered into an agreement with respondent No. 1 and agreed to pay the price of the molasses at the rate of Rs. 25.10 per quintal. Having entered into such an agreement with its eyes wide open it cannot now turn turtle and contend that it was liable to pay only at the rate of Rs. 9/- per quintal, the statutory price. It is true that the parties cannot be allowed to contract themselves out of law. If the law was that no molasses released in favour of the occupier of the sugar factory could be sold at a price higher than the controlled one, then the contention of the appellant would be correct. On an analysis of the relevant provisions of the Act we are quite clear that the controlled price was applicable only to the molasses for which an order had been passed by the Controller in favour of a specified person either for the purpose of distillation or for other industrial purposes. But so far as the molasses released in favour of the occupier of a sugar factory is concerned, there is no requirement of the law that the occupier should sell it only at the controlled price.

18. It was further contended that the respondent was not entitled to administrative charges. This contention loses sight of the terms of the agreement between the parties which includes administrative charges also.

19. For the foregoing discussion we find no force either in the appeal or in the writ petition under Art. 32. They are accordingly dismissed. There shall, however, be no order as to costs.

Appeal and petition dismissed.

AIR 1982 SUPREME COURT 789

D. A. DESAI, A. D. KOSHAL

AND R. S. MISRA, JJ.

Civil Appeal No. 535 of 1970 (with C.M.P. No. 5669 of 1981), D/- 30-7-1981.

Baniram and others, Appellants v. Gaiind and others, Respondents.

Constitution of India, Art. 133 — Appeal under — Grant of permission to withdraw suit with liberty to file fresh

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suit on same or different cause of action, on ground of non-pleading of point. (Civil P. C. (5 of 1908), O. 23, R. 1).

Having considered the fact that non-pleading of a point may prove a technical impediment and may result in the dismissal of the appeal which may impede a fresh adjudication if a point is to be made though belated, the Supreme Court considers it just and proper in the interests of justice to permit the appellant-plaintiff to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action, subject to the payment of Rs. 1,000/- by way of costs in addition to all other costs. (Para 1)

ORDER :— We heard Mr. Phadke, learned counsel for the appellant for some time. After the discussion, at a certain stage, a contention was advanced by Mr. Phadke on a particular point, in the case and he conceded that it was not the case pleaded in the plaint. At this stage Mr. Phadke wishes to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action. Having considered the fact that non-pleading may prove a technical impediment and may result in the dismissal of the appeal which may impede a fresh adjudication if a point is to be made though belated, we consider it just and proper in the interests of justice to permit the appellant-plaintiff to withdraw the suit with liberty to file a fresh suit as stated hereinabove. We accordingly grant the permission subject to the condition that the appellant shall pay Rs. 1,000/- by way of costs in this Court within two months from today in addition to any costs paid already under the orders of the High Court.

2. As the suit has been withdrawn this appeal becomes infructuous and stands disposed of accordingly, C. M. P. 5669/81 also stands disposed of.

Order accordingly.

AIR 1982 SUPREME COURT 790

(From: 1981 (UP) RCC 18)

R. S. PATHAK AND BAHARUL ISLAM, JJ.

Civil Appeal No. 1521 of 1981, D/- 24-4-1981.

Sagir Ahmad, Appellant v. 4th Additional District Judge, Agra and others, Respondents.

U. P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act (13 of 1972), S. 21 (1) Proviso — Order of release on application under S. 21 (1) (a) — Non-consideration of proviso to S. 21 (1) by High Court — Proviso to S. 21 (1) is mandatory — Parties before Supreme Court agreeing that in accordance with proviso, tenant should be entitled to compensation in amount equivalent to two years' rent — It was held by Supreme Court that it would not be necessary to send case back to High Court for consideration of S. 21 (1) Proviso. 1981 (UP) RCC 18 : 1980 All LJ NOC 153, Party Reversed. (Para 2)

PATHAK, J.:— Special leave granted.

2. Heard learned counsel for the parties. The judgment dated Oct. 1, 1980 made by the High Court does not consider the proviso to S. 21 (1) of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The consideration of the proviso was mandatory because the High Court was making an order for ejection of the tenant on an application made by the landlord under S. 21 (1) (a) of the Act. It is not necessary for us, however, to send the case back to the High Court for this purpose as learned counsel for the parties are agreed before us that in accordance with the proviso the appellant should be entitled to compensation in an amount equivalent to two years' rent. The judgment of the High Court is modified accordingly. Further, learned counsel for the parties are agreed, and we order, that the appellant shall not be evicted from the premises for a period of six months from today provided the appellant furnishes an undertaking to the Registrar of this Court within two weeks from today that he will hand over vacant and peaceful possession to the respondent-landlord on the expiry of the said period and will not induct any other person or otherwise part with possession of the premises. If the undertaking is not furnished within two weeks from today or any of the above condi-

tions is violated, this order granting time to vacate the premises shall stand vacated.

3. There will be no order as to costs.

Order accordingly.

AIR 1982 SUPREME COURT 791

O. CHINNAPPA REDDY, A. P. SEN AND
BAHARUL ISLAM, JJ.

Writ Petn. (Criminal) No. 7207 of 1981 and Review Petn. No. 284 of 1981 (in Criminal Appeal No. 126 of 1975), D/- 27-1-1982.

Champalal Poonjaji Shah, Petitioner v. State of Maharashtra, Respondent.

Criminal P. C. (2 of 1974), Sec. 428 — Acquittal of accused by High Court — Acquitted accused in preventive detention — Conviction of said accused in appeal by special leave — Detention, neither as one pursuant to conviction, nor as that of undertrial — Period of detention could not be set off under S. 428. (Constitution of India, Art. 136).

When in appeal against his conviction on various charges, the accused person was acquitted by High Court, but he was detained under preventive detention under orders passed subsequent to his acquittal, on conviction of the said accused person in appeal by special leave by State there could be no question of the detention being considered as detention pursuant to conviction; nor could the detention be treated as that of an undertrial. It is only in circumstances where the prisoner would have unquestionably been in detention in connection with a criminal case if he had not been preventively detained, his preventive detention might be reckoned as detention as an undertrial prisoner or detention pursuant to conviction, for the purposes of S. 428 Criminal P. C. Therefore, in this case the periods during which the said accused was in preventive detention could not be set off under S. 428, Cr. P. C. AIR 1977 SC 1096, Dist. (Para 4)

Cases Referred: Chronological Paras
AIR 1977 SC 1096 : 1977 Cri LJ 935 3, 4

O. CHINNAPPA REDDY, J.:— This petition for review and the petition for issue of Writ under Art. 32 were argued by Shri Jethmalani with, what appeared to us to be more than his customary vehemence and emotion. Nonetheless, we confess, we are not impressed.

2. By our judgment dated Aug. 12, 1981 (reported in AIR 1981 SC 1675), we had set aside the judgment of acquittal passed by the High Court of Bombay and restored that of the learned Additional Chief Presidency Magistrate, 8th Court, Esplanade, Bombay, convicting the petitioner under different heads of charges and sentencing him to suffer imprisonment for various terms ranging from two years to four years and to the payment of fine of Rs. 10,000/- on each of different counts. Shri Jethmalani contended that though he had argued that the period during which the petitioner had been preventively detained under the Maintenance of Internal Security Act and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act should be 'set off' against the sentence of imprisonment imposed upon him, we had not touched upon the point. He also drew our attention to a reference to 'set off' in the written submissions given to us after the hearing of the case. We may mention that what was argued before us was not that the petitioner was entitled to a 'set off' but that the period of his detention might be taken into account in considering the question of the appropriate sentence to be imposed on the petitioner, which question was considered by us. But, we will let that pass, accept Mr. Jethmalani's word for it and proceed to consider the question straightway.

3. It appears that the petitioner was detained first under the provisions of the MISA and later under the provisions of the COFEPOSA. The periods of detention were September 17, 1974 to April 18, 1975, July 1, 1975 to November 21, 1975 and May 20, 1976 to March 22, 1977. We are told that the orders of detention, which have not been produced before us, were based on facts which were the very subject matter of the criminal case. The learned Additional Chief Presidency Magistrate had convicted the petitioner by his judgment dated December 13, 1971 but that was set aside by the High Court by their judgment dated April (Feb.) 20, 1974. The State of Maharashtra filed an application for special leave under Article 136 of the Constitution on November 30, 1974 and special leave was granted by this Court on April 15, 1975. It was noticed by this Court at the time of granting special leave that the petitioner was then in preventive detention and it was directed that in

case, he was released from detention but rearrested in connection with the case he should be released on bail on the same terms as those on which bail had been previously granted by the High Court. The submission of Shri Jethmalani was that the total of the three periods of detention should be 'set off' against the sentence of imprisonment imposed upon him. He relied upon the decision of this Court in *Govt. of Andh Pra v. Anne Venkateswara Rao*, AIR 1977 SC 1096.

4. We are unable to agree with the submission of Shri Jethmalani. In the very case cited by the learned counsel, the Court negatived the contention that the expression 'period of detention' in Sec. 428 Code of Criminal Procedure included the detention under the Preventive Detention Act or the Maintenance of Internal Security Act. It was observed (Para 7):

"It is true that the section speaks of the period of detention undergone by an accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the case in which the accused person has been convicted. The section makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused on conviction must be during the investigation, enquiry or trial in connection with the 'same case' in which he has been convicted. We therefore agree with the High Court that the period during which the Writ Petitioners were in preventive detention cannot be set off under S. 428 against the term of imprisonment imposed on them".

After holding that the period during which the petitioners therein were in preventive detention could not be 'set off' under Section 428 Code of Criminal Procedure against the term of imprisonment imposed on them, the Court went on to consider whether the period during which the petitioners were in preventive detention could for any reason be considered as period during which the petitioners were in detention as under-trial prisoners or prisoners serving out a sentence on conviction. In the case of prisoner A. V. Rao the Court held that the period commencing from the date when he would have normally been arrested pursuant to the First Information Report registered against him should be reckoned as period of detention as an under-trial prisoner. In the case of another prisoner Krishnaiah it was held that the period during

which he was in preventive detention subsequent to the conviction and sentence imposed upon him should be treated as detention pursuant to conviction and sentence. The case before us is altogether different. The petitioner had been acquitted by the High Court before any of the orders of detention were made against him. There can be no question of the detention being considered as detention pursuant to conviction; nor can the detention be treated as that of an under-trial. It is only in circumstances where the prisoner would have unquestionably been in detention in connection with a criminal case if he had not been preventively detained, his preventive detention might be reckoned as detention as an under-trial prisoner or detention pursuant to conviction, for the purposes of S. 428 Criminal P. C.

5. Shri Jethmalani next contended that the petitioner had not been given an opportunity to argue on the question of sentence. That is hardly fair to us. A substantial part of the argument of Shri Jethmalani on that occasion was on the question of sentence and, in the judgment pronounced by us, we did consider the argument advanced by the learned counsel on the question of sentence. It was also contended before us that the Court was not justified in holding that the petitioner was responsible for the long delay that had been caused in the disposal of the case and that the Court was wrong in holding that it was for the accused to show that he had been prejudiced by the delay. We see no merit in these contentions. The application for review is therefore dismissed. No separate arguments were advanced in the Writ Petition which is also dismissed.

Application rejected.

AIR 1982 SUPREME COURT 792

(From: Punjab and Haryana)

Y. V. CHNDRACHUD, C. J.,

A. VARADARAJAN, AND

V. B. ERADI, JJ.

S.L.P. (Crl.) No. 1073 of 1981, D/- 6-4-1981.

Dr. Mrs. Veena Kapoor, Petitioner v. Varinder Kumar Kapoor, Respondent.

Constitution of India, Art. 226 — Habeas Corpus petition. — Custody of minor — Child in custody of father — Petition

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for his custody by mother dismissed by High Court on ground that father's custody is not illegal — Dismissal improper, paramount consideration in such cases being welfare of minor and not rights of parties. Habeas Corpus Petition No. 33 of 1981, Punjab & Haryana High Court, Reversed. (Para 2)

ORDER:— The petitioner, Dr. Mrs. Veena Kapoor, is the wife of the respondent. The two, it appears, are not living together. After their estrangement, their 1½ year old child, Akhil Ishwar, is in the custody of the respondent. The petitioner filed a habeas corpus petition (No. 33 of 1981) in the High Court of Punjab & Haryana, asking for the custody of the child alleging that the respondent was in illegal custody of the child. The petition having been dismissed by a learned single Judge of the High Court, the petitioner has filed this petition for Special Leave to appeal.

2. It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal.

3. It is difficult for us in this habeas corpus petition to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be determined. We, therefore, direct that the learned District Judge, Chandigarh, will make a report to us before 23rd of this month on the question as to whether the custody of the child should be handed over to the petitioner-mother, taking into consideration the interest of the minor. The learned Judge will give liberty to the parties to adduce evidence on the question in issue. The learned District Judge may either take up the matter himself or assign it to an Additional District Judge, if there is any at Chandigarh.

4. Parties have agreed to appear before the learned District Judge on Thursday, April 9, 1981 at 11.00 a.m. The learned Judge will give necessary directions to the parties for the expeditious disposal of the matter.

5. The matter will be listed before us on Monday, April 27, 1981.

Order accordingly.

AIR 1982 SUPREME COURT 793

(From : (1979) 1 Serv LR 258 (Mad))

O. CHINNAPPA REDDY AND

A. P. SEN, JJ.

Civil Appeal No. 3436 of 1979, D/- 28-1-1982.

D. Ramaswami, Appellant v. State of Tamil Nadu, Respondent.

Constitution of India, Art. 311 — Fundamental Rules, R. 56 (d) — Compulsory retirement. — Validity — Officer promoted after dropping of charges framed on basis of adverse entry — Compulsory retirement shortly thereafter, is invalid. (1979) 1 Serv LR 258 (Mad), Reversed.

Where the charges framed on basis of adverse entry in the confidential roll of an officer were dropped and he was subsequently not only promoted to a selection post but was appointed to a very responsible post on such promotion, his compulsory retirement shortly after such promotion was invalid and unsustainable when there was nothing even mildly suggestive of inaptitude or inefficiency thereafter and there was no entry in the service book to his discredit or hinting even remotely that he had outlived his utility as a Govt. servant. If there was some entry, not wholly favourable to the officer after his promotion, one might hark back to similar or like entries in the past, read them all in conjunction and conclude that the time had arrived for the Government servant to quit Government service. (1979) 1 Serv LR 258 (Mad), Reversed.

(Paras 3, 4)

Cases Referred: Chronological Paras

AIR 1981 SC 70 : (1981) 1 SCR 430 : 1980	
Lab IC 1184	5
AIR 1980 SC 269 : (1980) 1 SCR 923 : 1980	
Lab IC 219	5
AIR 1980 SC 563 : (1980) 1 SCR 736 : 1980	
Lab IC 221	5
AIR 1970 SC 2086 : (1970) 3 SCR 694	5

CHINNAPPA REDDY, J.:— An order of premature retirement following close upon the heels of promotion and appointment to a coveted selection post is bound to perplex any right thinking man and make him wonder whether the right hand knows what the left hand has done. If in the month of May a Government servant is found to possess such high merit and ability, which naturally includes integrity, as to entitle him not merely to be pro-

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moted to a selection post but to be appointed to a very responsible and much desired post in that cadre, what could have happened between May and September to merit his being weeded out altogether from service in September under the rule which enables the Government to retire a Government servant in the public interest after he has attained the age of 50 years or after he has completed 25 years of qualifying service. One would expect that some grave and grim situation had developed in the interregnum to warrant the pursuit of such a drastic course. But surprisingly, we found nothing whatsoever had happened in this case during that period. Let us look at the totality of the facts.

2. The appellant appears to have had quite a noteworthy career. Starting at the lowest rung as a Lower Division Clerk in 1953, he was promoted as an Assistant Commercial Tax Officer in 1954, next as a Deputy Commercial Tax Officer in 1957, then as a Joint Commercial Tax Officer in 1962, thereafter as a Commercial Tax Officer in 1966, later as an Assistant Commissioner of Commercial Taxes in 1972 and finally as a Deputy Commissioner of Commercial Taxes on 7-5-1975. On promotion as Deputy Commissioner of Commercial Taxes he was posted as Member of the Sales Tax Appellate Tribunal in the same cadre. On Sept. 20, 1975, he was retired under Fundamental Rule 56 (d). His Service Book shows that he had an excellent record of service. He had earned several encomiums, commendations and appreciations. The several promotions gained by him reflect his good record of service. But there was one dark spot. In 1969 when he was working as Commercial Tax Officer it was noted in his Confidential file by the Deputy Commissioner of Commercial Taxes as follows:

"This Commercial Tax Officer is a very intelligent and capable officer who kept the entire district under his control in perfect discipline. Unfortunately, his reputation is not at all good. There were complaints that he used to threaten dealers and take money. The entire matter is under investigation by the Vigilance and Anti-Corruption Department".

There was an enquiry by the Directorate of Vigilance and Anti Corruption. Charges were framed against the appellant by the Board of Revenue. The explanation of the appellant was obtained. The Full Board of Revenue then reported that the charges

should be dropped. The Government accepted the report of the Full Board and dropped the charges making the following order on 29-11-1974:—

"As the preliminary enquiry disclosed a prima facie case of corruption, a detailed enquiry was taken up by the Directorate of Vigilance and Anti-Corruption. Out of eleven allegations levelled against Thiru D. Ramaswami, seven allegations were not substantiated, in the enquiry made by the Directorate of Vigilance and Anti-Corruption. The Government, examined the report of the Directorate and considered that there was a prima facie case in respect of certain allegations and this was sufficient to proceed against Thiru D. Ramaswami. The Board of Revenue (CT) was therefore requested to frame charges straightway as for a major penalty against Thiru D. Ramaswami on the basis of allegations levelled against him. The Board accordingly framed charges against him in respect of allegations substantiated, obtained his explanation and sent its report thereon. The Full Board considered that all the charges framed against Thiru D. Ramaswami in consequence of the detailed enquiry conducted by the Vigilance Department cannot be pursued and proved. The Full Board has therefore expressed the view that the said charges may be dropped. The Government accept the views of the Full Board and direct that all the charges framed against Thiru D. Ramaswami be dropped."

The effect of the order of Nov. 29, 1974 of the Government was to grant absolution to the appellant from the repercussions of the note of the Deputy Commissioner of Commercial Taxes, made in 1969. If there was any ambiguity about the effect of the Government Order, it was cleared by the circumstance that within a few months, on May 7, 1975, he was promoted as Deputy Commissioner of Commercial Taxes and posted as Member, Sales Tax Appellate Tribunal, a prestigious post. It has to be mentioned here that the post of a Deputy Commissioner of Commercial Taxes is a Selection post. Under R. 36 (b) (i) of the Tamil Nadu General Rules for the State and Subordinate Services:

"Promotions in a service or class to a selection category or to a selection grade shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal".

Under R. 2 (b) of the Tamil Nadu Special Rules for Commercial Taxes Service:

"All promotions shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal".

3. So, what do we have? There was an adverse entry in the confidential file of the appellant in 1969. The basis of the entry was knocked out by the Order dated November 29, 1974 of the Government, and effect of the entry was blotted out by the promotion of the appellant as Deputy Commissioner. After his promotion as Deputy Commissioner there was no entry in the service Book to his discredit or hunting even remotely that he had outlived his utility as a Govt. servant. If there was some entry, not wholly favourable to the appellant after his promotion, one might hark back to similar or like entries in the past, read them all in conjunction and conclude that the time had arrived for the Government servant to quit Government service. But, with nothing of the sort, it is indeed odd to retire a Government a few months after promoting him to a selection post. In the present case, we made a vain search in the service record of the appellant to find something adverse to the appellant apart from the 1969 entry. All that we could find was some stray mildly deprecating entries such as the one in 1964 which said:

"He is sincere and hardworking. He manages his office very well. He exercises adequate control over subordinates. He maintains a cordial relationship with public.

Because of his stiff attitude some of the assessee complain about him stating that he is rude in his behaviour. This perhaps is due to his unbending attitude. With a little more tact he will be an asset to the Department".

One curious feature of the case is that while the 1969 entry noted that an enquiry was pending with the Vigilance and Anti-Corruption Department in regard to the allegations against the appellant, the ultimate result of the enquiry which was that the charges should be dropped was nowhere noted, in the personal file of the appellant. One wonders whether the failure to note the result of the enquiry in the personal file led to the impugned order!

4. In the face of the promotion of the appellant just a few months earlier and nothing even mildly suggestive of inepti-

tude or inefficiency thereafter, it is impossible to sustain the order of the Government retiring the appellant from service. The learned Counsel for the State of Tamil Nadu argued that the Government was entitled to take into consideration the entire history of the appellant including that part of it which was prior to his promotion. We do not say that the previous history of a Government should be completely ignored, once he is promoted. Sometimes, past events may help to assess present conduct. But when there is nothing in the present conduct casting any doubt on the wisdom of the promotion, we see no justification for needless digging into the past.

5. The learned Counsel for the appellant relied on the decisions in *Swami Saran Saksena v. State of U. P.*, (1980) 1 SCR 923 : (AIR 1980 SC 269), *Baldev Raj Chadha v. Union of India*, (1981) 1 SCR 430 : (AIR 1981 SC 70), *State of Punjab v. Dewan Chuni Lal* (1970) 3 SCR 694 : (AIR 1970 SC 2086). While the learned counsel for respondent relied on the decision in *Union of India etc. v. M. E. Reddy*, (1980) 1 SCR 736 : (AIR 1980 SC 563). All the decisions have been considered by us in reaching our conclusion. The appeal is allowed. G. Ms. No. 1112 dated September 19, 1975, Commercial Taxes Religious Endowments Department, Government of Tamil Nadu is quashed. The appellant will be reinstated in service and paid the arrears of salary due to him under the rules. He is entitled to his costs.

Appeal allowed.

AIR 1982 SUPREME COURT 795

A. D. KOSHAL, V. BALAKRISHNA
ERADI AND R. B. MISRA, JJ.

Writ Petn. No. 1337 of 1979, D/- 13-1-1982.

Ex. Capt. Ashok Kumar Sawhney, Petitioner v. Union of India and others, Respondents.

Released Emergency Commissioned Officers and Short Service Commissioned Officers (Reservation of Vacancies) Rules (1971), Rr. 4 (1), 6 (3), 8 — Expression "candidates appointed against unreserved vacancies", occurring in R. 6 (3) — Does not include Scheduled Castes and Scheduled Tribes candidates appointed through competitive examination — They cannot

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supersede in seniority officer appointed under R. 4 (1) — R. 6 (3) is not retrospective. (Constitution of India, Arts. 309, 311).

Rule 6 (3) envisages that the officers appointed to Central Civil Services and Posts, Class I against vacancies reserved under sub-r. (1) of R. 4 shall rank below candidates who were appointed against unreserved vacancies in the services concerned through a competitive examination, etc. Where the candidates are appointed through a competitive examination or test as envisaged by sub-r. (3) of R. 6 against vacancies reserved for Scheduled Castes and Scheduled Tribes it cannot be said with any plausibility that they are appointed against unreserved vacancies. Therefore in seniority, they must rank below the officers appointed against vacancies reserved under R. 4 (1). The word "unreserved" in R. 6 (3) does not embrace the vacancies reserved for candidates belonging to the Scheduled Castes and Scheduled Tribes who had joined the cadre through open competition, etc. (Para 2)

Sub-rule (3) of R.6 is intended to be prospective only which means that every seniority list prepared after the date of the promulgation of the sub-rule would be governed by it. Similarly, every promotion made and every question relating to seniority cropping up after the date of the promulgation of the sub-rule (which is 28th Aug. 1971) shall be determined according to that sub-rule. No question of retrospectivity of the sub-rule is thus involved. Of course, the inter se seniority of officers of the cadre prevailing up to 28th Aug., 1971 had to be determined under the rules as they existed before that date and any promotions made earlier to that date would continue to be good if made in accordance with those rules. However, the position changed with the promulgation of the Rules and any promotion made thereafter has to conform to them. (Paras 3, 4, 5)

Rule 8 is not restricted to recruitment of persons to Central Civil Services and Posts, Class I only but is comprehensive enough to embrace the contents of all the rules preceding R. 8 including fixation of seniority of candidates recruited to the services. (Para 6)

ORDER :— The short question which falls for determination in this petition under Art. 32 of the Constitution of India praying for the issuance of appropriate

writs quashing the letter dated 16th. of March, 1979, by which the representation made by the petitioner against the seniority assigned to him in the cadre of Income-tax Officers, Class I was rejected and he was informed that the seniority list forming an appendix to Annexure 'I' had been correctly framed in accordance with the rules then in force.

2. The answer to the question posed by the petition has to be answered with reference to Rules 4, 6 and 8 of the Released Emergency Commissioned Officers & Short Service Commissioned Officers (Reservation of Vacancies) Rules, 1971 (hereinafter called the Rules). The relevant part of Rule 4 (1) reads thus :

4 (1) Twenty per cent of the vacancies in the Indian Foreign Service, and 25 per cent of the vacancies in all the Central Civil Services and Posts, Class I, to which these rules apply shall be reserved for being filled by the Emergency Commissioned Officers and the Short Service Commissioned Officers of the Armed Forces of the Union who were commissioned after the 1st November, 1962 but before the 10th January, 1968, and who—

- (i) (ii) in the case of Short Service Commissioned Officers are released on the expiry of the tenure of their services; or (iii) ...

Rule 6 in so far as it is relevant for our purpose provides :

6 (1) (2) Seniority inter se of candidates who are appointed against the vacancies reserved under sub-rule (1) of Rule 4 and allotted to a particular year shall be determined according to the merit list prepared by the Commission on the basis of the results of their performance at the examination or test or interview.

(3) All candidates who have been appointed against the vacancies reserved under sub-rule (1) of Rule 4 shall rank below the candidates who were appointed against unreserved vacancies in the services of posts through the competitive examination or test or interview conducted by the Commission corresponding to the year to which the former candidates are allotted,

It is not disputed that the petitioner is an officer who is entitled to the benefit of reservation under the above abstracted portion of Rule 4 (1) and to have his seniority in accordance with sub-rule (3)

of R. 6. As we read the sub-rule last mentioned we do not find it to be ambiguous in any manner whatsoever. It lays down in clear terms that the officers appointed against vacancies reserved under sub-r. (1) of R. 4 shall rank below candidates who were appointed against unreserved vacancies in the services concerned through a competitive examination, etc. Respondents Nos. 2 to 14 who have been placed in the impugned seniority list above the petitioner were appointed to the cadre of Income-tax Officers, Class I, through a competitive examination or test as envisaged by sub-r. (3) of R. 6. Now if they were appointed against unreserved vacancies, they are entitled to rank above the petitioner but not otherwise. It is conceded before us that respondents Nos. 2 to 14 have been appointed against vacancies reserved for Scheduled Castes and Scheduled Tribes. Clearly, therefore, they must rank below the petitioner inasmuch as it cannot be said with any plausibility that they were appointed against unreserved vacancies.

3. Mr. Abdul Khader appearing for the Union of India has contested the interpretation just above placed by us on sub-rule (3) of Rule 6. According to him that interpretation makes the sub-rule retrospective in operation, which it is not. We agree that the sub-rule is intended to be prospective only and that the above interpretation would be operative only after the date on which the sub-rule was promulgated and not before that. But then that means that every seniority list prepared after the date of the promulgation of the sub-rule would be governed by it. Similarly, every promotion made and every question relating to seniority cropping up after the date of the promulgation of the sub-rule (which is 28th Aug., 1971) shall be determined according to that sub-rule. No question of retrospectivity of the sub-rule is thus involved. Of course, the inter se seniority of officers of the cadre prevailing up to 28th Aug., 1971 had to be determined under the rules as they existed before that date and any promotions made earlier to that date would continue to be good if made in accordance with those rules. However, the position changed with the promulgation of the Rules and any promotion made thereafter has to conform to them.

4. Faced with the above situation Mr. Abdul Khader argued that the word 'unreserved' in sub-rule (3) of Rule 6

would embrace the vacancies reserved for candidates belonging to the Scheduled Castes and Scheduled Tribes who had joined the cadre through open competition, etc., because the sub-rule meant to take within its ambit all such persons who had been recruited in that manner. The logic of the argument is not clear to us because it makes the whole sub-rule meaningless. If the argument were to be accepted, the use of the word 'unreserved' would be wholly uncalled for and we just cannot hold that the word is redundant, forms part as it does of subordinate legislation. The word 'unreserved' can obviously not be equated with its antonym, that is, 'reserved', and has to be applied only to vacancies which do not fall within the reserved categories.

5. Mr. Abdul Khader took another point and that was to the effect that the rules of the service in question had been amended earlier to 1971 so as to place candidates covered by R. 4 (1) below those who had been appointed to reserved vacancies through a competitive examination. That may well have been so but then that makes no difference to the interpretation which is given above to sub-rule (3) of R. 6. R. 8 of the Rules declares in no uncertain terms that all rules regulating the recruitment of persons to Central Civil Services and Posts, Class I, to which the Rules apply, shall be deemed to have been amended to the extent provided for in the Rules. If the rules regulating the seniority of the petitioner and respondents Nos. 2 to 14 were so amended earlier to 1971 as to assign to the petitioner seniority below respondents Nos. 2 to 14, the situation would be wholly irrelevant to the present dispute because after the amendment brought about Rule 8 of the Rules, the members of the service to which the contested parties belong, have to be governed by the amendment of which sub-rule (3) of R. 6 forms a part. This is the inescapable consequence flowing from R. 8 of the Rules.

6. We may take note here of the only other argument raised by Mr. Abdul Khader and that is that R. 8 regulates only the recruitment of persons to Central Civil Services and Posts, Class I, and not to their conditions of service. We do not find any substance in this argument either. The word 'recruitment' is comprehensive enough to embrace the content of all the rules preceding R. 8 including this

fitment of candidates recruited to the service vis-a-vis each other.

7. In the result, we accept the petition, quash the seniority list abovementioned as well as the letter by which the representation thereagainst made by the petitioner was rejected and direct respondent No. 1 to re-frame the seniority list assigning the petitioner seniority in accordance with law as explained above. There will be no order as to costs.

Petition allowed.

AIR 1982 SUPREME COURT 798

(From: (1972) 74 Pun LR 30)

Y. V. CHANDRACHUD, C. J. AND
A. D. KOSHAL, J.

Civil Appeal No. 1099 (N) of 1972, D/- 5-2-1982.

M/s. Sat Pal Gupta and another, Appellants v. State of Haryana and others, Respondents.

Essential Commodities Act (10 of 1955), Ss. 2 (a) (v) and 3 — Rice bran is foodstuff within meaning of S. 2 (a) (v) and is thus essential commodity — Power conferred by S. 3 can be used to regulate its production, sale or supply. (Words and Phrases — Foodstuff — Meaning of.)

Rice bran which is commonly used as poultry feed and not uncommonly as cattle feed being foodstuff within meaning of S. 2 (a) (v), and, thus an essential commodity, power conferred on State Government under S. 3 to regulate production and supply of foodstuff can be exercised in respect of rice bran also. Civil Appeal No. 817 of 1980, D/- 7-5-1980 (SC), Rel. on. AIR 1952 SC 335 and AIR 1951 Nag 226, Distinguished. (Para 7)

When 'cattle fodder' is expressly brought within the compass of essential commodities by S. 2 (a) (i), it would be illogical in that context, to exclude rice bran from the purview of essential commodities on the ground that it is eaten by the poultry and not by human beings. (Para 5)

The dictionary meanings of the word 'food' are not restricted to what is eaten by human beings for nourishment and sustenance. According to them, what one takes into the system to maintain life and growth or what is taken into the body of an organism in order to sustain growth is food. (Para 6)

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Cases Referred: Chronological Paras

(1980) Civil Appeal No. 817 of 1980, D/- 7-5-1980, (SC) M/s. Sachdeva & Sons v. State of Punjab 9

AIR 1952 SC 335 : 1952 SCR 877 : 1952 Cri LJ 1406 10

AIR 1951 Nag 226 10

M/s. B. P. Maheshwari and Suresh Sethi Advocates, for Appellants; Mr. K. G. Bhagat and Mr. M. N. Shroff Advocates, for Respondents.

CHANDRACHUD, C. J.:— The appellants, in this appeal by special leave, are dealers in rice, paddy and rice bran. They also have an associate rice milling and husking plant which is run under the name and style of Jagdamba Rice Mills, Traori.

2. Section 3 of the Essential Commodities Act, 10 of 1955, empowers the Central Government, under the circumstances stated in that section, to issue notified orders providing for the regulation of production, supply and distribution of any essential commodity. Under S. 5, the Central Government can delegate its powers to a State Government or an officer or authority subordinate to it. In exercise of that power, the Central Government issued a notification on July 24, 1967 delegating to the State Governments the power conferred upon it by S. 3 of the Act. In exercise of such delegated power, respondent 1, the State of Haryana, promulgated the Haryana Rice Bran (Distribution and Price) Control Order, 1967. Clause 3 of the said Order provides that no dealer or owner of a rice mill shall sell or offer to sell or supply rice bran save against a permit granted by the Director, Food and Supplies, or the District Magistrate or any other officer authorised by the Director in that behalf. The appellants filed a writ petition under Art. 226 of the Constitution in the High Court of Punjab and Haryana, challenging Cl. 3 of the aforesaid Control Order, on the ground that rice bran is not an essential commodity and, therefore, the power conferred by S. 3 of the Act cannot be exercised for the purpose of regulating its sale or supply. This contention has been negatived by the High Court.

3. It is true that the power conferred by S. 3 (1) of the Essential Commodities Act, 1955, can be exercised by the Central Government or its delegate, only if it is of the opinion that it is necessary or expedient to provide for the regulation of

any 'essential commodity'. The only sub-clauses of S. 2 (a) which are relevant for the purpose of deciding whether rice bran is an essential commodity, are sub-cl. (i) and (v). Sub-cl. (i) of S. 2 (a) defines an 'essential commodity' to mean "cattle fodder, including oilcakes and other concentrates". By sub-cl. (v), an 'essential commodity' means "foodstuffs including edible oilseeds and oils". If rice bran is either cattle fodder or foodstuff, it would be an essential commodity and the Central Government or its delegate, the State Government, would have the power to regulate its production, supply and distribution, and trade and commerce therein.

4. Coming first to the question argued by Shri Maheshwari as to whether rice bran is a 'foodstuff' it is well known that rice bran is commonly used as poultry feed and not uncommonly as cattle feed. This is undisputed. Rice bran is a by-product of the husking and milling process of paddy and consists of the layer which lies between the husk and the kernel. The affidavit of Shri T. K. Banerji, Director, Food and Supplies, Haryana which was filed in the High Court shows that rice bran is used in place of wheat bran or wheat middlings in livestock feeding. To the same effect is the affidavit filed in this Court by Shri H. D. Bansal, Director, Food & Supplies, Haryana. If this is the true position, we are unable to appreciate that rice bran cannot be considered to be a foodstuff. Any stuff which is commonly used as food by the generality of living beings is foodstuff: it is not legitimate to restrict the meaning of that word to things which are used as food by human beings. The animal kingdom is not any the less important in the cosmic scheme than the human empire and it is a distortion to say that it is a matter of little or no concern to the State whether the cattle and the poultry get their due ration of the means of their subsistence. Cattle feed and poultry feed are food to the cattle and the poultry, and therefore they are foodstuffs.

5. The word 'foodstuffs' which occurs in cl. (v) of S. 2 (a) is not defined in the Act and therefore it must receive its ordinary and natural meaning, that is to say, a meaning which takes account of and accords with the day-to-day affairs of life. Cattle and poultry are living components of the natural environment and there is no reason to exclude that which they eat

or feed upon, from the meaning of the word 'foodstuffs'. If, what the human beings eat is food, so is what the other living beings eat. 'Cattle fodder' is expressly brought within the compass of essential commodities by cl. (i) of S. 2 (a). It would be illogical if, in that context, rice bran is excluded from the purview of essential commodities on the ground that it is eaten by the poultry and not by Homo Sapiens.

6. By 'foodstuffs' is meant food of any kind. The Shorter Oxford English Dictionary (Third Edition) says that 'food' is "what one takes into the system to maintain life and growth". According to Webster's Third New International Dictionary, 'food' means "material consisting of carbohydrates, fats, proteins and supplementary substances, that is taken or absorbed into the body of an organism in order to sustain growth, repair, and all vital processes and to furnish energy for all activity of the organism; something that nourishes or develops or sustains". These dictionary meanings of the word "food" are not restricted to what is eaten by human beings for nourishment and sustenance. According to them, what one takes into the system to maintain life and growth or what is taken into the body of an organism in order to sustain growth is food.

7. We are therefore of the opinion that rice bran being a foodstuff within the meaning of S. 2 (a) (v) of the Act, it is an essential commodity and, therefore, the power conferred by S. 3 can be used to regulate its production, sale or supply.

8. The affidavits filed on behalf of the State of Haryana have attempted to make out a case that rice bran is also used for human consumption. A research bulletin brought out by the Department of Chemical Engineering and Technology, Punjab University, Chandigarh, is cited therein as showing that the oil extracted from rice bran can be used in a variety of ways in the edible field as, for example, for fat, frying, cooking and in the preparation of salads and sauces, and that in Japan, it has been used for edible purposes for many years. This claim may or may not be true but we would like to have better evidence to uphold it. It may be possible, in course of time, to process rice bran by the use of advanced food technology in order to make it a common article of food for human consumption.

9. Our attention is drawn by Shri Bhagat, who appears on behalf of the

Haryana Government, to a decision of this Court in *M/s. Sachdeva & Sons v. State of Punjab* (Civil Appeal No. 817 of 1980 decided on May 7, 1980) in which it was held that rice bran is "cattle fodder" within the meaning of S. 2 (a) (i) of the Act. We need not go into that question since we are of the view that rice bran, being a foodstuff, is an essential commodity.

10. The decisions in *State of Bombay v. Virkumar Gulabchand Shah* 1952 SCR 877 : (AIR 1952 SC 335) and *Shrinivas Pannalal Chockhani v. The Crown* AIR 1951 Nag 226 which were cited by *Shri Maheshwari* and *Shri Bhagat* respectively do not bear upon the question in issue before us and need not, therefore, be discussed.

11. For these reasons we dismiss the appeal, but without costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 800

(From : Madhya Pradesh)*

A. D. KOSHAL, A. P. SEN AND
V. BALAKRISHNA ERADI, JJ.

Criminal Appeal No. 278 of 1975, D/-
29-1-1982.

State of Madhya Pradesh, Appellant v.
Dewadas and others, Respondents.

(A) M. P. High Court Rules, Chap. I, Part I, R. 1 (q) (As stood before amendment) — Appeal against acquittal under S. 378 (3), Cr. P. C. — Leave to file — Application is to be laid before Bench of two Judges and not before Single Judge. Misc. Criminal Case No. 786 of 1974, D/- 16-10-1974 (Madh Pra), Reversed. 1974 MPLJ (Notes) 102, Overruled. (Criminal P. C. (1974), Ss. 378, 384).

An application for 'leave' to appeal under sub-sec. (3) of S. 378 without which no appeal under sub-sec. (1) or sub-section (2) thereof can be entertained, being an integral part of the appeal, must be laid before a Bench of two Judges of the High Court, under Rule 1 (q) (ii), Chap. I, Part I, of the Madhya Pradesh High Court Rules, (as stood before amendment) and cannot be heard and disposed of by a Single Judge of the High Court under Rule 1 (q) of the Rules as it stood prior to amendment. (Para 12)

*Misc. Criminal Case No. 786 of 1974, D/-
16-10-1974 (Madh Pra).

BZ/BZ/A373/82/DVT

A practice was prevalent in the Madhya Pradesh High Court, requiring the State Government or the Central Government, desirous of preferring an appeal under sub-sec. (1) or sub-sec. (2) of S. 378 of the Code, to make an application for leave under sub-sec. (3) thereof, and it was registered as a Miscellaneous Criminal Case and treated as a petition and as such placed before a Single Judge for hearing as per R. 1 (q), Chap. I, Part I, of the Madhya Pradesh High Court Rules. It was only when the Single Judge granted leave to appeal under sub-sec. (3), that the petition for leave was registered as a Criminal Appeal and placed before a Division Bench for admission under sub-sec. (1) of S. 384.

Held that the Single Judge had no competence to entertain, hear or dispose of the question of grant of leave under sub-sec. (3) of S. 378. Misc. Criminal Case No. 786 of 1974, D/- 16-10-1974 (Madh Pra), Reversed. 1974 MPLJ (Notes) 102, Overruled. (Paras 8, 11, 12)

Under the scheme of the Code, the State Government or the Central Government may prefer an appeal under sub-sec. (1) or sub-sec. (2) of S. 378 of the Code, but such appeal shall not be entertained unless the High Court grants 'leave' under sub-s. (3) thereof. The Code, by enacting sub-s. (3) of S. 378 brought about a change in that there is no longer an unrestricted right of appeal against the orders of acquittal passed in such cases. The making of an application for grant of leave to appeal by the State Government or the Central Government under sub-s. (3) of S. 378 is, however, not a condition precedent to the entertainment of such an appeal. The prayer for grant of leave under sub-s. (3) may, as it should, be contained in the petition of appeal filed under S. 382 of the Code. There is a difference in the procedure regulating entertainment of State appeals against acquittals under sub-s. (1) or sub-s. (2) of S. 378 and appeals against acquittals filed by a complainant under sub-s. (5) of S. 378. The difference in language used in sub-s. (3) and sub-s. (4) of S. 378 manifests the legislative intent to preserve a distinction between the two classes of appeals by prescribing two different procedures in the matter of entertainment of appeals against acquittals. It, therefore, follows that the State Government or the Central Government may, while preferring an appeal against acquittal under sub-s. (1) or sub-s. (2) of S. 378, incorporate a prayer in the

memorandum of appeal for grant of leave under sub-s. (3) thereof, or make a separate application for grant of leave under sub-s. (3) of S. 378, but the making of such an application is not a condition precedent for a State appeal.

(Paras, 10, 11)

(B) M. P. High Court Rules, Chap. I, Part I, R. 1 (q) (as amended) — Appeal against acquittal — Leave to file — Powers of Division Bench and single Judge respectively — Scope. (Criminal P. C. (1974), S. 378).

Rule 1 (q) as amended has made a distinction between appeals from orders of acquittals under sub-sec. (1) of S. 378 in respect of: (1) offences punishable with sentence of death or imprisonment for life and triable by Court of Session, and (2) other offences. All appeals falling under category (1), together with applications for leave under sub-sec. (3) of S. 378, have to be heard by a Bench of two Judges, and other appeals falling under category (2), together with applications for leave under sub-sec. (3) of S. 378, are to be heard by a single Judge. (Para 13)

Cases Referred: Chronological Paras

AIR 1977 SC 1328: (1977) 3 SCR 139:

1977 Cri LJ 997 11

1974 MPLJ (Notes) 102 2, 7, 8, 11

Mr. Gopal Subramaniam, Advocate, for Appellant; Mr. P. D. Sharma, Advocate, for Respondents.

SEN, J.:— The short question involved in this appeal by special leave from the judgment and order of the Madhya Pradesh High Court is, whether an application for 'leave' to appeal under sub-section (3) of S. 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'), without which no appeal under sub-sec. (1) or sub-sec. (2) thereof can be entertained, being an integral part of the appeal, must be laid before a Bench of two Judges of the High Court, under R. 1 (q) (ii), Chap. I, Part I, of the Madhya Pradesh High Court Rules, or can be heard and disposed of by a Single Judge of the High Court under R. 1 (q) of the Rules.

2. The material facts giving rise to the appeal are these. The State Government of Madhya Pradesh having decided to prefer an appeal under sub-sec. (1) of S. 378 of the Code, filed an application for 'leave' to appeal under sub-sec. (3) thereof, setting out therein the grounds of appeal. According to the practice pre-

valent in the Madhya Pradesh High Court, the application was listed before a Single Judge, as per Rule 1 (q), Chap. I, Part I of the Madhya Pradesh High Court Rules. The learned Single Judge refused to grant leave to appeal under sub-section (3) of S. 378 on the ground that the judgment of acquittal was based on appreciation of evidence and was not perverse or unreasonable. The State Government applied for grant of a certificate under Art. 134 (1) (c) of the Constitution. The application for grant of a certificate was placed before and heard by a Division Bench. The contention on behalf of the State Government was that an application for grant of leave under sub-sec. (3) of S. 378 of the Code must be treated as a part of the appeal preferred by the State Government under sub-sec. (1) thereof, and therefore, should have been placed before a Bench of two Judges and consequently the order of the learned Single Judge rejecting the application for grant of leave under sub-sec. (3) of S. 378 of the Code was a nullity. The Division Bench, following the decision of another Division Bench in the State of Madhya Pradesh v. Narendrasingh, 1974 MPLJ (Notes) 102, rejected the contention of the State that the learned Single Judge had no jurisdiction to entertain or decide the application for leave to appeal under sub-sec. (3) of S. 378 of the Code. It, however, noticed the incongruity of the requirement that an appeal under sub-sec. (1) or sub-sec. (2) of S. 378 should be placed before a Bench of two Judges under R. 1 (q) (ii) of the Madhya Pradesh High Court Rules and the hearing and disposal of an application for leave under sub-sec. (3) thereof should be by a Single Judge, and observed:—

"The matter is being examined by the rule making committee. It is rather anomalous that under Rule 1 (q) item (ii) of Chapter I of the Madhya Pradesh High Court Rules, an appeal against acquittal filed by the State Government has to be heard by a Division Bench, still the application for leave under Section 378 (3) of the Code should be laid before a Single Judge."

As the case involved an important question relating to procedure and practice, and as the correctness of the decision of the High Court in Narendrasingh's case was open to question, special leave was granted by this Court.

3. It appears that a practice was prevalent in the Madhya Pradesh High Court,

7. In Narendrasingh's case (1974 M P L J (Notes) 102) the State Government being desirous of preferring an appeal against acquittal under sub-sec. (1) of S. 378, made an application for grant of leave under sub-sec. (3) and the proposed memorandum of appeal was annexed thereto. An application was filed on behalf of the State Government stating that the prayer for grant of leave under sub-sec. (3) be treated as a part of the appeal itself and not separately. It was further prayed that the case, which had originally been registered

ed as a Miscellaneous Criminal Case relating to the grant of leave, should be registered as a 'Criminal Appeal'. The matter was, therefore, placed before a Division Bench. The learned Judges of the High Court referred to the report of the Law Commission 48th Report, Vol. II, Chapters 30-57, paras 28-34, at pp. 810-813; and observed that the legislative object in re-enacting the provisions of S. 417 of the old Code with the addition of the new provision contained in sub-s. (3) of S. 378 of the Code, was that there had to be a further scrutiny of a State appeal by the Court even prior to the stage of admission, requiring the Court to consider at the very outset whether the appeal should be entertained or not. It was only after the appeal was entertained with the 'leave' of the Court that it had to be heard for admission and it may be dismissed summarily without notice to the other side. It was further observed that the legislature brought about the change while accepting the recommendation of the Law Commission to retain the power of the High Court to dismiss State appeals summarily without notice to the respondents.

8. In substance, the decision in Narendrasingh's case (1974 MPLJ (Notes) 102), as expressed in the words of the learned Judges, may be thus stated:

"(A) the very outset on an appeal against acquittal being lodged by the State, the High Court is to consider whether leave should be granted or not. It is only when leave is granted under Section 378 (3) that the appeal is entertained. On the appeal being so entertained as a consequence of the grant of leave, it is to be listed for admission and in case it is not dismissed summarily under Section 384 (1) notice is to be issued to the accused under Section 385 (1) (iv).

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The appeal being entertained only on the grant of leave under Section 378 (3), the matter relating to grant of leave has to be ordinarily heard and disposed of by a Single Bench of this Court according to Rules. The appeal itself being entertained only when leave is granted, there is, in fact, no appeal as such till the leave is granted, even though, it may have been lodged while praying for leave. The matter has, therefore, to be initially registered only as a 'Miscellaneous Criminal Case' and it is only when the leave is granted resulting in the appeal being entertained that it can be registered as

a criminal appeal. Thereafter it has to be listed before the Division Bench for admission."

In making these observations the learned Judges appear to have been swayed by a practice which was prevalent in their Court. The jurisdiction of the Court in these matters is, however, statutory and the Court is not entitled to go outside the provisions of a statute but must interpret them as they are.

9. The answer to the question involved must turn on a proper construction of sub-sec. (3) of S. 378 of the Code. Section 378 of the Code corresponds to S. 417 of the old Code, as amended in 1955. Sub-sec. (1) of S. 378 of the Code is in terms the same as sub-sec. (1) of S. 417 of the old Code and it provides that 'Save as otherwise provided in sub-sec. (2) and subject to the provisions of sub-ss. (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by a court other than a High Court'. Sub-sec. (2) of S. 378 corresponds to sub-sec. (2) of S. 417 and confers the right of appeal on the Central Government in certain class of cases subject to the provisions of sub-sec. (3) from such an order of acquittal. Sub-sec. (3) of Section 378 is a new provision inserted to implement the recommendation of the Law Commission made in its 48th Report on Appeals against Acquittals, and provides that—

"3. No appeal under sub-sec. (1) or sub-sec. (2) shall be entertained except with the leave of the High Court."

Sub-section (4) and sub-sec. (5) deal with an order of acquittal passed in any case instituted upon a claimant. Sub-sec. (4) provides that if an order of acquittal is passed in such a case, and the High Court on an application made to it by the complainant in that behalf, grants 'special leave' to appeal from the order of acquittal, the complainant may present such an appeal to the High Court. Sub-sec. (5) provides for two distinct periods of limitation. No application under sub-sec. (4) for grant of special leave to appeal from an order of acquittal in a complaint case shall be entertained by the High Court at the expiry of six months where the complainant is a public servant and sixty days in other cases computed from the date of the order of acquittal. There is no period of limitation prescribed for presenting an application

for grant of leave to appeal under sub-sec. (3) of S. 378 from an order of acquittal passed in a case instituted otherwise than upon a complaint, obviously because the Code does not contemplate the making of an application for leave under sub-sec. (3) of S. 378 of the Code. Thus, the period of limitation in such a case, is for an appeal from an order of acquittal under sub-sec. (1) or sub-sec. (2) of S. 378 of the Code, as prescribed by Article 114 of the Limitation Act, 1963. The period of limitation prescribed therefor is sixty days from the date of the order appealed from.

10. Under the scheme of the Code, the State Government or the Central Government may prefer an appeal under sub-sec. (1) or sub-sec. (2) of S. 378 of the Code, but such appeal shall not be entertained unless the High Court grants 'leave' under sub-sec. (3) thereof. The words 'No appeal under sub-sec. (1) or sub-sec. (2) shall be entertained' used in sub-sec. (3) of S. 378 create a qualified bar to the entertainment of an appeal filed by the State Government or the Central Government under sub-sec. (1) or sub-sec. (2) from an order of acquittal passed in a case instituted otherwise than upon a complaint. The Code, by enacting sub-sec. (3) of S. 378, therefore, brought about a change in that there is no longer an unrestricted right of appeal against the orders of acquittal passed in such cases. The making of an application for grant of leave to appeal by the State Government or the Central Government under sub-sec. (3) of S. 378 is, however, not a condition precedent to the entertainment of such an appeal. The prayer for grant of leave under sub-sec. (3) may, as it should, be contained in the petition of appeal filed under S. 382 of the Code.

11. There is no warrant for the view expressed by the High Court in Narendrasingh's case (1974 MPLJ (Notes) 102) that the legislative object in re-enacting the provisions of S. 417 of the old Code with the addition of the new provision contained in sub-sec. (3) of S. 378 of the Code, was that there was to be a preliminary scrutiny of a State appeal by the Court even prior to the stage of admission, requiring the Court to consider at the very outset whether the appeal should be entertained or not, and that it was only after the appeal was entertained with the leave of the Court that it was to be heard for admission under sub-sec. (1) of S. 384 read with sub-sec. (1) of S. 385 of the Code. The High Court ap-

pears to rest its decision more on the Report of the Law Commission than the actual language of sub-sec. (3) of S. 378 of the Code, in coming to the conclusion that sub-sec. (3) contemplated two stages. Sub-sec. (3) of S. 378 is not susceptible of any such construction. The Law Commission in its 48th Report had observed:—

"While one may grant that cases of unmerited acquittals do arise in practice, there must be some limit as to the nature of cases in which the right should be available."

And, keeping in view the general rule in most common law countries not to allow an unrestricted right of appeal against acquittals, it recommended:—

"With these considerations in view, we recommend that appeals against acquittals under S. 417, even at the instance of the Central Government or the State Government, should be allowed only if the High Court grants special leave."

It may be pointed out that even now the High Court can summarily dismiss an appeal against an acquittal, or for that matter, any criminal appeal. (Section 422, Criminal P. C.).

Therefore, the amendment which we are recommending will not be so radical a departure as may appear at the first sight. It will place the State and the private complainant on equal footing. Besides this, we ought to add that under S. 422 of the Code, it is at present competent to the appellate Court to dismiss the appeal both of the State and of the complainant against acquittal at the preliminary hearing."

The recommendations of the Law Commission were not, however, fully carried into effect. Sub-sec. (3) of S. 378 of the Code was introduced by Parliament to create a statutory restriction against entertainment of an appeal filed by the State Government or the Central Government under sub-sec. (1) or sub-sec. (2) of S. 378 from an order of acquittal passed in a case instituted otherwise than upon complaint. At the same time, Parliament re-enacted sub-secs. (3) and (4) of S. 417 as sub-secs. (4) and (5) of S. 378, which deal with an order of acquittal passed in any case instituted upon a complaint. The result of this has been that there is a difference in the procedure regulating entertainment of State appeals against acquittals under sub-sec. (1) or sub-sec. (2) of S. 378 and appeals against acquittals filed by a complainant under sub-sec. (5) of S. 378. On a comparison of the language

employed in sub-sec. (3) and sub-sec. (4) of S. 378, it is clear that the legislature has chosen to treat State appeals in a manner different from appeals by a complainant in the matter of preferring appeals against acquittals. In the case of an appeal from an order of acquittal passed in a case instituted otherwise than upon complaint preferred by the State Government or the Central Government under sub-sec. (1) or sub-sec. (2) of S. 378, the Code does not contemplate the making of an application for leave under sub-sec. (3) thereof, while the making of an application under sub-sec. (4) of S. 378 is a condition precedent for the grant of 'special leave' to a complainant under sub-sec. (5). The difference in language used in sub-sec. (3) and sub-sec. (4) of S. 378 manifests the legislative intent to preserve a distinction between the two classes of appeals by prescribing two different procedures in the matter of entertainment of appeals against acquittals. It, therefore, follows that the State Government or the Central Government may, while preferring an appeal against acquittal under sub-sec. (1) or sub-sec. (2) of S. 378, incorporate a prayer in the memorandum of appeal for grant of leave under sub-sec. (3) thereof, or make a separate application for grant of leave under sub-sec. (3) of S. 378; but the making of such an application is not a condition precedent for a State appeal.

In the State of Rajasthan v. Ramdeen, (1977) 3 SCR 139: (AIR 1977 SC 1328), this Court dealt with a case where the Rajasthan High Court granted the State Government leave to appeal under sub-sec. (3) of S. 378 of the Code, but dismissed the appeal filed thereafter on the ground that it had not been filed within ninety days from the judgment appealed from and was therefore barred by limitation under Art. 114 of the Limitation Act, 1963. The application for grant of leave under sub-sec. (3) contained all the requisites of a memorandum of appeal and had been filed within ninety days from the date of order of acquittal but was not accompanied by a petition of appeal. It was held that an appeal under sub-sec. (1) of S. 378 was an integral part of an application for leave to appeal under sub-sec. (3). Accordingly, the order passed by the High Court dismissing the appeal as barred by limitation was set aside. In dealing with the question, it was observed (at p. 1330 of AIR):—

"Under the law it will be perfectly in order if a composite application is made

giving the necessary facts and circumstances of the case along with the grounds which may be urged in the appeal with a prayer for leave to entertain the appeal. It is not necessary, as a matter of law, that an application for leave to entertain the appeal should be lodged first and only after grant of leave by the High Court an appeal may be preferred against the order of acquittal. If such a procedure is adopted, as above, it is likely, as it has happened in this case, the appeal may be time-barred if the High Court takes more than ninety days for disposal of the application for leave. The possibility that the High Court may always in such cases condone the delay on application filed before it does not, in law, solve the legal issue. The right conferred by Section 378 (1), Cr. P. C., upon the State to prefer an appeal against acquittal will be jeopardised if such a procedure is adopted, for in certain cases it may so happen that the High Court may refuse to exercise its discretion to condone the delay. The right conferred under the section cannot be put in peril by an interpretation of Section 378, Cr. P. C., which is likely to affect adversely or even perhaps to destroy that right."

The view expressed by the High Court in Narendrasingh's case being in conflict with the decision of this Court in Ramdeen's case must be overruled.

12. It must accordingly be held that the learned Single Judge had no competence to entertain, hear or dispose of the question of grant of leave under sub-sec. (3) of S. 378, as it had virtually entailed dismissal of the appeal preferred by the State Government under sub-sec. (1) thereof. The matter should have been dealt with by a Bench of two Judges in terms of R. 1 (q) (ii), Chap I, Part I, of the Madhya Pradesh High Court Rules.

13. The question at issue has now become academic. As already stated, the High Court while refusing the grant of certificate of fitness, had adverted to the fact that the matter was being examined by the Rule-making Committee. It has since amended R. 1 (q) and made a distinction between appeals from orders of acquittals under sub-sec. (1) of S. 378 in respect of: (1) offences punishable with sentence of death or imprisonment for life and triable by Court of Session, and (2) other offences. All appeals falling under category (1), together with applications for leave under sub-sec. (3) of S. 378, have to be heard by a Bench of

two Judges, and other appeals falling under category (2), together with applications for leave under sub-sec. (3) of S. 378, are to be heard by a Single Judge.

14. In the result, the appeal must succeed and is allowed. The order passed by the High Court, dismissing the application for leave under sub-sec. (3) of S. 378 of the Code of Criminal Procedure, 1973, filed by the State Government of Madhya Pradesh, is set aside, and it is directed that the application shall be dealt with by a Bench of two Judges as required by R. 1 (q) (ii), Chap. I, Part I, of the Madhya Pradesh High Court Rules, prior to its amendment.

Appeal allowed.

AIR 1982 SUPREME COURT 806

P. N. BHAGWATI AND

R. S. PATHAK, JJ.

Writ Petns. Nos. 9133, 8974 of 1981 and 6 of 1982, D/- 19-1-1982.

Munna and others etc. etc., Petitioners v. State of U. P. and others etc., Respondents.

(A) Constitution of India, Art. 226 — Writ petition — Necessary parties — Relief against maltreatment given to juvenile prisoners sought — Allegations of maltreatment based on certain statements said to have been made by a party and set out in news report — Person making the statements should be made party to the petition. (Para 2)

(B) Children Act (60 of 1960), S. 18 — Juvenile offender — Must be detained in children's home or other place of safety and not in jail — Inhibition against detention of child in jail — Nature of. (i) U. P. Children Act (1 of 1952), Ss. 23, 24, 25, 27; (ii) U. P. Children Rules (1962), Rr. 14, 15).

Where the Children Acts are in force, the Magistrates must be extremely careful to see that no person apparently under the age of 16 years is sent to jail but he must be detained in a Children's Home or other place of safety.

(Para 5)

It is clear from Ss. 23 to 25 of the U. P. Children Act and Rr. 14 and 15 of the U. P. Children Rules (1962) that when a child is arrested for an offence and is not released on bail, he cannot be sent to jail but he must be detained in a

place of safety as defined in S. 2 (9) of the Act. The inhibition against sending a child to jail does not depend upon any proof that he is a child under the age of 16 years but as soon as it appears that a person arrested is apparently under the age of 16 years this inhibition is attracted. The reason for this inhibition lies in the court solicitude which the law entertains for juveniles below the age of 16 years. The law is very much concerned to see that juveniles do not come into contact with hardened criminals and their chances of reformation are not blighted by contact with criminal offenders. In view of S. 27 of U. P. Act 1 of 1952, even where a child is convicted of an offence, he is not to be sent to a prison but he may be committed to an approved school under S. 29 or either discharged or committed to suitable custody under S. 30. (Para 5)

Mr. Krishan Mahajan, Advocate (in WP No. 6/82), Miss Lily Thomas, Advocate (in W. P. No. 8974/81) and Mrs. K. Hingorani, Advocate (in W.P. No. 9133/81), for Petitioners, Mr. R. K. Bhatt, Advocate, for Respondents in all WPs.

ORDER :— These three writ petitions come before us on notice to the State of Uttar Pradesh. They seek relief in respect of certain juvenile undertrial prisoners in the Kanpur Central Jail. The allegations in respect of these juvenile undertrial prisoners are that though there is a Children's Home in Kanpur, these juvenile undertrial prisoners who are, according to the allegations in the writ petitions, more than 100 in number are lodged in the Kanpur Central Jail instead of being sent to the Children's Home and they are being sexually exploited by the adult prisoners. These allegations are based on a news report published in the issue of the Indian Express dated 2nd December, 1981 where a reference is made to a visit of Shri Madhu Mehta of the Hindustani Andolan to the Kanpur Central Jail incognito. Shri Madhu Mehta, according to this news report, found that "young boys of 10 to 14 years" were being "supplied to convicts for their delectation" and a boy named Munna whom he met, was in agony because "after the way he was used, he was unable to sit". When these three writ petitions based on the news report came up for admission, it was not possible to state whether these allegations contained in the news report were correct or not. But if they were correct, they disclosed an extremely distressing state of affairs and they were

sufficient to shock the conscience of the court. The Court, therefore, issued notice to the State of Uttar Pradesh in each of these three writ petitions. But, it appears that, in the meanwhile, a writ petition bearing number 14645 of 1981 was also filed in the High Court of Allahabad by an organisation called Human Rights Organisation seeking relief in respect of these juvenile undertrial prisoners and on this writ petition, the High Court of Allahabad rightly activated itself and decided to investigate into the matter and with that end in view, made an order dated 18th December, 1981 requesting the seniormost Sessions Judge of Kanpur to visit the Kanpur Central Jail and to make a report on the following points:

1. Whether there is any detenu below the age of 16 years who is being detained in the Distt. Jail, Kanpur? if so, the names of such detenues and the offences in connection with which they are being detained be indicated.
2. Whether any detenu below the age of 21 years is being kept under fetters or was being kept under fetters?
3. Whether any such person is being subjected to torture of the nature mentioned in the petition?
4. Whether such inmates of the prison are being provided with proper medical facilities?

The Sessions Judge accordingly visited the Kanpur Central Jail on 21st December, 1981 and submitted his Report dated 22nd December, 1981 to the High Court of Allahabad. We do not propose to consider this Report in detail at this stage, but suffice it to state that according to this Report, there were admittedly seven juvenile undertrial prisoners below the age of 16 in the Kanpur Central Jail, but, curiously enough, barring one Deshraj who was transferred to the Children's Home Kanpur on 19th December, 1981, all the rest happened to be released on different dates between 7th and 16th December, 1981, before the order made by the Allahabad High Court on 18th December, 1981. It is rather interesting to note that the news report in the issue of the Indian Express was published on 2nd December, 1981 and Writ Petition No. 8974/81 which is the first of these three writ petitions was filed by Miss Lily Thomas on 3rd December, 1981 and these juvenile undertrial prisoners were released within a few days of the publication of the news report and the filing of the writ petition. Even so far as Deshraj

is concerned, though he was admitted in the Kanpur Central Jail on 7th March, 1981, he was not transferred to the Children's Home Kanpur until 19th December, 1981 after the order was made by the Allahabad High Court. The consequence of release of these undertrial juvenile prisoners, except Deshraj, was that the Sessions Judge could not interview any of them when he visited the Kanpur Central Jail on 21st December, 1981. The Sessions Judge gave in Annexure A to his Report the names, ages and other particulars of 84 undertrial prisoners who, according to the jail record, were above 16 but below 21 years of age and added that the possibility could not be ruled out that on proper scientific medical examination, three or four out of these 84 undertrial prisoners might be found to be below 16 years of age. The Sessions Judge picked out nine from amongst these undertrial prisoners and got them examined by the Chief Medical Officer and enclosed the Report of the Chief Medical Officer as Annexure B to his Report. The Sessions Judge also reported that there appeared to be general ignorance in the Kanpur Central Jail about the provisions of the U. P. Children Act, 1951 and observed:

"All the child accused mentioned in Annexure B should have been produced before the Juvenile Judge after their arrest. Where there was doubt whether the detenu was above the age of 16 or below it, he should have been sent for medical report in connection with his age and on being found to be a child, should have been dealt in accordance with the Children Act."

The Sessions Judge instructed the Jail Superintendent and the jail doctor that in case there was any doubt about the age of an undertrial prisoner, they should instead of relying upon the police papers with regard to age, obtain the opinion of the Chief Medical Officer and "apprise the court concerned of it so that the presiding officer directs the accused to be produced before the Juvenile Judge to enable him to take the benefit of the provisions of the Children Act for a better social order." We do not know what order has been passed by the Allahabad High Court in the writ petition before it but when these three writ petitions came up for hearing before us on 5th January, 1982, the Report of the Sessions Judge was placed before us and an affidavit in reply was also filed by the Assistant Jailer of the Kanpur Central Jail

denying the allegations made in the news report.

2. Now in the first place, since these three writ petitions are based upon certain statements said to have been made by Shri Madhu Mehta and set out in the news report of the Indian Express, we think it would be desirable to join Shri Madhu Mehta as a party respondent in each of the three writ petitions, so that he can place before the court all the facts gathered by him in regard to the juvenile inmates of the Kanpur Central Jail. The Assistant Jailer has in his affidavit in reply disputed that Shri Madhu Mehta ever visited the jail, but since, according to the news report, Shri Madhu Mehta entered the jail incognito, it is quite possible that the Assistant Jailer may not have any record of his visit. But, since the Assistant Jailer has denied the visit of Shri Madhu Mehta, we think it necessary that Shri Madhu Mehta should be impleaded as a party respondent to the writ petitions so that he can state on oath whether he visited the Kanpur Central Jail and if so, what were the facts which he observed. We cannot reject in limine the allegations made in the news report in regard to what Shri Madhu Mehta found in the course of his visit to the Kanpur Central Jail, merely because the Assistant Jailer has disputed the visit of Shri Madhu Mehta. The allegations are indeed so serious and, if correct, disclose to what utter depths of depravity man can sink, that the court cannot abdicate its constitutional duty of ensuring human dignity to the juvenile undertrial prisoners and summarily throw out the three writ petitions merely on the basis of a denial made by the Assistant Jailer. We must investigate into this matter not only in the interest of fair administration of justice but also for enforcing the basic human rights of these unfortunate juvenile undertrial prisoners who are alleged to have been the victims of sexual exploitation. Juvenile delinquency is, by and large, a product of social and economic mal-adjustment. Even if it is found that these juvenile have committed any offences, they cannot be allowed to be maltreated. They do not shed their fundamental rights when they enter the jail. Moreover, the object of punishment being reformation, we fail to see what social objective can be gained by sending juveniles to jails where they would come into contact with hardened criminals and lose whatever sensitivity they may have to finer and nobler sentiments. That is

the reason why Children Acts are enacted by States all over the country and the U. P. Legislature has also enacted the Uttar Pradesh Children Act, 1951. Since, according to the Report of the Sessions Judge, there were 7 juvenile undertrial prisoners below the age of 16 years, that being the limit of age below which a juvenile would be regarded as a 'child' within the meaning of the Uttar Pradesh Children Act, 1951, and out of these seven child undertrial prisoners, six were released prior to the visit of the Sessions Judge and they could not therefore be interviewed by the Sessions Judge, we would direct Shri O. P. Garg, Secretary of the U. P. State Board of Legal Aid and Advice, to immediately contact these six children after finding out their addresses either from the court proceedings or from the jail records and take their statements with a view to ascertaining what was the treatment meted out to them in the Kanpur Central Jail and whether any of them was mal-treated or sexually exploited. Shri O. P. Garg will immediately without any delay, proceed to take the statements of these six children and submit them to this Court along with his report on or before 27th January, 1982. His expenses may be met by the U. P. State Board of Legal Aid and Advice.

3. We should also like the State of Uttar Pradesh and the Superintendent of the Kanpur Central Jail to inform us by a proper affidavit before the next hearing of the writ petitions as to what were the circumstances in which these six children whose names are given at serial numbers 2 to 7 in Annexure B were released, and also produce before us the orders of the Magistrates directing their release. We should also like the State of Uttar Pradesh and the Superintendent of the Kanpur Central Jail to inform us as to why Deshraj was detained in the Kanpur Central Jail from 7th March, 1981 though he was admittedly, even on the basis of the jail records, a child below 16 years of age and how did it happen that suddenly on 19th December, 1981, an order was obtained for transferring him to the Children's Home, Kanpur. The State of Uttar Pradesh and the Superintendent of the Kanpur Central Jail will also explain as to why such an order for transfer of Deshraj to the Children's Home, Kanpur could not be obtained earlier.

4. The learned counsel appearing on behalf of the State of U. P. handed over to us copies of Annexures A and B,

but we do not have copies of the other annexures to the Report of the Sessions Judge. We would therefore request the Registrar of the High Court of Allahabad to forward to us immediately copies of all the annexures to the Report of the Sessions Judge. The copies may be in quadruplicate.

5. Since, according to the Report of the Sessions Judge, 7 children were lodged in the Kanpur Central Jail and perhaps a few more out of the 84 undertrial prisoners mentioned in Annexure A to the Report of the Sessions Judge could possibly be children within the meaning of Uttar Pradesh Children Act, 1951, we think it is necessary to point out that under the provisions of that Act, no child can, except in the rare cases provided in the Act, be detained in jail. Chapter IV of the Act deals with youthful offenders. S. 23 which occurs in this chapter provides in sub-sec. (1) that when a person apparently under the age of 16 years is arrested for a non-bailable offence and cannot be brought forth before a court, the officer in charge of the police station to which such person is brought may in any case and shall unless the offence is one of culpable homicide or is an offence punishable with death or transportation release him on bail unless for reasons to be recorded in writing the officer believes that such release will bring him into association with any reputed criminal or expose him to moral danger or that his release would defeat the ends of justice. S. 24 then proceeds to enact that when a person apparently under the age of 16 years having been arrested is not released under S. 23 or otherwise, the officer in charge of the police station, shall cause him to be detained in the prescribed manner until he can be brought before a court. So also S. 25 provides that a court, on remanding or committing for trial a child who is not released on bail, shall order him to be detained in the prescribed manner. The manner in which a child can be detained is prescribed by the Uttar Pradesh Children Rules, 1962 made in exercise of the powers conferred under sub-sec. (1) of S. 88 of the Uttar Pradesh Children Act, 1951. Rules 14 and 15 are the relevant rules which make provision in this behalf. R. 14 provides that except as provided in the Act, where a child having been arrested is not released on bail under S. 23, the officer in charge of the police station shall cause him to be detained in a place of safety until he can be brought before a court and R. 15 says

that except as provided in the Act, where a child is not released on bail, the court shall on remanding or committing a child for trial order him to be detained in a place of safety pending the disposal of the proceeding. What is a "place of safety" is defined in S. 2, sub-sec. (9) of the Act to mean, "any observation home or any orphanage, hospital, or any other suitable place or institution, the occupier or manager of which is willing temporarily to receive a child, or where such observation home, orphanage, hospital or other suitable place of institution is not available in the case of a male child only, a police station in which arrangements are available or can be made for the safe keeping of a child separately from adult offenders." It is therefore clear that when a child is arrested for an offence and is not released on bail, he cannot be sent to jail but he must be detained in a place of safety as defined in S. 2, sub-sec. (9) of the Act. The inhibition against sending a child to jail does not depend upon any proof that he is a child under the age of 16 years but as soon as it appears that a person arrested is apparently under the age of 16 years this inhibition is attracted. The reason for this inhibition lies in the court solicitude which the law entertains for juveniles below the age of 16 years. The law is very much concerned to see that juveniles do not come into contact with hardened criminals and their chances of reformation are not blighted by contact with criminal offenders. The law throws a cloak of protection round juveniles and seeks to isolate them from criminal offenders, because the emphasis placed by the law is not on incarceration but on reformation. How anxious is the law to protect young children from contamination with hardened criminals is also apparent from S. 27 of the Act which provides, subject only to a few limited and exceptional cases referred to in the proviso, that notwithstanding anything contained to the contrary, no court can sentence a child to death or transportation or imprisonment for any term or commit him to prison in default of payment of fine. It would thus be seen that even where a child is convicted of an offence, he is not to be sent to a prison but he may be committed to an approved school under S. 29 or either discharged or committed to suitable custody under S. 30. Even where a child is found to have committed an offence of so serious a nature that the court is of opinion that no punishment which under the provi-

sions of the Act it is authorised to inflict is sufficient. S. 32 provides that the offender shall not be sent to jail but shall be kept in safe custody in such place or manner as it thinks fit and shall report the case for the orders of the State Government. S. 33 sets out various methods of dealing with children charged with offences. But in no case except the exceptional ones mentioned in the Act, a child can be sent to jail. It is therefore very surprising that the seven children whose names are mentioned in Annexure B' to the Report of the Sessions Judge were sent by the concerned Magistrate to jail instead of being sent to Children's Home which we believe was a place of safety in Kanpur within the meaning of S. 2 sub-s. (9) of the Act. We would strongly impress upon the magistrates in the State of Uttar Pradesh — and what we say here must apply mutatis mutandis to the magistrates in the other parts of the country where the Children Acts are in force, that they must be extremely careful to see that no person apparently under the age of 16 years is sent to jail but he must be detained in a Children's Home or other place of safety. It is absolutely essential in order to implement the provisions of the Uttar Pradesh Children Act, 1951 that Children's Home or other suitable places of safety are set up by the government for the purpose of providing a place of detention for children under the age of 16 years. No words we can use would be strong enough to convey our feelings in this respect. A nation which is not concerned with the welfare of its children cannot look forward to a bright future.

6. With these observations, we adjourn the hearing of these three writ petitions to 29th January, 1982.

Order accordingly.

AIR 1982 SUPREME COURT 810

(From: 1980 All LJ NOC 1)

S. MURTAZA FAZAL ALI AND R. B.

MISRA. JJ.

Civil Appeal No. 812 of 1980, D/- 1-2-1982.

Babu Singh Chauhan, Appellant v. Smt. Rajkumari Jain and others, Respondents.

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Pre., S. 17 (2) — Object of the Act

BZ/BZ/A520/82/VCD/SSG

— Tenant inducted by Landlord voluntarily vacating premises — Landlord in occupation of other part of building — He has right to have tenant of his choice.

A perusal of S. 17 (2) would clearly disclose that the object of the Act is that where a tenant inducted by the landlord voluntarily vacates the premises, which are a part of the building occupied by the landlord, an allotment in the vacancy should be made only to a person nominated by the landlord. The dominant purpose to be subserved by the Act is manifestly the question of removing any inconvenience to the landlord by imposing or thrusting on the premises an unpleasant neighbour or a tenant who invades the right of privacy of the landlord. Hence, the statute, while empowering the prescribed authority to allot the accommodation, safeguards at least the right of the landlord to have a tenant of his choice.

(Para 4)

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 17 (2) — Applicability — Word "Possession" — Meaning of — Allotment of Premises — Landlady in possession of part of a building — Prescribed authority not complying with S. 17 (2) while making allotment — Order of allotment is illegal. (Words and Phrases — Word "Possession" — Meaning of).

Merely because the landlady did not actually reside in the premises which were locked and contained her household effects, it cannot be said that she was not in possession of the premises so as to make S. 17 (2) inapplicable. The fact that the landlady, who is a widow, was staying with her son in some other town by itself is hardly a good ground for her to sever her connections with her own property.

(Paras 10, 11)

Possession by a landlord of his property may assume various forms. A landlord may be serving outside while retaining his possession over a property or a part of the property by either leaving it in charge of a servant or by putting his household effects or things locked up in the premises. Such an occupation also would be full and complete possession in the eye of law.

(Para 10)

Even occupation of a part of a building by the landlady which she may visit off and on its possession in the legal sense of the term and, therefore, it cannot be said that the provision of S. 17 (2) would not

apply and that the Rent Control authorities would make an allotment in favour of any person without giving an opportunity to the landlady to exercise her privilege of nominating a tenant.

(Para 12)

Where a tenant inducted by landlady voluntarily vacated the premises, which were a part of the building occupied by the landlady and the prescribed authority, despite several opportunities, did not approach the landlady for making nomination of tenant in respect of the premises vacated by the original tenant and there was no evidence to show that the landlady refused to nominate a tenant, the order of the prescribed authority allotting the premises to a person without allowing an opportunity to the landlady to nominate a tenant, was illegal, being violative of S. 17 (2), 1980 All LJ (NOC) 1, Affirmed.

(Para 12)

In the instant case, the conduct displayed by the allottee clearly showed that if he was thrust on the landlady without her being allowed an opportunity to nominate a tenant, it will violate the very spirit and tenor of S. 17 (2) of the Act.

(Para 13)

Mr. R. K. Garg, Sr. Advocate, M/s. V. J. Francis, S. K. Jain, Advocates with him, for Appellant; Mr. Shanti Bhushan, Sr. Advocate M/s. R. K. Jain, P. K. Jain and Punkaj Kalra, Advocates with him, for Respondent No. 1.

FAZAL ALI, J.:— This appeal by special leave is directed against a judgment dated Nov. 23, 1979 of the Allahabad High Court allowing a writ petition quashing the order of the Rent Control and Eviction Officer and remanding the case to him for considering the question afresh in accordance with law and in the light of the observations made by the High Court.

2. The appeal involves a short and simple point but the case appears to have had rather a long and chequered career. Put briefly, the facts of the case fall within a narrow compass so far as the points for decision are concerned. The first respondent, Smt. Rajkumari Jain, inducted Shri Thapalayal as a tenant in the premises in dispute which are situated in the town of Bijnor. The tenant intimated his intention to the Rent Control & Eviction Officer to vacate the premises on 25-6-1974. On receipt of the aforesaid application of the tenant a Rent Control Inspector was directed to visit the spot

and after visiting the same he reported that the premises in question were likely to fall vacant on 9-6-1974. The prescribed authority by its Order dated 1-6-1974 allotted the premises to the appellant. In fact, the appellant had applied to the authority on 20-5-1974 for allotment of the accommodation to him. It appears that these proceedings were taken behind the back of the respondent-landlady who was not taken into confidence either by the appellant or by the Rent Control authorities. It was only after the prescribed authority had allotted the premises to the appellant and the respondent-landlady came to know of this fact that she moved the prescribed authority for cancellation of the allotment but her prayer was rejected.

3. Thereafter, the landlady filed an appeal before the Additional District Judge, Bijnor which was allowed and the allotment in favour of the appellant was cancelled on the ground that the provisions of S. 17 (2) of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the 'Act') were not complied with. Before narrating further sequence of facts, it may be necessary to examine the relevant provisions of the Act. S. 17 (2) of the Act may be extracted thus:

"Where a part of a building is in the occupation of the landlord for residential purposes or is released in his favour under cl. (b) of sub-sec. (1) of S. 16 for residential purposes, the allotment of the remaining part thereof under cl. (a) of the said sub-sec. (1) shall be made in favour of a person nominated by the landlord."

4. A perusal of this statutory provision would clearly disclose that the object of the Act was that where a tenant inducted by the landlord voluntarily vacates the premises, which are a part of the building occupied by the landlord, an allotment in the vacancy should be made only to a person nominated by the landlord. The dominant purpose to be subserved by the Act is manifestly the question of removing any inconvenience to the landlord by imposing or thrusting on the premises an unpleasant neighbour or a tenant who invades the right of privacy of the landlord. It is obvious that if the tenant has vacated the premises by himself and not at the instance of the landlord, there is no question of the landlord occupying the said premises because he

has got a separate remedy for evicting the tenant on the ground of personal necessity. The statute however, while empowering the prescribed authority to allot the accommodation, safeguards at least the right of the landlord to have a tenant of his choice.

5. In the instant case, the admitted position seems to be that when the prescribed authority allotted the premises to the appellant, the landlady was not taken into confidence nor was she asked to induct either the appellant or somebody else as the tenant of the premises which were likely to fall vacant or which may have fallen vacant. This was undoubtedly an essential requirement of the provisions of S. 17 (2) of the Act as extracted above. In these circumstances, there could be no doubt that the Order of the prescribed authority allotting the premises to the appellant was completely without jurisdiction and against the plain terms of S. 17 (2) of the Act. It was in view of this serious legal infirmity that the District Judge allowed the appeal filed by the landlady on 27-1-1976 and cancelled the allotment of the accommodation to the appellant. On 2-2-1976 the landlady herself filed an application before the District Magistrate, Bijnor for delivery of possession of the said premises to her but the District Magistrate rejected the application by his Order dated 8-3-1976 on the ground that as the landlady had not applied for release of the accommodation, she could not be allotted the premises straightway. On 5-4-1976 the District Supply Officer, Bijnor directed the counsel for the landlady to nominate a person for allotment of the premises. As against this, the landlady applied for release of the accommodation to her in terms of the provisions of S. 16 (1) (b) of the Act which runs thus:

"16. Allotment and release of vacant building.

(1) Subject to the provisions of this Act, the District Magistrate may by order—

(a) xx xx

(b) release the whole or any part of such building, or any land appurtenant thereto, in favour of the landlord (to be called a release order)."

6. The prayer of the landlady under S. 16 (1) (b) also appears to have been ignored by the Rent Control authorities and by an Order dated 15-4-1976, the District Supply Officer reallocated the accom-

modation to the appellant. This led the landlady to file another appeal before the Additional District Judge, Bijnor who by his Order dated 21-9-1977 rejected the plea of the landlady, dismissed the appeal and confirmed the order of allotment. The respondent-landlady thereupon filed a writ petition in the High Court challenging the orders of the District Supply Officer as also of the District Judge who had affirmed that order and confirmed the order of allotment in favour of the appellant. The High Court by the impugned order allowed the writ petition and sent the matter back to the Rent Control and Eviction Officer to consider the question of allotment afresh in view of the observations made by the High Court.

7. The appellant then obtained special leave of this Court against the order of the High Court and hence this appeal before us.

8. In support of the appeal, Mr. Shanti Bhushan, learned counsel for the appellant submitted that the High Court had no jurisdiction to interfere with the concurrent finding of fact given by the District Supply Officer and the District Judge confirming the allotment in favour of the appellant and that too in a writ jurisdiction. He also submitted that the landlady was not at all in actual physical possession of the premises and had been living outside Bijnor and, therefore, neither the provisions of S. 16 (1) (b) nor those of S. 17 (2) of the Act would apply to the facts of the present case. On the other hand, the counsel for the respondent submitted that initially the only question before the Rent Control Authority was whether the allotment should be made to the appellant even though he was not nominated by the landlady under S. 17 (2) of the Act. It is common ground that the appellant was not a nominee of the landlady and, as discussed above, the District Judge in his first order had quashed the allotment on the ground that the provisions of S. 17 (2) had not been complied with.

9. It was also argued on behalf of the respondent-landlady that the circumstances having changed, she now wanted to stay in Bijnor permanently and as she wanted additional accommodation she had applied to the District Magistrate under S. 16 (1) (b) for releasing the building in her favour. This application was not at all considered on merits by

the District Magistrate or by any Court for that matter. If the respondent could succeed in convincing the District Magistrate that a case for release of the entire building was made out, then the question of allotting the premises to the appellant would not have arisen at all.

10. We have gone through the judgment of the High Court in the light of the arguments of the parties and we are inclined to agree with the view taken by the High Court that (from) the mere fact that the lady did not actually reside in the premises which were locked and contained her household effects, it cannot be said that she was not in possession of the premises so as to make S. 17 (2) inapplicable. Possession by a landlord of his property may assume various forms. A landlord may be serving outside while retaining his possession over a property or a part of the property by either leaving it in-charge of a servant or by putting his household effects or things locked up in the premises. Such an occupation also would be full and complete possession in the eye of law.

11. It was further argued by Mr. Shanti Bhushan that the landlady had absolutely no reason to stay in Bijoor because she was staying with her son in some other town. That by itself is hardly a good ground for the landlady who was a widow to sever her connections with her own property. Moreover, we do not want to make any observations on the merits of this matter as the High Court has rightly remanded the case for a fresh decision on all the points involved.

12. So far as the second point is concerned, viz., the question of allotment of the premises to the appellant, the High Court was fully justified in quashing the order of the District Supply Officer as affirmed by the District Judge because despite several opportunities no attempt had been made to approach the landlady to nominate a tenant. There is no evidence to show that either the prescribed authority or the Rent Control and Eviction Officer ever approached the landlady for making a nomination in respect of the premises vacated by the original tenant and she refused to do so. All that the landlady did was to ask for the release of the premises but even if this was refused it was incumbent on the Rent Control authorities to have fulfilled the essential conditions of S. 17 (2) of the Act before making any allotment in favour of

the appellant or for that matter any other person. It was suggested that as the landlady was not living in the premises which were locked up, S. 17 (2) did not apply. We have already rejected this argument because even occupation of a part of a building by the owner which she may visit off and on is possession in the legal sense of the term and, therefore, it cannot be said that the provision of S. 17 (2) would not apply and that the Rent Control authorities could make an allotment in favour of any person without giving an opportunity to the landlady or the landlord to exercise her/his privilege of nominating a tenant.

13. We have already pointed out that the object of the Act seems to be to arm the owner with the power of nomination so as to protect him/her from unpleasant tenants or indecent neighbours who may make the life of the owner a hell. Moreover, the conduct displayed by the appellant in this case clearly shows that if he was thrust on the respondent without her being allowed an opportunity to nominate a tenant, it will violate the very spirit and tenor of S. 17 (2) of the Act.

14. As we are of the opinion that the order of the High Court has to be upheld we refrain from making any further observations on the merits or any aspect of the matter which have to be gone into afresh as directed by the High Court.

15. We find no merit in this appeal which is dismissed with costs quantified at Rs. 1,000/- (Rupees one thousand only.)
Appeal dismissed.

AIR 1982 SUPREME COURT 813

E. S. VENKATARAMIAH AND
BAHARUL ISLAM, JJ.

Civil Appeal No. 2612 of 1981, D/- 9-2-1982.

Smt. Kalloo and others, Appellants v. Dhakadevi and others, Respondents.

Transfer of Property Act (4 of 1882), Ss. 105, 8 — Decree for eviction — Execution — Compromise therein — Intention of parties not to extinguish decree but to create mode of its full discharge — No fresh lease can be said to be created by compromise — (Civil P. C. (5 of 1908), S. 47 and O. 23, R. 4).

When a compromise takes place in the course of execution of a decree for

BZ/BZ/A521/82/VNP/MVJ-H

eviction. the compromise may extinguish the decree and create a fresh lease, or the compromise may provide a mere mode for the discharge of the decree. What actually takes place depends on the intention of the parties to the compromise. And the intention has to be gathered from the terms of the compromise and the surrounding circumstances including the order recorded by the Court on the basis of the compromise. (Para 6)

Where the compromise petition entered into in the course of execution of a decree for eviction shows that the judgment-debtor had already vacated half of the shop and given its possession and specified time was granted for vacating and delivering possession of the shop as the judgment-debtor wanted time till then lest his business would be ruined by vacating the shop in hurry, it cannot be said that the intention of the parties was to create a fresh lease in respect of the half of the shop in possession of the judgment-debtor. As the intention of the parties clearly was not to extinguish the decree for eviction but to create a mode of its full discharge, no fresh lease can be said to be created by such compromise. AIR 1968 SC 919, Rel. on. (Para 7)

Cases Referred: Chronological Paras
AIR 1968 SC 919 : (1968) 2 SCR 559 8

BAHARUL ISLAM, J.:— This appeal by special leave is by the judgment-debtors. The material facts which are not in dispute may be stated thus:

2. The predecessor of the respondents (hereinafter referred to as 'the decree-holder') filed a suit for eviction of the predecessor of the appellants (hereinafter referred to as 'the judgment-debtor') and obtained a decree on 21-3-1960, inter alia, for eviction from a shop. The decree-holder filed a petition for execution of the decree for eviction in the executing Court on 3-1-1961. The petition was dismissed on 20-1-1961. A fresh petition for execution was filed on 19-1-1965. It was also dismissed on 20-3-1965. The decree-holder again filed an application for execution of the decree on 22-6-1966. During the pendency of this execution proceeding, the parties filed a compromise petition on 31-3-1968. The terms of the compromise on the interpretation of which the result of this appeal depends were as follows: (material portions only):

"In the above case, a compromise has taken place between the parties as follows:

(1) That for the present the judgment-debtor is not getting a shop. His established business will be ruined by vacating the shop in hurry. Therefore, the judgment-debtor wants time till 31-12-1972 from the decree-holder for vacating half the shop in his possession. So the judgment-debtor will vacate the shop and give possession thereof to the decree-holder by 31-12-1972. He has vacated half the shop and given its possession.

(2) That during this period the judgment-debtor shall pay damages to the decree-holder for use of the shop @ 110/- per month.

(3) That the damages shall be paid up to the 5th of every month. In the event of non-payment of damages for any six months, the decree-holder shall be entitled to get the shop immediately vacated, by filing execution, from the possession of the judgment-debtor, without any objection as regards limitation.

(4) The decree-holder wants to have new shutters put up after removing the present shutters in the front portion of the shop. The judgment-debtor will not be entitled to object to this.

He will help in the putting of girders and he will vacate the portion.

If he will demur to it, the decree-holder can have the shop vacated, without any objection as regards the above limitation.

So, the aforesaid compromise be accepted and kept on record."

3. It is also not in dispute that at the time of the compromise, half of the shop had been vacated and its possession delivered to the decree-holder as stated in the compromise petition. In order to appreciate the intention of the parties to the compromise, it is also necessary to refer to the order dated 21-3-1968 recorded by the execution court on the basis of the compromise. The material para of the order is para 3 and it is in the following terms:

"The judgment-debtor to give vacant possession of the shop to the decree-holder by 31-12-1972 according to the compromise and he will pay damages for use and occupation by the 5th of every month to the decree-holder according to the compromise @ 110/- per month. On six months' damages being due, the decree-holder will be entitled to have the shop vacated. The decree-holder will provide shutters in the front portion. The judgment-debtor will not object to them.

The case is decided in terms of the compromise.

The compromise be recorded."

4. On 25-11-1975, the decree-holder filed an execution petition for recovery of possession of the portion of shop in possession of the judgment-debtor, alleging that the judgment-debtor had not paid damages at the rate of Rs. 110/- per month from 1-7-1975. Notice of the execution petition was issued to the judgment-debtor who appeared and raised several objections to the execution proceedings. But we are concerned in this appeal only with one which was that in terms of the compromise, a fresh lease was created in favour of the judgment-debtor in respect of the remaining half of the shop. It was therefore submitted that the decree was not executable. The Executing Court upheld the objection holding that the compromise dated 21-3-1968 amounted to a fresh lease. An appeal was taken to the Court of the District Judge who set aside the order of the Executing Court. In a second appeal, the High Court upheld the order of the District Judge, and dismissed the appeal. It is against this order of the High Court is this appeal by special leave.

5. The only point urged before us by Shri Amlan Ghosh, learned counsel for the judgment-debtor was that the compromise dated 21-3-1968 created a fresh lease in favour of the judgment-debtor in respect of the undelivered half of the shop, and the decree-holder's remedy was by a suit for recovery of its possession.

6. When a compromise petition is filed in an execution proceeding, and a contention is raised by the judgment-debtor on a subsequent execution being started by the decree-holder that the compromise has given rise to a fresh contract between the parties and that the decree sought to be executed is not executable, what is to be seen is whether the decree has been extinguished as a result of the compromise and a fresh contract has emerged. When a compromise takes place in the course of execution of a decree — for eviction, the compromise may extinguish the decree and create a fresh lease, or the compromise may provide a mere mode for the discharge of the decree. What actually takes place depends on the intention of the parties to the compromise. And the intention has to be gathered from the terms of the compromise and the surrounding circumstances including the

order recorded by the Court on the basis of the compromise.

7. In the instant case, para. 1 of the compromise petition quoted above and the order of the Executing Court recording the compromise are important and disclose the intention of the parties. Para. 1 of the compromise petition shows that the judgment-debtor had already "vacated half of the shop and given its possession" and time was granted till 31-12-1972 for vacating and delivering possession of the other half of the shop as the judgment-debtor wanted time till then lest his business "will be ruined by vacating the shop in hurry". This clearly shows that the intention of the parties was not to create a fresh lease in respect of the half of the shop in possession of the judgment-debtor, but to help the judgment-debtor find out, not in a hurry, alternative accommodation for his shop so that his established business was not 'ruined' and time for vacating the half of the room was given till 31-12-1972. And this was also how the compromise petition was understood by the Executing Court when it recorded in para 3 of its order: "The judgment-debtor to give vacant possession of the shop to the decree-holder by 31-12-1972 according to the compromise... ..". The intention of the parties clearly was not to extinguish the decree for eviction but to create a mode of its full discharge.

8. The above interpretation gets support from the use of the term 'damages', and not 'rents', in the compromise petition as well as the order of the Executing Court. The view we have taken gets support also from a decision of this Court reported in (1968) 2, SCR 559 : (AIR 1968 SC 919). In that case, the appellant filed a suit for eviction of the respondent from the appellant's house. The suit was dismissed by the trial Court. In appeal, compromise was entered into between the parties and the decree was passed in terms of the compromise. The compromise provided for the respondent's continuation of possession of the house for five years, but it enabled the appellant to execute the decree by evicting the respondent, if the latter failed to pay rent for three consecutive months. When the appellant sought to evict the respondent, the latter claimed protection from eviction on the ground that the compromise decree created a lease. It was held by

this Court that the facts that the appellant had filed a suit for eviction of the respondent and the compromise decree enabled him to execute the decree by evicting the respondent, showed that the intention of the parties, which was the decisive test, was not to enter into a relationship of landlord and tenant.

9. This appeal has no merit and is dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 816

= 1982 All. L. J. 202

(From : Allahabad)

V. R. KRISHNA IYER AND

O. CHINNAPPA REDDY, JJ.

Civil Appeal No. 2052 of 1979. D/- 26-3-1980.

Ved Prakash Wadhwa, Appellant v. Vishwa Mohan, Respondent.

(A) U. P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act (13 of 1972), S. 20 (4) — "The first hearing of the suit" — Never earlier than date fixed for preliminary examination of parties — Deposit in treasury — Deposit relates back to date of presentation of challan — Decision of Allahabad High Court, Reversed — (Civil P. C. (1908), O. 10, R. 1; O. 14, R. 1 (5)).

"The first hearing of the suit" is when, after the framing of issues, the suit is posted for trial, that is, production of evidence. The said expression is also to be found in O. 10, R. 1; O. 14, R. 1 (5) and O. 15, R. 1 of the C. P. C. These provisions indicate that "the first hearing of the suit" can never be earlier than the date fixed for the preliminary examination of the parties (O. 10, R. 1) and the settlement of issues (O. 14, R. 1 (5)). When actual deposit of rent by the tenant in proceeding for eviction against him is long prior to the framing of issues, it is well within time within S. 20 (4). Decision of Allahabad High Court, Reversed. (Paras 3, 4)

When money is tendered before the Court, the challan is passed by the ministerial officer and thereupon, the money is deposited in the treasury with the challan, such deposit relates back to the date on which the tender was made or the challan presented. AIR 1977 NOC 253 (All) and 1977 (UP) RCC 227, Approved. (Para 4)

(B) Interpretation of Statutes — State Statute relating to procedure — Rule of construction.

In the matters of State statutes where procedure has to be pronounced upon, the practice of the Court is the best guide to interpretation and the High Court having pronounced upon the question such interpretation should be accepted unless there is something revoltingly wrong about the construction. (Para 3)

Cases Referred : Chronological Paras

AIR 1977 NOC 253 : 1977 All LR (SOC)

79 : 1977 All WC 321 4

1977 (UP) RCC 227 : (1977) 2 Rent LR 127 4

V. R. KRISHNA IYER, J. :— The short point raised in this appeal turns on the question as to when the first hearing of the suit arrives in the course of a case. Section 20 (4) of U. P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 runs thus :

"20 (4). In any suit for eviction on the ground mentioned in Cl. (a) of sub-s. (2), if at the first hearing of the suit the tenant unconditionally pays or tenders to the landlord or deposits in Court the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the landlords' costs of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub-sec. (1) of S. 30, the Court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground :

Provided that nothing in this sub-section, shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area."

2. In this case the tenant was sought to be evicted on the ground of arrears of rent and under the provision above quoted. If he tendered the rent at the first hearing of the suit, the decree for eviction could not be granted on the ground of default in payment of rent. The learned District Judge, however, ordered eviction on the ground that although the

money was tendered before the first hearing, the actual deposit in the Treasury was made later, which was a few days beyond the date of first hearing. There were two other minor contentions turning on Advocate's fee having been calculated at half the sum due and also about interest. The Court took the view that the deposit was made beyond time and directed eviction in allowance of the revision against the decree of the trial Court which had dismissed the suit for eviction. The High Court dismissed the revision against the District Court's order. The appellant has arrived in this Court by special leave.

3. We are not disposed to investigate the facts in detail. The question of law raised before us may perhaps be pronounced upon as it is of general importance. S. 20 (4) of the Act which we have excerpted above fixes the crucial date for deposit of rent as "at the first hearing of the suit." What is "the first hearing of the suit"? Certain decisions have been cited before us of the Allahabad High Court which indicate that "the first hearing of the suit" is when, after the framing of issues, the suit is posted for trial, that is, production of evidence. In the matters of State statutes where procedure has to be pronounced upon, the practice of the Court is the best guide to interpretation and the Allahabad High Court having pronounced upon the question we think we ordinarily accept such interpretation unless there is something revoltingly wrong about the construction. We see none here and, therefore, adopt as correct the decision of the High Court regarding the meaning of the expression "at the first hearing of the suit". We may however add that the expression "at the first hearing of the suit" is also to be found in O. X, R. 1; O. XIV, R. 1 (5) and O. XV R. 1 of the Code of Civil Procedure. These provisions indicate that "the first hearing of the suit" can never be earlier than the date fixed for the preliminary examination of the parties (O. X, R. 1) and the settlement of issues (O. XIV, R. 1 (5)).

4. If this be the true meaning of the expression there is no doubt that the appellant made the necessary deposit into the Treasury well within time because issues were framed only on 24-10-1975 while the actual deposit has been made as early as on 18-9-74. A rather trifling

question has been mooted before us that the date of deposit cannot be taken to be the date on which the challan was passed by the Court but only the actual date on which the money was put into the treasury. Here again we cannot quibble over expressions but must be guided by the practice prevailing in the Courts in the States. Two decisions to which our attention was so drawn were 1977 All LR (SOC) 79 : (AIR 1977 NOC 253) — Bankey Behari v. Gopal Dass and 1977 (UP) RCC 227 — Daya Ram v. Virender Kumar Goel. They lay down the law that when money is tendered before the Court, the challan is passed by the ministerial officer and thereupon, the money is deposited in the treasury with the challan, such deposit relates back to the date on which the tender was made or the challan presented. Taking this view as correct, and we are inclined to that view, the appellant has deposited the arrears of rent well within time. The question must, therefore, be decided against the respondent on both the points. We must add here that we are not concerned in this case with the amendment by way of explanation to S. 20 (4), as the present litigation was antecedent to the amendment.

5. The other minor questions which we have adverted to earlier do not require adjudication by us partly because they have become obsolescent by subsequent amendments and largely because on our suggestion both sides have come to an agreement which is just and fair in the given circumstances. The landlord will receive with effect from 1-2-1977 a sum of Rs. 250/- by way of rent per month. The entire arrears up to that date will be calculated on the original basis of Rs. 68/- per month and thereafter, at the rate of Rs. 250/- per month. The whole sum will be deposited within one month from today, failing to do which, there will be a decree for eviction. There is some apprehension of obstruction on the part of the landlord because access to one room which is in his occupation on the first floor has to be through the premises let out to the tenant-appellant. The latter in his affidavit has agreed that he will cause no such obstruction and will afford the necessary facility for entry and exit and, if necessary, repairs. We record this undertaking — which will be sufficient for the present purpose.

6. We direct the appellant in the circumstances of the case to pay a sum of Rs. 2,000/- by way of costs to the respondent. Shri R. K. Garg appearing for the respondent states that a sum of Rupees 1,000/- be made over to the Legal Aid Society (Supreme Court) out of this sum. The appeal is disposed of accordingly.

Appeal allowed.

AIR 1982 SUPREME COURT 818

(From: 1981 All. L. R. 612)

A. P. SEN AND R. B. MISRA, JJ.

Petition for Special Leave to Appeal (Civil) No. 7771 of 1981, D/- 29-1-1982.

Babu Lal, Petitioner v. M/s. Hazari Lal Kishori Lal and others, Respondents.

Specific Relief Act (47 of 1963), Ss. 22, 21 and 28 — Civil P. C. (1908), S. 47 and O. 2, R. 2 — Agreement to sell — Vendor selling property to another in defiance of previous agreement — Suit for specific performance — Relief of possession can be granted at appellate stage. (T. P. Act (1882), S. 55).

Respondents 6-9 entered into an agreement with Respondents 1-5 for sale of certain plots of land. Some amount was paid as earnest money. The sale deed was agreed to be executed within fifteen days of the agreement. Respondents 6-9 however, executed a sale deed in favour of petitioner in respect of the same property in defiance of the earlier agreement with Respondents 1-5. The Respondents 1 to 5 filed a suit for specific performance of contract. The trial Court dismissed the suit but on appeal the Addl. District Judge decreed the suit. In Second Appeal the High Court confirmed the judgment and decree of the first Appellate Court with a slight modification inasmuch as the High Court directed the petitioner and respondents Nos. 6 to 9 to execute the sale deed in favour of the respondents Nos. 1 to 5. The decree-holders applied for execution of decree. Petitioner filed objection under S. 47, Civil P. C. Ultimately, the High Court modified the order of the Courts below in these proceedings to the effect that the decree-holders shall be entitled to possession also. The special leave to appeal was sought on the ground that the High Court could not grant relief in execution application in excess of and outside the framework of the prayer by the plain-

tiffs in the original main suit. As a second limb to this argument it was further contended that the High Court acted in flagrant violation of the provisions of S. 22 of the Specific Relief Act in granting the relief of possession.

Held, that the High Court was right in granting relief and there was no fault with the High Court judgment and consequently the special leave could not be granted. (Paras 29, 30)

Section 22 of the Specific Relief Act which enacts a rule of pleading provides that a person in a suit for specific performance of a contract for the transfer of immoveable property, may ask for appropriate reliefs, namely, he may ask for possession, or for partition or for separate possession including the relief for specific performance. These reliefs he can claim, notwithstanding anything contained in the Civil P. C., to the contrary. Sub-sec. (2) of this section, however, specifically provides that these reliefs cannot be granted by the Court, unless they have been expressly claimed by the plaintiff in the suit.

The proviso to this sub-s. (2), however, says that where the plaintiff has not specifically claimed these reliefs in his plaint, in the initial stages of the suit, the Court shall permit the plaintiff at any stage of the proceedings, to include one or more of the reliefs, by means of an amendment of the plaint on such terms as it may deem proper. The only purpose of this newly enacted provision is to avoid multiplicity of suits and that the plaintiff may get appropriate relief without being hampered by procedural complications.

(Paras 11, 12)

The expression "in an appropriate case" in S. 22 (1) is very significant. The expression only indicates that it is not always incumbent on the plaintiff to claim possession or partition or separate possession in a suit for specific performance of a contract for the transfer of the immoveable property. That has to be done where the circumstances demanding the relief for specific performance of the contract of sale embraced within its ambit not only the execution of the sale deed but also possession over the property conveyed under the sale deed. It may not always be necessary for the plaintiff to specifically claim possession over the property, the relief of possession being inherent in the relief for specific performance of the contract of sale. Besides, the proviso to sub-

sec. (2) of S. 22 provides for amendment of the plaint on such terms as may be just for including a claim for such relief "at any stage of the proceedings". In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simpliciter, without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is bound not only to execute the sale deed but also to put the property in possession of the decree-holder. This is in consonance with the provisions of S. 55 (1) of the T. P. Act which provides that the seller is bound to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits. (Paras 13, 16)

The word "proceeding" has not been defined in the Act. That term is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted. The word "proceeding" in S. 22 includes execution proceedings also.

(Para 17)

Since neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives any right or title to the decree-holder and the right and the title passes to him only on the execution of the deed of sale either by the judgment-debtor himself or by the Court itself in case he fails to execute the sale deed, it is idle to contend that a valuable right had accrued to the petitioner merely because a decree has been passed for the specific performance of the contract. The limitation would start against the decree-holders only after they had obtained a sale in respect of the disputed property. It is, therefore, difficult to accept that a valuable right had accrued to the judgment-debtor by lapse of time. S. 22 has been enacted only for the purpose of avoiding multiplicity of proceedings which the law Courts always abhor.

(Para 21)

Further, S. 28 (3) clearly contemplates that if the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree, the

Court may on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to. Sub-cl. (b) of sub-sec. (3) of S. 28 contemplates the delivery of possession or partition and separate possession of the property on the execution of such conveyance or lease. Sub-sec. (4) of S. 28 bars the filing of a separate suit for any relief which may be claimed under this section. This is an additional reason why the Supreme Court should not interfere with the eminently just order of the High Court. The High Court had amended the decree passed by the first Appellate Court and passed a decree for possession not only against the transferors but also against their transferee, that is, the petitioner. (Para 28)

Cases Referred : Chronological Paras

AIR 1976 Delhi 56	19
AIR 1975 Delhi 155	18
AIR 1973 Mys 131	9
AIR 1972 SC 1826	27
AIR 1957 Pat 701	8
AIR 1956 All 586 : 1956 All LJ 470	17, 19
AIR 1955 Cal 267	8
AIR 1954 SC 75 : 1954 SCR 360 : 1954 All LJ 73	2
AIR 1954 All 643 : 1954 All LJ 255	8, 18
AIR 1952 Cal 362	7
AIR 1938 All 432 : 1938 All LJ 569	6
AIR 1931 Pat 179	7
AIR 1920 Pat 89 : 5 Pat LJ 314	7
(1911) 14 Cal LJ 159 : 11 Ind Cas 228	7
(1910) ILR 37 Cal 57 : 14 Cal WN 527	7

Mr. R. K. Jain Advocate, for Petitioner;
Mrs. S. Bhandare, Advocate, for Respondents.

MISRA, J.:— This is a petition for special leave to appeal against the judgment and order dated 2nd of Sept., 1981 passed by the High Court of Judicature at Allahabad disposing of Execution Second Appeals Nos. 1001 and 1720 of 1977 and Civil Revision No. 1447 of 1978. The petition was heard on 7th of Dec., 1981 at some length and after hearing the counsel for the parties we dismissed the same for reasons to be recorded later. We now proceed to give the reasons.

2. The present petition is a typical example of the desperate effort of the judgment-debtor to ward off the execution of the decree till the bailiff knocks at the door. Respondents Nos. 6 to 9 entered into an agreement with respondents Nos. 1 to 5 on 30th of July, 1967 for sale of certain plots situate behind

their shop for Rs. 15,500/-. Respondents Nos. 1 to 5 had paid a sum of Rs. 1,500/- as earnest money pursuant to the agreement. The sale deed was agreed to be executed within fifteen days of the agreement. Respondents Nos. 6 to 9, however, executed a sale deed in favour of the petitioner Babu Lal in respect of the same property for Rs. 20,000/- on 7th of August, 1967 in defiance of the earlier agreement dated 30th of July, 1967. Under the circumstances respondents Nos. 1 to 5 were obliged to file a suit which was later on numbered as suit No. 10 of 1968 in the Court of Civil Judge, Aligarh for specific performance of the contract of sale. The petitioner resisted the claim on the ground that the sale in his favour was in pursuance of a prior agreement dated 8th of July, 1967. It appears that during the pendency of the suit the petitioner started construction on the disputed plot after demolishing the old construction. The plaintiffs, therefore, filed an application for an injunction restraining the petitioner from making any construction. The petitioner, however, gave an undertaking on 25th of March, 1968 that he was making the construction at his own peril and would demolish the construction and restore the land to its original position in case the suit of the plaintiffs was decreed. It appears that on the undertaking given by the petitioner the application for injunction was dismissed. The trial Court dismissed the suit but on appeal the Addl. District Judge decreed the suit. In Second Appeal the High Court confirmed the judgment and decree of the first Appellate Court with a slight modification inasmuch as the High Court directed the petitioner and respondents Nos. 6 to 9 to execute the sale deed in favour of the respondents Nos. 1 to 5 to bring it in line with the decision of the Supreme Court in *Lala Durga Prasad v. Lala Deep Chand*, 1954 SCR 360 : (AIR 1954 SC 75) wherein it was held :

"In a suit instituted by a purchaser against the vendor and a subsequent purchaser for specific performance of the contract of sale, if the plaintiff succeeds, the proper form of the decree to be passed is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff."

The petitioner, however, did not hand-over possession and remove construction raised by him despite his undertaking dated 25th of March, 1968. The decree-holders, therefore, applied for execution of the decree. The judgment-debtor-petitioner filed an objection under S. 47, Civil P. C. taking all possible pleas to defeat the execution. His objections were three-fold: (1) The decree was inexecutable as the decree-holders did not claim a relief for possession in the suit itself and consequently there was no decree for possession. The application for execution by delivery of possession was liable to be dismissed on this score alone in view of S. 22 (2) of the Specific Relief Act. (2) The Urban Land Ceiling Act having come into force it was incumbent on the decree-holders to obtain the permission as required under Ss. 26 and 27 of that Act and in the absence of any such permission the application for execution was not maintainable. (3) The vendors were not impleaded as parties originally and they were impleaded as parties only after the Court had directed the vendors to execute the sale deed in Second Appeal. As the vendors were not parties in the execution application it was not maintainable and it was not open to the execution Court to implead a person who was not originally impleaded in the application. The execution Court allowed the objection of the judgment-debtor in part inasmuch as it directed the execution of the sale deed in pursuance of the decree. It, however, refused to grant the relief of possession with the observation that the remedy of the decree-holders for possession was by means of a separate suit and not the execution proceedings. The other two objections were, however, overruled. The order of the execution Court was confirmed in appeal by the First Addl. District Judge, Aligarh dated 21st of Feb., 1977. This order gave rise to two appeals, one by the judgment-debtor, being appeal No. 1720 of 1977, and the other by the decree-holders, being execution second appeal No. 1001 of 1977 to the extent the order went against them. There was yet another revision filed by the judgment-debtor-petitioner, being civil revision No. 1447 of 1978 against the order dated 15th of March, 1978 whereby the judgment-debtor was directed to execute a sale deed in favour of the decree-holder without obtaining permission from the Urban Land Ceiling Authorities under Ss. 26 and 27 of the

Act. The appeal as well as the revision filed by the judgment-debtor were dismissed while the appeal of the decree-holders was allowed and the order of the Courts below was modified to the effect that the decree-holders shall be entitled to possession also. The judgment-debtor-petitioner has now come to this Court to seek permission to file an appeal against the judgment of the High Court dated 2nd of Sept., 1981.

3. Only one contention has been raised on behalf of the petitioner by Mr. Shanti Bhushan, senior counsel, that the High Court could not grant relief in execution application in excess of and outside the framework of the prayer by the plaintiffs in the original main suit. As a second limb to this argument it was further contended that the High Court has acted in flagrant violation of the provisions of S. 22 of the Specific Relief Act in granting the relief of possession. In substance, the main plank of the contention of the petitioner is based on S. 22 of the Specific Relief Act. As it stands after amendment of 1963, it reads:

"22 (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908) any person suing for the specific performance of a contract for the transfer of immoveable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under Cl. (a) or Cl. (b) of sub-sec. (1) shall be granted by the Court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the Court to grant relief under Cl. (b) of sub-section (1) shall be without prejudice to its powers to award compensation under Sec. 21."

4. Mr. Shanti Bhushan was laying emphasis on sub-sec. (2) of S. 22 to contend that the plaintiffs having not claimed any

relief for possession in the suit they cannot claim the same relief at a subsequent stage. According to him, in face of the clear mandate of sub-sec. (2) it was not open to the High Court to have allowed the relief of possession at the execution stage, and in any case without an amendment of the plaint.

5. The contention at the first flush appears to be alluring and plausible but on a closer scrutiny it cannot be accepted.

6. It would be appropriate to refer to the state of law as it existed prior to the amendment of the Specific Relief Act in 1963. One view was that the decree-holder does not acquire title or right to recover possession unless a sale deed is executed, in execution of the decree for specific performance. In *Hakim Enayat Ullah v. Khalil Ullah Khan*, AIR 1938 All 432, a Division Bench of the Allahabad High Court dealing with the question observed:

"A decree for specific performance only declares the right of the decree-holder to have a transfer of the property covered by the decree executed in his favour. The decree by itself does not transfer title. That this is so is apparent from the fact that in order to get title to the property the decree-holder has to proceed in execution in accordance with the provisions of O. 21 of the Code. So long as the sale deed is not executed in favour of the decree-holder either by the defendant in the suit or by the Court the title to the property remains vested in the defendant and till the execution of the sale deed the decree-holder has no right to the possession of the property. It is only the execution of the sale deed that transfers title to the property."

7. In *Kartik Chandra Pal v. Dibakar Bhattacharjee*, AIR 1952 Cal 362 a Division Bench of the Calcutta High Court, however, after reviewing a number of reported cases, viz., *Ranjit Singh v. Kalidasi Devi*, (1910) ILR 37 Cal 57; *Madanmohan Singh v. Gaja Prasad Singh*, (1911) 14 Cal LJ 159; *Deonandan Prasad v. Janki Singh*, (1920) 5 Pat LJ 314 : (AIR 1920 Pat 89) and *Atal Behary v. Barada Prasad*, AIR 1931 Pat 179, observed (at p. 363):

"It is incontestable that in a suit for specific performance of contract for the sale of land it is open to the plaintiff to join in the same suit two prayers, one for the execution of the deed of transfer and

another for recovery of possession of the land in question.

...We ought to remember in this connection that no special form of decree in a suit for specific performance is supplied by the Civil Procedure Code. Chapter 11, Specific Relief Act, deals with the various circumstances under which a contract may be enforced specifically and where it cannot be allowed. When a contract is to be specifically enforced, it means simply this that when the parties do not agree to perform the contract mutually the intervention of the Court is required and the Court will do all such things as the parties would have been bound to do had this been done without the intervention of the Court. A sale of a property after payment of the consideration and upon due execution of the deed of sale presupposes and requires the vendor to put the purchaser in possession of the property. It cannot be suggested that when a party comes to Court for a specific performance of a contract he is to be satisfied with simply the execution of the document on payment of the consideration money. The Court when allowing the prayer for specific performance vests the executing Court with all the powers which are required to give full effect to the decree for specific performance. By the decree for specific performance, the Court sets out what it finds to be the real contract between the parties and declares that such a contract exists and it is for the executing Court to do the rest.

It may be noticed further that a decree in a suit for specific performance has been considered to be somewhat in the nature of preliminary decree which cannot set out in the fullest detail all the different steps which are required to be taken to implement the main portion of the order directing specific performance of the contract. The executing Court is in such a case vested with authority to issue necessary directions."

8. In *Balmukand v. Veer Chand*, AIR 1954 All 643 the decree for specific performance of a contract of sale was silent as to the relief of delivery of possession even though such relief was claimed in the suit. It was held by the Allahabad High Court that the executing Court was still competent to deliver the possession. It was further held that it was not necessary in a suit for specific performance either to separately claim possession nor

was it necessary for the Court to pass a decree for possession. A decree for specific performance of a contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being governed by S. 55 of the Transfer of Property Act. In *Janardan Kishore v. Girdhari Lal* AIR 1957 Pat 701, the Patna High Court took the view that the relief of possession is inherent in a relief for specific performance of contract for lease, and the Court executing a decree for specific performance of such a contract can grant possession of the property to the decree-holder even though the decree did not provide for delivery of possession. In *Subodh Kumar v. Hiramoni Dasi*, AIR 1955 Cal 267, the Calcutta High Court took a similar view that the right to recover possession springs out of the contract which was being specifically enforced and not as a result of the execution and completion of the conveyance, and as such the judgment-debtor was bound to deliver possession to the decree-holder.

9. In *Mohammed Ali Abdul Chani-momin v. Bisahemi Kom Abdulla*, AIR 1973 Mys 131, the Mysore High Court observed that the liability to deliver possession for specific performance was necessarily implied in a decree for specific performance directing the defendant to execute a sale deed on the principle of cl. (f) of sub-sec. (1) of S. 55 of T. P. Act, according to which the liability to deliver possession arises immediately upon execution of a sale deed unless by agreement the date for delivery of possession is postponed.

10. In this state of the law the Legislature intervened and on the basis of the report of the Law Commission enacted Section 22 in 1963 as it stands.

11. Section 22 enacts a rule of pleading. The Legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance, even though strictly speaking, the right to possession accrues only when suit for specific performance is decreed. The Legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the Court to provide in the decree itself that upon payment by the plaintiff of the considera-

tion money within the given time, the defendant should execute the deed and put the plaintiff in possession.

12. The section enacts that a person in a suit for specific performance of a contract for the transfer of immoveable property, may ask for appropriate reliefs, namely, he may ask for possession, or for partition or for separate possession including the relief for specific performance. These reliefs he can claim, notwithstanding anything contained in the Code of Civil Procedure, 1908, to the contrary. Sub-sec. (2) of this section, however, specifically provides that these reliefs cannot be granted by the Court, unless they have been expressly claimed by the plaintiff in the suit. Sub-sec. (2) of the section recognised in clear terms the well-established rule of procedure that the Court should not entertain a claim of the plaintiff unless it has been specifically pleaded by the plaintiff and proved by him to be legally entitled to. The proviso to this sub-section (2), however, says that where the plaintiff has not specifically claimed these reliefs in his plaint, in the initial stages of the suit, the Court shall permit the plaintiff at any stage of the proceedings, to include one or more of the reliefs, mentioned above by means of an amendment of the plaint on such terms as it may deem proper. The only purpose of this newly enacted provision is to avoid multiplicity of suits and that the plaintiff may get appropriate relief without being hampered by procedural complications.

13. The expression in sub-sec. (1) of S. 22 'in an appropriate case' is very significant. The plaintiff may ask for the relief of possession or partition or separate possession 'in an appropriate case'. As pointed out earlier, in view of O. 2, R. 2 of Civil P. C. some doubt was entertained whether the relief for specific performance and partition and possession could be combined in one suit; one view being that the cause of action for claiming relief for partition and possession could accrue to the plaintiff only after he acquired title to the property on the execution of a sale deed in his favour and since the relief for specific performance of the contract for sale was not based on the same cause of action as the relief for partition and possession, the two reliefs could not be combined in one suit. Similarly, a case may be visualized where after the contract between the plaintiff and the defendant the property passed in

possession of a third person. A mere relief for specific performance of the contract of sale may not entitle the plaintiff to obtain possession as against the party in actual possession of the property. As against him, a decree for possession must be specifically claimed for such a person is not bound by the contract sought to be enforced. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simpliciter, without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is bound not only to execute the sale-deed but also to put the property in possession of the decree-holder. This is in consonance with the provisions of S. 55 (1) of the T. P. Act which provides that the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits.

14. There may be circumstances in which a relief for possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession, viz., where the property agreed to be conveyed is jointly held by the defendant with other persons. In such a case the plaintiff in order to obtain complete and effective relief must claim partition of the property and possession over the share of the defendant. It is in such cases that a relief for possession must be specifically pleaded.

15. In the instant case, it is pointed out on behalf of the petitioner that the possession was not with the respondents Nos. 6 to 9 but was with a third person namely, the petitioner, who was subsequent purchaser and, therefore, this was an appropriate case where the relief for possession should have been claimed by the plaintiffs-respondents Nos. 1 to 5.

16. It may be pointed out that the Additional Civil Judge had decreed the suit for specific performance of the contract. The High Court modified the decree to the extent that the sale deed was to be executed by respondents Nos. 6 to 9 together with the petitioner. In short, the decree was passed by the High Court not only against respondents Nos. 6 to 9 but also against the subsequent purchaser i. e., the petitioner and thus the petitioner was himself the judgment-debtor and it cannot be said that he was a third person in possession and, therefore, relief for

possession must be claimed. The contention on behalf of the petitioner is that the relief for possession must be claimed in a suit for specific performance of a contract in all cases. This argument ignores the significance of the words 'in an appropriate case'. The expression only indicates that it is not always incumbent on the plaintiff to claim possession or partition or separate possession in a suit for specific performance of a contract for the transfer of the immoveable property. That has to be done where the circumstances demanding the relief for specific performance of the contract of sale embraced within its ambit not only the execution of the sale deed but also possession over the property conveyed under the sale deed. It may not always be necessary for the plaintiff to specifically claim possession over the property, the relief of possession being inherent in the relief for specific performance of the contract of sale. Besides, the proviso to sub-sec (2) of S. 22 provides for amendment of the plaint on such terms as may be just for including a claim for such relief 'at any stage of the proceedings'.

17. The word 'proceeding' is not defined in the Act. Shorter Oxford Dictionary defines it as "carrying on of an action at law, a legal action or process; any act done by authority of a Court of law; any step taken in a cause by either party". The term 'proceeding' is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted. The word 'proceeding' in S. 22 includes execution proceedings also. In *Rameshwar Nath v. Uttar Pradesh Union Bank Ltd.*, AIR 1956 All 586 such a view was taken. It is a term giving the widest freedom to a Court of law so that it may do justice to the parties in the case. Execution is a stage in the legal proceedings. It is a step in the judicial process. It marks a stage in litigation. It is a step in the ladder. In the journey of litigation there are various stages. One of them is execution.

18. In *Mahendra Nath Gupta v. M/s. Moti Ram Rattan Chand*, AIR 1975 Delhi 155, the Delhi High Court endorsed the view taken in *Balmukand v. Veer Chand* (AIR 1954 All 643) (supra) that where in

a suit for specific performance of the contract for sale relief for possession is not claimed and consequently the decree passed in the suit contains no relief for delivery of possession, the Court executing the decree is competent to deliver possession, an order directing delivery of possession being merely incidental to the execution of the deed of sale. The Court, however, observed that on March 1, 1964 Specific Relief Act of 1963 came into force and this Act altered the law by enacting S. 22. It made it necessary for the plaintiff to ask specifically the relief of possession in suits for specific performance. The Court, however, held that S. 22 of the Specific Relief Act of 1963 had no application to that case as the decree was passed when the old Act was in force.

19. The same High Court, however, in *Ex-Servicemen Enterprises (P) Ltd. v. Sumey Singh*, AIR 1976 Delhi 56 considered the effect of S. 22 (2) with its proviso. In that case the decree did not give the plaintiff the relief of possession. The question arose: Was the Court powerless to put him in possession of the property though he had a decree for specific performance in his favour? The Delhi High Court observed (at pp. 58, 59):

"Section 22 enacts a rule of pleading. The legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance even though strictly speaking the right to possession accrues only when specific performance is decreed. The legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the Court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession.

In my opinion the proviso gives ample power to a Court to allow the amendment of the plaint even at this stage. The proviso says that the amendment of the plaint can be allowed "at any stage of the proceedings" on such terms as may be just for including a claim for possession where the plaintiff has not claimed such relief in his original plaint.

.....The term "proceeding" is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a

technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted.

The word "proceeding" in S. 22 in my opinion includes execution proceedings also."

The High Court had relied upon *Rameshwar Nath v. U. P. Union Bank Ltd.*, AIR 1956 All 586 for its decision in this case. We are in complete agreement with the view taken by the Delhi Court in this case.

20. It is thus clear that the Legislature has given ample power to the Court to allow amendment of the plaint at any stage, including the execution proceedings. In the instant case the High Court granted the relief of possession and the objection raised on behalf of the petitioner is that this was not possible at the execution stage and in any case the Court should have allowed first an amendment in the plaint and then an opportunity should have been afforded to the petitioner to file an objection.

21. If once we accept the legal position that neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives any right or title to the decree-holder and the right and the title passes to him only on the execution of the deed of sale either by the judgment-debtor himself or by the Court itself in case he fails to execute the sale deed, it is idle to contend that a valuable right had accrued to the petitioner merely because a decree has been passed for the specific performance of the contract. The limitation would start against the decree-holders only after they had obtained a sale in respect of the disputed property. It is, therefore, difficult to accept that a valuable right had accrued to the judgment-debtor by lapse of time. S. 22 has been enacted only for the purpose of avoiding multiplicity of proceedings which the law Courts always abhor.

22. The only amendment to be made in the plaint was to add a relief for possession necessitated because of the provisions of S. 22, which is only an enabling provision.

23. There has been a protracted litigation and it has dragged on practically for about 13 years and it will be really a travesty of justice to ask the decree-holders to file a separate suit for possession. The objection of the petitioner is

hyper-technical. The execution court has every jurisdiction to allow the amendment. The only difficulty is that instead of granting a relief of possession the High Court should have allowed an amendment in the plaint. The mere omission of the High Court to allow an amendment in the plaint is not so fatal as to deprive the decree-holders of the benefits of the decree when S. 55 of T. P. Act authorises the transferee to get possession in pursuance of a sale deed.

24. As pointed out in the earlier part of the judgment, the petitioner had started construction and, therefore, the decree-holders sought to injunct him from making construction on the disputed land but they were lulled by the undertaking given by the petitioner that he would demolish the construction and restore the land to its original position in case the suit for specific performance was decreed. The undertaking given no doubt is a clever undertaking, but that might have given an impression to the plaintiffs-decree-holders that in the event of success of the suit the construction would be demolished and they would get back possession. Now, the judgment-debtor-petitioner seeks to take advantage of the expression used in the undertaking to contend that he had undertaken only to demolish the construction and restore the land to its original position. The contention now raised is that the petitioner never gave an undertaking to restore back possession of the disputed property to the decree-holders. Indeed, Mr. Shanti Bhushan stated before the Court that he was prepared to get the construction demolished but then stops short and says that possession could not be delivered to the decree-holders unless there was an amendment in the plaint. We are not prepared to take such a narrow view of S. 22. It was open to the Court to allow an amendment and the Court on the basis of that section has allowed delivery of possession in pursuance of the decree passed in the case.

25. Before closing discussion on this point we cannot lose sight of S. 28 of the Specific Relief Act, 1963, which reads:

"28. (1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase-money or other sum which the Court has ordered

him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the Court—

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which the possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor. and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connexion with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the Court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition, and separate possession of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be."

26. Sub-section (3) of Section 28 clearly contemplates that if the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree, the Court may on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to. Sub-cl. (b) of sub-sec. (3) of S. 28 contemplates the delivery of possession or partition and separate possession of the property on the execution of such conveyance or lease. Sub-sec. (4) of S. 28 bars the filing of a separate suit for any

relief which may be claimed under this section.

27. In *Hungerford Investment Trust Ltd. v. Haridas Mundhra*, (AIR 1972 SC 1826) dealing with S. 28 (1) of the Specific Relief Act, 1963 this Court observed (at p. 1832):

"The Specific Relief Act, 1963, is not an exhaustive enactment and under the law relating to specific relief a Court which passes a decree for specific performance retains control over the decree even after the decree had been passed. Therefore, the Court, in the present case, retained control over the matter despite the decree and it was open to the Court, when it was alleged that the party moved against had positively refused to complete the contract, to entertain the application and order rescission of the decree if the allegation was proved."

The reasoning given by this Court with regard to the applicability of sub-sec. (1) of S. 28 will equally apply to the applicability of sub-sec. (3) of S. 28.

28. This is an additional reason why this Court should not interfere with the eminently just order of the High Court. The High Court had amended the decree passed by the first appellate Court and passed a decree for possession not only against the transferors but also against their transferee, that is, the petitioner.

29. Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree-holder starts in getting possession in pursuance of the decree obtained by him. The judgment-debtor tries to thwart the execution by all possible objections. In the circumstances narrated above, we do not find any fault with the order passed by the High Court.

30. For the reasons given above the petition for special leave to appeal must fail and it was accordingly dismissed.

Petition dismissed.

AIR 1982 SUPREME COURT 827

(From : Madhya Pradesh)*

D. A. DESAI AND A. VARADARAJAN, JJ.

Civil Appeal No. 853 of 1981, D/- 4-2-1982.

Amitabh Shrivastava, Appellant v. State of Madhya Pradesh and others, Respondents.

Constitution of India, Arts. 15, 226 — Rules framed by M. P. Government for Admission to Medical, Dentistry and Ayurvedic Colleges (1979), Rr. 9, 20, 7 — Admission to medical college — Reservation for specific categories — Overall shortage of qualifying candidates — Minimum qualification statutorily lowered — Seats still vacant — Govt. by executive order further lowering minimum qualification — R. 9 could not be applied at this stage for finalising admissions. (Administrative Law — Administrative directions). Misc. Writ Petn. No. 167 of 1980, D/- 4-11-1980 (Madh Pra), Reversed.

Admission to medical colleges in the State of Madhya Pradesh are made strictly from the merit list prepared on the basis of the result of the pre-medical examination. The minimum qualifying marks for admission as provided by R. 20 are 50% in the aggregate and 33% of marks in each of the subjects in the pre-medical examination. Some seats are reserved for specific categories of candidate passing the pre-medical examination. R. 9 provides that in case sufficient number of candidates do not qualify for admission under any reserved category, and any seats remain vacant, such vacant seats shall be filled by preparing a combined merit list of all the remaining categories of candidates on the waiting list and the candidates shall be admitted according to merit in the list so prepared. In the relevant academic year there was inavailability of required number of candidates possessing the minimum qualifying marks in all the categories. As such the minimum qualifying marks were lowered by 5% (that is to 45% in aggregate) and candidates were accordingly admitted. Even then there was an overall shortage of candidates and many seats still remained vacant. As such the State Govt. by an executive resolution lowered the mini-

imum marks to 43%. The State Govt. at this stage applied R. 9 and gave admissions, accordingly. In the result the appellant an aspirant for admission to the medical college who had secured 43.6% of marks in the pre-medical examination and who belonged to a reserved category was refused admission.

Held, since the minimum qualifying marks were reduced to 43% by an executive order without any provision therefor in the statutory Rules, R. 9 could not be applied at that stage and as such the appellant who had secured 43.6% marks in the aggregate should have been admitted in the category to which he belongs.

(Para 11)

Furthermore the difference between 45% in the aggregate, to which the minimum qualifying marks were reduced under Note (1) to R. 20 and 43.6% of marks in the aggregate secured by the appellant was so little that it could not be a valid or sufficient reason for giving a go-bye, on the ground of merit, to the reservation. Misc. Writ Petn. No. 167 of 1980, D/- 4-11-1980 (Madh Pra), Reversed. (Para 11)

Mr. Shiv Dayal, Sr. Advocate, M/s. P. S. Das Gupta and J. B. Dadachanji, Advocates with him, for Appellant; M/s. Gopal Subramaniam and S. A. Shroff, Advocates, for Respondents.

VARADARAJAN, J.:— This appeal by special leave is directed against the judgment of K. K. Dube, J. of the Madhya Pradesh High Court in Writ Petition No. 167 of 1980, with whom the learned Chief Justice of that High Court had agreed on a difference of opinion between the learned Judge and A. R. Navkar, J. The petition filed under Art. 226 of the Constitution was for the issue of a writ, order or direction for the writ petitioner's admission into one of the medical colleges in Madhya Pradesh for the M.B.B.S. course, commencing in the academic year 1979-80. After hearing the learned counsel for the parties we allowed the appeal by a brief order on 14-1-1982 without any order as to costs, on account of the urgency of the matter, reserving our reasons to be given later, and directed the respondents to admit the appellant to the M.B.B.S. course for the academic year 1981-82 for which admissions are admittedly going on even now. We are presently giving reasons.

2. The Government of Madhya Pradesh, Public Health and Family Welfare Department, have framed Rules on 17-4-

*Misc. Writ Petn. No. 167 of 1980, D/- 4-11-1980 (Madh Pra).

1979 for admission into the Medical, Dentistry and Ayurvedic Colleges in the State. In this appeal we are not concerned with the Dentistry and Ayurvedic Colleges. There are six Medical Colleges in the State of Madhya Pradesh affiliated to different universities. There are 720 seats for admission into the first year course in those six colleges. R. 5 (1) of the aforesaid Rules, hereinafter referred to as the Rules, lays down that no candidates shall be admitted to the M.B.B.S. course unless he has passed the B.Sc. Part I (three years degree course Medical Group) examination of the recognised universities of the State with Physics, Chemistry, Biology (Zoology and Botany) or any examination of any other university or board recognised as equivalent thereto with practical tests in each subject provided the candidate has passed in each of those subjects in theory and practical separately. Under R. 6 of the Rules no candidate shall be admitted to the medical college unless he completes the age of 17 years on the 31st Dec. of the year of admission to the college. R. 1 (3) provides for the pre-medical examination being held every year for selection of candidates for admission to the medical colleges in the State and says that all admissions to those colleges have to be made only from the merit list prepared on the basis of the result of that examination except in the case of seats placed at the disposal of the Government of India or other States.

3. Under R. 7 certain number of seats have to be reserved for specific categories of candidates passing the pre-medical examination as below:—

(1) Fifteen per cent shall be reserved for women candidates;

(2) Fifteen per cent shall be reserved for each of the categories of Scheduled Castes and Scheduled Tribes candidates;

(3) Seats not exceeding 3 per cent may be reserved for children of military personnel who have to produce the necessary certificates.

Apart from those reservations, under R. 8 seats not exceeding 3 per cent are reserved for nominees of the Government of India and three seats are reserved for candidates nominated by the Government of Jammu and Kashmir in consideration of three seats reserved in the medical colleges in that State for candidates of the State of Madhya Pradesh.

4. Under R. 20, selection of candidates from amongst those who had appeared

and qualified in the written examination shall be made strictly on merit as disclosed by the total number of marks obtained by a candidate in the pre-medical examination. The qualifying marks for admission shall be 50% in the aggregate and 33 per cent in each of the subjects. For Scheduled Castes and Scheduled Tribes candidates the minimum qualifying marks shall be 45 per cent in aggregate and 30 per cent in each of the subject. In case the required number of candidates for admission are not available according to the above percentage of qualifying marks the Board conducting the pre-medical examination under R. 2 shall have power to lower the marks up to 5 per cent in the aggregate for all categories of candidates. If even with the relaxation granted by the Board, as above, required number of candidates in the categories of Scheduled Castes and Scheduled Tribes are not available for admission the Government has power to grant special relaxation in the maximum qualifying marks to the extent considered necessary.

5. Under R. 9, in case sufficient number of candidates do not qualify for admission under any reserved category and any seats remain vacant, such vacant seats shall be filled by preparing a combined merit list of all the remaining categories of candidates on the waiting list and the candidates shall be admitted according to merit in the list so prepared.

6. It is not necessary to refer to any of the other rules for the purpose of this appeal.

7. Indisputably, the appellant belongs to the third category of seats reserved under R. 7 as he is a son of a military personnel settled in Madhya Pradesh. Sons and daughters of military personnel of Madhya Pradesh are entitled to 21 seats in all out of 720 seats available in the six medical colleges in the State. As per the minimum number of qualifying marks prescribed in R. 20, namely, 50 per cent in the aggregate and 33 per cent in each of the subjects, children of military personnel secured only 8 seats, and 13 seats in that category remained vacant and all other categories secured only 361 seats and 338 seats of those categories remained vacant. The appellant did not qualify for admission on the basis of the marks specified in R. 20 for the academic year 1979-80. Then the Board applied Note (1) to R. 20 which provides for lowering the minimum qualifying marks up to 5 per cent in the aggregate for all

categories of candidates. After that was done 6 more candidates belonging to the category of sons and daughters of military personnel and 274 more candidates belonging to all other categories secured admission and 7 seats belonging to the category of children of military personnel and 64 seats of all other categories remained vacant. Even then the appellant could not secure admission as he had secured only 43.6 per cent of marks in the aggregate and 33 per cent in each of the subjects in the pre-medical examination and in the merit list prepared according to R. 9 he ranked 74 and only 71 candidates in that list could be admitted on the basis of merit.

8. Then the Madhya Pradesh Government issued an executive notification dated 10th March, 1980 regarding relaxation of qualifying marks for the purpose of admission to the medical colleges. That notification is to the effect that for the year 1979-80 candidates who have obtained at least 43 per cent of marks in the aggregate in the pre-medical examination shall be admitted to the medical colleges in the unfilled seats on the basis of merit according to the rules. Ordinarily, the appellant who had secured 43.6 per cent of marks in the aggregate in the pre-medical examination and another candidate in the category of children of military personnel should have got admission after the lowering of the minimum qualifying marks to 43 per cent in the aggregate, leaving 5 seats in that category still vacant. But R. 9 was applied and a combined list of all the remaining categories on the waiting list was prepared and the candidates were admitted according to merit in the list so prepared and consequently the appellant who belongs to the category of children of military personnel and had secured 43.6 per cent of marks in the aggregate in the pre-medical examination could not secure admission. These facts are not in dispute.

9. The appellant filed a writ petition for the aforesaid relief contending that as minimum qualifying marks have been reduced by the Notification dated 10-3-1980 to 43 per cent in the aggregate and as he had secured 43.6 per cent marks he should have been given admission in the category to which he belongs. The writ petition was at first heard by K. K. Dube and A. R. Navkar, JJ. A. R. Navkar, J. who decided in favour of the appellant, has observed in his judgment thus:-

"The reduction of percentage of marks for admission by the Government on 10-3-1980 (Annexure II) clearly shows that the candidates who got 43 per cent of marks will be eligible for admission. There is no dispute that the petitioner got 43.6 per cent of marks in the pre-medical examination. Therefore, applying this order of reduction of qualifying marks (Annexure II), I am of the opinion that the right of the petitioner for admission in the medical college cannot be defeated by resorting to Rule 9 of the Rules. As mentioned above, Rule 9 of the Rules, in my opinion, is a mandatory one. It says: 'if any seats remain vacant, such vacant seats shall be filled in by preparing a combined merit list of all the remaining categories of candidates on waiting list. This was not done when the percentage of marks for admission was reduced from 50 per cent to 45 per cent for all categories. Therefore, in my opinion, it cannot be done to defeat the right of the petitioner.....' I am of the opinion that the present petitioner cannot be denied his right of admission to the medical college if he is otherwise eligible to get admission. Denial of admission to him by purporting to act on the strength of Rule 9 of the Rules, in my opinion, will not be justified and will amount to denial to him the protection given to him by Article 14 of the Constitution. The result, therefore, is that the petition deserves to be allowed....."

But K. K. Dube, J. who took the opposite view has, after extracting notification dated 10-3-1980, observed in his judgment thus:-

"The reduced qualifying marks limit is only for filling up the vacant seats and the notification does not seek to amend Rule 20 or substitute 43 per cent for 50 per cent marks in the aggregate as minimum qualifying marks limit laid down under Rule 20. Indeed, the notification does not state that the reduced qualifying marks limit is in substitution of the one provided in Rule 20. That being the position, Rule 9 would necessarily operate, and it is for selecting from amongst the candidates for the number of seats remaining vacant by operation of Rule 9. The petitioner's contention would have some substance if Rule 9 was not there. The effect of Rule 9 is to wipe out the reservation for admission to any of the reserved categories. The main idea is that the best candidates be given admission to the medical colleges. The reservation is for the purpose of securing a conces-

sion and must operate in a like manner as provided in the Rules. The reservation is not absolute, and, therefore, when the minimum qualifying marks were reduced to 43 per cent it was only for filling up the vacant seats as obtained by operation of Rule 9 of the Rules, according to the merit in the combined merit list. We are unable to agree with the contention that the reduction in the eligibility to 43 per cent in the Government notification dated 10th March, 1980 could be availed of by the petitioner and other similar candidates for filling up the 7 vacant seats in the reserved quota of the children of military personnel".

10. The learned Chief Justice before whom the matter came up on account of the difference of opinion between the two learned Judges who originally heard the writ petition, as mentioned above, while agreeing with K. K. Dube, J. has observed in his judgment thus:

"When even on reduction of qualifying marks under Note (i) the required number of candidates do not qualify for admission under any reserved category and seats remain vacant, Rule 9 begins to apply and as directed by that Rule "such vacant seats shall be filled in by preparing a combined merit list of all the remaining categories of candidates in the waiting list and the candidates shall be admitted according to the merit in the list so prepared". At this stage there is no further scope for reservation. In other words, the reservation comes to an end after the required number of candidates in a reserved category do not become available on reduction of qualifying marks in the aggregate by the Board in exercise of its power under Note (i) to Rule 20. It is generally expected that there would be a long waiting list of qualified candidates in the general category who would be available for filling in the seats transferred from a reserve category to general category. In 1979, however, it so happened that there were vacancies in the general category, that is, there were not sufficient number of qualified candidates who could have exhausted the general category under R. 9. It is at this stage that the Government issued the order dated 10th March, 1980. It is in the interpretation and application of this order that difference of opinion has arisen. The order has not been issued under the Rules. It is an independent order. The order does not expressly refer to any reservation. The order directs selection of candidates for vacant seats on

the basis of merit from those who had secured aggregate marks up to 43 per cent. The order was passed at a stage when the reserved categories had come to an end under Rule 20 read with Rule 9 as sufficient number of candidates were not available. In my opinion, therefore, Dube, J. was right in holding that the order dated 10th March, 1980 did not bring back the reservation and selection had to be made on the basis of a combined merit list for all the vacant seats irrespective of whether they originally belong to any reserved category.....

There is yet another important factor to be taken notice of. Not only the vacancies in the reserved category of children of military personnel but there were also vacancies in the category of women to be filled in on the basis of a combined merit list and no reservation was at all allowed in working out the order of 10th March, 1980. The way in which this order was applied by the Board had apparently the approval of the Government and no other candidate excepting the petitioner has come forward to challenge its application. As already pointed out, the order is not a statutory order. It is an order passed by the State Government in the exercise of its executive power. The Government's approval of the manner in which the Board has applied the order goes to show that that was the intention of the Government in passing the order. Although the approval of the Government of a particular mode of application of an order is not decisive of its meaning and it is for the Court to decide the correct meaning, still when the meaning of an order which is purely executive is in doubt the way in which it has been applied by all concerned is a relevant factor to be taken into account in deciding its true meaning. The uniform application of the order by the Board with apparent approval of the Government for filling in all the vacant seats, goes a long way to show that the Government intended that the order should be applied by preparing a common merit list without continuing the reservations. In these circumstances, even if the interpretation put forward by the learned counsel for the petitioner and accepted by Navkar, J. can be accepted as a possible interpretation of the order, it would not be right for me to hold that it conveys the true meaning."

11. We are inclined to agree with the conclusion reached by A. R. Navkar, J., though for different reasons. The matter

is simple. Under R. 20, the minimum number of marks prescribed for admission into the Medical Colleges in the State is 50 per cent in the aggregate and 33 per cent in each of the subjects. On that basis, out of the total of 720 seats available in all the six medical colleges in the State only 8 out of 21 of the category of sons and daughters of military personnel, and only 361 out of 699 available for all other categories could be and were admitted in the academic year 1979-80. R. 9, which has been relied upon by the respondents as well as by K. K. Dube, J. and the Chief Justice says that in case sufficient number of candidates do not qualify for admission under any reserved category, barring, of course, the category of Scheduled Castes and Scheduled Tribes candidates, and any seats remain vacant, such vacant seats shall be filled by preparing a combined merit list of all the remaining categories of candidates on the waiting list and the candidates shall be admitted according to merit in the list so prepared. But that Rule was not applied by the respondents and could not be applied under the circumstances of the case when 338 seats in all other categories and 13 seats of the category of sons and daughters of military personnel could not be filled in 1979-80 on the basis of the said minimum number of qualifying marks, namely, 50 per cent in the aggregate and 33 per cent in each of the subjects. Then Note (1) to R. 20 providing for lowering of the qualifying marks up to 5 per cent in the aggregate for all categories was applied. Even then 64 seats of all other categories and 7 seats of the category of sons and daughters of military personnel could not be filled and remained vacant. Then the Government by an executive order issued the notification dated 10th March, 1980 reducing the minimum qualifying marks to 43 per cent in the aggregate, and it is only at this stage R. 9 was applied with the result that in the category of sons and daughters of military personnel only 2 more candidates could secure admission and 7 seats of that category had to be filled by other categories. We are of the opinion that since the minimum qualifying marks were reduced to 43 per cent by an executive order without any provision therefor in the statutory rules, R. 9 of the statutory rules could not be applied at that stage, and that the appellant who had secured 43.6 per cent of marks in the aggregate should have been admitted in the category to which he

belongs. We think that the difference between 45 per cent in the aggregate, to which the minimum qualifying marks were reduced under Note (1) to R. 20 and 43.6 per cent of marks in the aggregate secured by the appellant is so little that it could not be a valid or sufficient reason for giving a go-bye, on the ground of merit, to the reservation provided for in R. 7 of the Rules. The appellant deserves to be admitted even for this reason. In these circumstances we are unable to agree with the view taken by K. K. Dube, J. and the Chief Justice, and we agree with the conclusion reached by A. R. Navkar, J. The appeal is accordingly allowed without any order as to costs. As already directed the appellant shall be admitted to the M.B.B.S. course for the academic year 1981-82 in the category mentioned in R. 7 (3) (c) of the Rules.

Appeal allowed.

AIR 1982 SUPREME COURT 831

(From : Allahabad)

D. A. DESAI, A. P. SEN AND
BAHARUL ISLAM, JJ.

Civil Appeal No. 478 of 1982 arising out of Special Leave Petn. (Civil) No. 7885 of 1981, D/- 11-2-1982.

Sri Ram Pyare Chaudhary and another, Appellants v. State of Uttar Pradesh and others, Respondents.

U. P. Co-operative Societies Act (11 of 1966), S. 29 — U. P. Co-operative Societies Rules (1968), Rr. 444, 445, 439 — Applicability — Committee of Management — Election of members — Mere holding of poll does not complete election process — “Co-operative year of their election year” — Means the year in which the member is elected. Writ Petn. No. 7869 of 1981 (All), Reversed.

The various stages of election are clearly demarcated in the rules. If the poll has become necessary and is held, the unavoidable and inescapable stage of counting of votes and the next stage of announcement of result and subsequently publicising the result are part and parcel and necessary adjuncts of conducting poll. If the rules provide for all the three stages it cannot be contended that by merely holding of the poll the process of election can be said to have been completed and the term of members who had contested would commence from the time of holding the election. No election process can be

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said to be complete unless the votes are recorded, they are counted and those who have secured highest number of votes are declared elected and the result is publicised, as required by the relevant provision. (Para 8)

Rule 445 (1) indicates the terminus a quo for commencement of the term, viz., that the term of office of the elected members would be three co-operative years including the year of their election. Even when votes are recorded, the candidates contesting the poll do not acquire the status of members of Committee of Management. That status is acquired on being declared elected. And unless that status is acquired the term of office as member cannot begin to run. Therefore, the expression 'co-operative year of their election year', upon true construction can only mean the year in which the member is declared elected and not the year in which he contested the poll. (Para 8)

When even though the poll for election of members of a Committee of Management was held on 11-9-1978, on account of the injunction granted by the Court, the result was declared on 28-1-1980 and on the very next day, i.e. 29-1-1980, there was election of the Chairman, the term of the members of the Committee of the Management would commence from the co-operative year commencing from 1-7-1979 and ending with 30-6-1980, and including this year the term would be of three years. Therefore, obviously the term would expire on 30-6-1982. Sub-section 4 (a) of S. 29 would not be attracted at all to the facts of this case. Therefore, the Registrar could not have issued teleprinter message declaring that the term had come to an end on 30-6-1981. If the term had not expired, the administrator could not be appointed as contemplated by sub-section (4) (b) of S. 29. Hence, the order of the Deputy Registrar of the Co-operative Societies, appointing administrator was without jurisdiction and was clearly illegal and invalid. Writ Petn. No. 7869 of 1981 (All), Reversed. (Paras 9 to 11)

D. A. DESAI, J.:— The District Co-operative Federation (Zila Sahakari Federation), Basti ('Federation' for short) is a co-operative society registered under the U. P. Co-operative Societies Act, 1965 ('Act' for short). As provided by S. 29 of the Act, the management of the Federation vests in a committee designated as Committee of Management. The committee consists of 10 elected members and 1 nominated member. As the term of the Committee was drawing to a close, programme for election of the new committee of management was announced as required

by Part VI of the U. P. Co-operative Societies Rules, 1968 ('Rules' for short). Pursuant to this programme poll was held on Sept. 11, 1978. It is not made clear to us when the counting of the votes commenced, though R. 444 (1) provides that counting of the votes will take place immediately after the close of the poll except when postponed in a given set of circumstances. Sub-rule (4) of R. 444 provides that Election Officer shall announce the result of election as soon as the counting is completed indicating the number of votes secured by each candidate. It appears that one Shri Kashi Nath whose name did not appear in the voters' list and who, on account of the omission, could not contest the election filed Civil Suit No. 291 of 1978 in the Court of Munsif, Basti on Sept. 9, 1978 and asked for and obtained ad interim ex parte injunction restraining the defendants in the suit from conducting the election of Board of Directors (Committee of Management), President, Vice-President and the delegates of District Co-operative Federation, Basti and/or announcing the result of election. Defendants Nos. 1 to 4 in the suit appeared and contested the application for interim injunction. The learned Munsif after hearing both sides confirmed the injunction in the following terms:

"6-C is allowed and the defendants Nos. 1 to 4 are directed not to conduct the election and not to declare the result, if any, of Board of Directors of District Co-operative Federation, Basti, till disposal of the suit".

This order was made on Sept. 21, 1978. It appears that by the time the suit was filed and ex parte ad interim injunction obtained, the poll was already held but by the injunction, the defendants in the suit were prohibited from declaring the result and accordingly the result was not declared. It now appears that the result was declared on Jan. 28, 1980, and the election of the Chairman and the Vice-Chairman took place on Jan. 29, 1980. Appellant No. 1 was elected as Chairman. The term of the members of the Committee of Management as provided by R. 445 as amended on June 30, 1981, is three co-operative years including the year of election. The Registrar of Co-operative Societies pursuant to the amended R. 445 issued a teleprinter message to various authorities indicating that the term of the committee of management has expired and administrator should be appointed as provided by sub-s. (4) (b) of S. 29 of the Act. Pursuant to this teleprinter message, the Deputy Registrar, Co-operative Society, Gorakhpur made an order on July 1, 1981, that the term of the members of the committee of management of the Federation

has expired on June 30, 1981, and proceeded to appoint an administrator. The appellants questioned the validity and legality of the order of the Deputy Registrar in Writ Petition No. 7869 of 1981 filed in the High Court of Judicature at Allahabad.

2. The High Court was of the opinion that even though under R. 445 the term of the office of the elected members of the committee of management of co-operative society is three co-operative years including the co-operative year of their election, once the poll is held and even though the result of the election is not announced, the term would commence from the date of the poll and therefore the decision of the Deputy Registrar that the term expired on June 30, 1981, is correct. The High Court accordingly dismissed the writ petition. Hence this appeal by special leave limited to one point only, namely, the commencement and completion of the term of office of the members of the committee of management of the second appellant.

3. Section 29 (1) provides that the management of every co-operative society shall vest in a committee of management constituted in accordance with the Act, the rules and the bye-laws. Sub-sec. (2) provides that the term of the elected members of the committee of management shall be such as may be provided in the rules or the bye-laws of the society. Rule 445 (1) provides that except as otherwise provided in Rr. 406, 433, 434 and 435, the term of the office of the elected members of the committee of management of a co-operative society shall be three co-operative years including the co-operative year of their election. Explanation appended to this Rule clarifies how the period of three co-operative years is to be computed. In substance the explanation clarifies that:

"For the purpose of determination on the term of a elected member the co-operative year during which the elections are held shall count as full year irrespective of the period left after such election in that co-operative year".

There is a proviso to this explanation which is immaterial. The expression 'co-operative year' is defined in S. 2 (i) of the Act to mean the year commencing on the 1st day of July and ending on the 30th day of June next following.

4. Part VI of the Rules sets out procedure for holding the election. Election of members of committee of management of a co-operative society has to be held in accordance with the provisions of the Act and rules

and the District Magistrate of the district in which the headquarter of the society is situated, shall take steps to organise the election under the superintendence, direction and control of the Registrar (see R. 439 (1)). Sub-rule (1) of R. 439 provides that the election in a co-operative society or societies or a class or classes of co-operative societies shall be held on such due date or dates as the Registrar may by order fix and the District Magistrate concerned shall on such dates being so fixed appoint by order one or more Election Officers or different Election Officers for different class or classes of society or for different areas for this purpose. Sub-r. (3) provides that the Election Officer shall perform all such functions as are enjoined upon him by the Rules or as may be incidental to or necessary for the discharge of his duties. Rule 444 provides that the counting of votes will take place immediately after the closing of the poll and in case it is not possible to count votes immediately after the close of the poll, the ballot boxes shall be sealed by the Election Officer and kept in the said custody in the nearest police station. Sub-rule (4) of R. 444 provides that the election Officer shall announce the result of election as soon as the counting is completed indicating the number of votes secured by each candidate. Sub-rule (6) provides that the Election Officer shall display a list of elected candidates on the notice board of the society and also at such public places as he may deem fit. Sub-rule (7) provides that a copy of the list prepared under sub-rule (6) shall be sent to the District Assistant Registrar concerned or the officer authorised under sub-rule (2) of R. 440 and also to Secretary/Managing Director of the Society concerned.

5. Having noticed the conspectus of the provisions bearing on the topic 'election to a co-operative society', the principal point canvassed in this petition may be examined. According to the appellant even though the poll was held on Sept. 11, 1978, the result, as required by R. 444 (4), was declared for the first time on Jan. 28, 1980; the term of three co-operative years of the elected members of the co-operative society will expire on June 30, 1982.

6. On the other hand, according to the respondents, as the poll was held on Sept. 11, 1978, the term of three co-operative years including the co-operative year of the election has expired on 30th June, 1981 and therefore the order appointing the administrator was legal and valid. *

7. The question that emerges on rival contentions is as to from what date the term of the elected members of the committee of management shall commence. The period of three years as amplified by the Explanation to R. 445 (1) is to be reckoned not from the date of the election but the term shall be three co-operative years including the co-operative year of the election. The co-operative year, as pointed out earlier, commences on July 1 and ends on June 30 of the next succeeding year. Therefore, if the term commences from the date of poll which happened to be Sept. 11, 1978, the whole of co-operative year commencing from July 1, 1978 would have to be taken into reckoning for computing the term of three years and, therefore, three years would expire on June 30, 1981. The question, however, is whether mere holding of the poll constitutes election of the members of committee of management or the result being declared after the counting has been completed and notified in the manner prescribed by sub-rules (6) and (7) of Rule 444 would provide the starting point for a terminus quo for the term of office to commence. If the term was to commence on the declaration of the result of election, in this case admittedly the result was declared on Jan. 28, 1980. That date would fall within the co-operative year from July 1, 1979 to June 30, 1980, and the term of three co-operative years would expire on June 30, 1982.

8. At one stage, Mr. Dixit, learned counsel for the respondents stated that there is no stage like declaration of result when the election of the members of the committee of management of a co-operative society is held. Sub-rule (4) of R. 444 clearly indicates to the contrary and it casts an obligation on the Election Officer to announce the result of election as soon as the counting is complete and he is also under a duty to indicate the number of votes secured by each candidate. His duty does not end there. He has to display a list of elected candidates on the notice board of the society and also at such public places as he may deem fit. He is also under an obligation to send a copy of the list prepared under sub-rule (6) to the District Assistant Registrar concerned. It is, therefore, not possible to accept the submission that there is nothing like a stage of announcement of the result of election when election is held for electing members of the committee of management of a co-operative society. In fact, the various stages of election are clearly demarcated in the rules. If the poll has become necessary and is held the unavoidable and inescapable stage of counting of votes and

the next stage of announcement of result and subsequently publicising the result are part and parcel and necessary adjuncts of conducting poll. If the rules provide for all the three stages it is difficult to accept the submission that by merely holding of the poll, the process of election can be said to have been completed and the term of members who had contested would commence from the time of holding the election. That is what the High Court holds. Says the High Court:

"that the elections since were held on 11-9-1978, mere act of not declaring the result on account of any order issued by the Court or a stay order granted by it which was subsequently vacated could not be taken as if the term of the committee of the management has not commenced".

The High Court, at another stage, observed that the postponement of declaration of the result did not justify the holding of the view that elections had not been held in Sept. 1978. Taken to the logical end, the judgment of the Court would imply that elected and non-elected members both who participated in the poll would have their term as members commence since the poll is held. Could this be the intendment of R. 445 (1)? This approach betrays lack of knowledge of the democratic process of election. When the number of the members to be elected to the committee of management is fixed and candidates in excess of the fixed number are desirous of seeking office, the democratic process postulates holding of elections. Mere holding of poll which means recording of votes without anything more would be inconsequential. It is the counting of votes and the consequent declaration of result showing who amongst the contesting candidates has secured highest number of votes or large number of votes which would determine who has become eligible for office by the democratic process. Therefore, recording of votes is a preliminary stage, the counting of votes and declaration of result are integral and inseparable part of process of holding and completing the process of election. No election process can be said to be complete unless the votes are recorded, they are counted and those who have secured highest number of votes are declared elected and the result is publicised, as required by the relevant provision. Rule 445 (1) provides that the term of office of the elected members of a committee of management of a co-operative society shall be three co-operative years including the co-operative year of their election. This provision indicates the terminus quo for commencement of the term, viz., that the term of office of the elected members would be three co-operative years including

the year of their election. Election means process of being elected and the term of office is of the elected member, not of contesting member. When candidates offer themselves for election, they are called candidates and unless elected the term of such candidates would not commence. Their term would commence when elected. The expression 'year of their election' even on literal and grammatical construction would mean the year in which the member concerned whose term is in dispute, is declared elected meaning thereby he became eligible for office and entitled to enter office as a member. Apart from literal construction, the completed process of election comprehends nomination, recording of votes, counting of votes and declaration of result and publicising and notifying the result. There ends the process of election. Recording of votes is a mere stage in the process of election. Even when votes are recorded, the candidates contesting the poll do not acquire the status of members of committee of management. That status is acquired on being declared elected. And unless that status is acquired the term of office as member cannot begin to run. Therefore, the expression 'co-operative year of their election year', upon true construction can only mean the year in which the member is declared elected and not the year in which he contested the poll.

9. Turning to the facts of this case, undoubtedly the poll was held on Sept. 11, 1978, but in view of the injunction granted by the learned Munsif the respondents were restrained from declaring the result. In the counter-affidavit filed on behalf of the respondents in the High Court, the fact that the result was declared on Jan. 28, 1980, is admitted. The relevant portion reads as under:

"4. That the election of the committee of management of the Federation was held on 11-9-1978 and not on 28-1-1980 as alleged in the writ petition. In fact, the election was actually held on 11-9-1978, but the declaration of the result of election stayed in pursuance of the order of learned Munsif, Basti, in Suit No. 291 of 1978 (Kashi Nath Tripathi v. D. M., Basti). Consequent upon the order of the learned Munsif, the election officer also passed similar order on 11-9-1978 on which date the election was held. The result was subsequently declared on 28-1-1980."

It is thus an admitted position that even though the poll was held on Sept 11, 1978, on account of the injunction granted by the Court, the result was declared on Jan. 28, 1980. On the very next day, i.e. Jan. 29, 1980, first appellant was elected as Chairman

of the Federation. Once it is admitted that the result was declared on Jan. 28, 1980, the term of the members of the committee of the management would commence from the co-operative year July 1, 1979, ending with June 30, 1980, and including this year the term would be of three years. Therefore, obviously the term would expire on June 30, 1982.

10. Mr. Dixit, however, urged that where for any reason whatsoever, election of the elected members of the committee of management has not taken place or could not take place before the expiry of the term of elected members, the committee of management shall, notwithstanding anything to the contrary in the Act or the Rules or the bye-laws of the society, cease to exist on the expiry of the said term. In support of this submission he relied upon sub-sec. (4) (a) and (b) of S. 29. They may be extracted:

"29. Committee of management:

XX XX XX

(4) (a) Where, for any reason whatsoever the election of the elected members of the committee of management has not taken place or could not take place before expiry of the term of elected members, the committee of management shall, notwithstanding anything to the contrary in this Act or the rules, or the bye-laws of the Society, cease to exist on the expiry of such term.

(b) On or as soon as may be after the expiry of such term, the Registrar shall appoint an Administrator for the management of the affairs of the society until the reconstitution of the Committee of Management in accordance with the provisions of this Act, the rules and the bye-laws of the society, and the Registrar shall have power to change the Administrator from time to time:

Provided that so long as no Administrator is appointed under this sub-section the Secretary or the Managing Director, as the case may be, of the society shall be in charge only of the current duties of the committee of management."

Explanation— Where results of the election of members of the Committee of Management have not been or could not be declared, for any reason whatsoever, before the expiry of the term of the elected members of the outgoing committee, it shall be deemed that the election of the elected members of the committee has not taken place within the meaning of this sub-section."

Sub-sec. (4) (a) would not be attracted at all in the facts of this case because when the term of the members of the former committee of management expired, poll was held on Sep-

tember 11, 1978. Once poll was held as a part of the programme of the election it must progress to the statutory end of declaration of result. Unless the term begins to run it cannot come to an end. Sub-s. (4) (a) caters to a situation where the term of the members of a committee of management has begun and the election could not be held before the expiry of the term then, notwithstanding that no election has been held the term of the members of the former committee would come to an end and the committee of management would cease to exist on expiry of said term. Sub-s. (4) (b) would only be attracted if the term expires as contemplated by sub-sec. (4) (a). If the term expires and the old managing committee whose term has expired ceases to exist and the election has not been held or could not be held to elect a new committee of management then in the interregnum the Registrar has the power to appoint an administrator for the management of the affairs of the society. In the fact situation as we have in the present case, sub-ss. (4) (a) and (b) are not attracted and, therefore the provision therein contained would not assist the respondent in any manner.

11. As the term of the committee of management would commence from the co-operative year from July 1979 to June 1980, the same would expire on June 30, 1982. On this reckoning the Registrar could not have issued teleprinter message declaring that the term has come to an end on June 30, 1981. If the term had not expired, the administrator could not be appointed as contemplated by sub-sec. (4) (b) of S. 29. Therefore, the order of the Deputy Registrar of the Co-operative Societies, Gorakhpur Division dated July 1, 1981, appointing administrator is without jurisdiction and is clearly illegal and invalid and must be quashed and set aside.

12. Mr. Dixit lastly urged that even on the view this Court would take, the term of the committee of management would expire on June 30, 1982, and therefore, hardly a period of four months remains and the Court should not, therefore, disturb the administrator. This submission does not commend to us because the Government by executive fiat cannot reduce the term of office statutorily fixed. Further, the elections to panchayats, co-operative societies and smaller local bodies provide an apotheosis or a training ground for success of our larger experiment of parliamentary democracy. Election process is sacrosanct. Members elected must be permitted to discharge their functions as chosen representatives of the electorate for the statutory terms. Such a drastic nower of removing elected re-

presentatives before the expiry of term and substituting non-elected persons must receive strict and narrow interpretation at the hands of the Courts. If allowed to foster it would be the negation of the democratic process and would engulf the whole fabric of democratic institutions which we are trying to build up. Therefore, even though the term would expire roughly after four months, we would be perfectly justified in removing the administrator and reinstating the elected representatives.

13. Accordingly, this appeal is allowed and the judgment of the High Court is set aside. A writ in the nature of mandamus is issued quashing the impugned order dated July 1, 1981, of the Deputy Registrar, Co-operative Societies, Gorakhpur Division, Gorakhpur. It is declared that the term of the committee of management of District Co-operative Federation Limited, Basti, and the 1st appellant-Chairman has not expired and the elected members continue to occupy the office. The administrator is hereby directed to hand over the charge forthwith to the Chairman of the Committee of Management. There will be no order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 836

(From : AIR 1976 Kant 187)

Y. V. CHANDRACHUD, C. J.,
S. MURTAZA FAZAL ALI AND
D. A. DESAI, JJ.

Civil Appeal No. 1282 of 1976, D/- 16-2-1982.

Padma Srinivasan, Appellant v. Premier Insurance Co. Ltd., Respondent.

Motor Vehicles Act (4 of 1939), S. 95 (2), (a) (as amended by (Amendment) Act (56 of 1969)) — Insurance of motor vehicles against third party risk — Insurer undertaking "liability as one under Chap. VII of the Act" — Accident occurring during currency of policy — Liability of Insurer would be extended to legal provision as it stood on date of accident. AIR 1976 Kant 187, Reversed.

Where the Insurance Company which had issued certificate of insurance to the owner of a truck had undertaken "liability as the one under Chapter VII of the Motor Vehicles Act 1939", and the accident occurred during the currency of the policy the insurer's liability for third party risks under the statutory policy would not be limited to Rs. 20,000 according to the relevant legal provision as it existed on the date on which the policy came into force but would be extended to Rupees

50,000 in accordance with the legal provision as it stood on the date of the accident when the accident occurred during the currency of the policy. The liability must mean liability is determinable under Chap. VIII at the relevant time, that is to say, at the time when the liability arises. Since the liability of the insurer to pay a claim under a motor-accident policy arises on the occurrence of the accident and not until then, one must necessarily have regard to the state of the law obtaining at the time of the accident for determining the extent of the insurer's liability under a statutory policy. In this behalf, the governing factor for determining the application of the appropriate law is not the date on which the policy of insurance came into force but the date on which the cause of action accrued for enforcing liability arising under the terms of the policy. When the contracting parties did not incorporate the provisions of Chapter VIII of the Act in their contract, that is to say, they did not identify the liability of the promisor on the basis of the provisions of Chapter VIII as they stood on the date when the contract was made, they merely referred to the provisions of Chapter VIII, which means "the provisions of Chapter VIII in force at any given time", the given time being the date on which the right to sue accrues or, correspondingly, the liability arises. AIR 1976 Kant 187, Reversed; AIR 1979 Kant 1 (FB), Approved. (Para 6)

If the parties to a contract agree that one shall pay to the other damages for breach of contract in accordance with the law contained in any particular statute, without identifying the law as the provision which is in force on the date of the contract, the law which will apply for determining the quantum of damages is the one which is in force on the date on which the breach of contract is committed, that being the date on which the cause of action arises, and not the law which was in force on the date on which the contract was made. (Para 6)

The application of a law to facts which come into existence after that law has come into force does not involve giving retrospective operation to the law, merely because the acts to which the law is being applied are attributable to a contract or an instrument which had come into operation prior to the date on which the law itself had come into force.

(Para 7)

Cases Referred: Chronological Paras
AIR 1979 Kant 1 : (1978) 2 Kant LJ 226
(FB) 8

Mr. K. N. Bhatt, Advocate, for Appellant;
Mr. K. C. Dua, Advocate, for Respondent.

CHANDRACHUD, C. J.:— This appeal by certificate of fitness arises out of the judgment of the Karnataka High Court dated Jan. 9, 1976 in Misc. First Appeal No. 19 of 1973.

2. On April 5, 1970, the appellant's husband was driving a scooter, MYL 8574, on the Kasturba Road, Bangalore, when a goods truck, MYT 3298, knocked him dead. The owner of the truck had taken a statutory insurance policy with the respondent. The Premier Insurance Co. Ltd., Gandhinagar, Bangalore, which was operative from June 30, 1969 to June 29, 1970. The appellant filed an application before the Motor Accidents Claims Tribunal, Bangalore, under S. 110-A of the Motor Vehicles Act, 1939, seeking compensation for her husband's death. The respondent denied its liability on the ground, amongst others, that its record did not disclose that it had issued any insurance policy in respect of the particular truck. On a consideration of the entire evidence, the Tribunal passed an award on Nov. 20, 1972, holding that the appellant was entitled to recover compensation in the sum of Rs. 60,000 for herself and her children. The Tribunal limited the liability of the respondent-insurer to a sum of Rs. 50,000.

3. The respondent filed an appeal in the High Court contending that on the date on which the insurance policy was alleged to have been issued by it, its statutory liability was limited to a sum of Rs. 20,000 only and, therefore, the Tribunal was in error in passing an award against it in the sum of Rupees 50,000. This contention was accepted by the High Court and hence this appeal by the claimant.

4. Chap. VIII of the Motor Vehicles Act, 1939 (The Act), bears the heading "Insurance of motor vehicles against third party risks". By S. 94 (1) of the Act, no person can use a motor vehicle in a public place, except as a passenger, unless there is in force in relation to the use of the vehicle a policy of insurance complying with the requirements of the chapter. Section 95 prescribes the requirements of the insurance policy and the "limits of liability" thereunder. Broadly, by sub-sec. (1) of S. 95, a policy of insurance must insure the person or classes of persons specified in the policy to the extent specified in sub-s. (2) against any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in a public place. Section 95 (2) (a) of the Act, with which alone we are concerned in this appeal, was originally cast thus:

"95 (2). Subject to the proviso to sub-s. (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely :—

(a) where the vehicle is a vehicle used or adapted to be used for the carriage of goods, a limit of twenty thousand rupees."

This section was amended by Amendment Act 100 of 1956 which, *inter alia*, introduced therein the words "in all" after the words "twenty thousand rupees". We are not concerned with that amendment. What we are concerned with is the amendment made to Cl. (a) of S. 95 (2) by the Motor Vehicles (Amendment) Act 56 of 1969, which substituted therein the word "fifty" for the word "twenty". Section 95 (2) (a) so amended reads thus :

"95 (2). Subject to the proviso to sub-s. (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely :—

(a) where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all"

Thus, the insurer's liability under the statutory policy was increased by this amendment from twenty thousand rupees to fifty thousand rupees. The amendment came into force on March 2, 1970.

5. The question which arises for consideration is whether the insurer's liability for third party risks under the statutory policy must be held to be limited to Rs. 20,000 according to the relevant legal provision as it existed on the date on which the policy came into force or, whether, that liability can be extended to Rs. 50,000 in accordance with the legal provision as it stood on the date of the accident, the accident having occurred during the currency of the policy. The relevant dates which have to be borne in mind in this behalf are these : The insurance policy came into force on June 30, 1969 and covered the period from June 30, 1969 to June 29, 1970; the amendment by which the statutory liability of the insurer was increased from Rs. 20,000 to Rs. 50,000 came into force on March 2, 1970; and the accident which gave rise to these proceedings occurred on April 5, 1970.

6. The High Court, in its judgement, has referred to the principles governing retrospectivity of statutes and has held by the application of those principles that the amendment introduced by Amending Act 56 of 1969 is prospective in nature and cannot be given any retrospective effect. We consider that the High Court, with respect, has failed to appreciate the true nature of the issue before it. The certificate of insurance, Ext. P-9, which was issued by the respondent's agent

on May 31, 1969 for the period June 30, 1969 to June 29, 1970 shows that the respondent-insurer had undertaken "liability as the one under Chap. VIII of the Motor Vehicles Act, 1939". That must mean liability as determinable under Chap. VIII at the relevant time, that is to say, at the time when the liability arises. Since the liability of the insurer to pay a claim under a motor-accident policy arises on the occurrence of the accident and not until then, one must necessarily have regard to the state of the law obtaining at the time of the accident for determining the extent of the insurer's liability under a statutory policy. In this behalf, the governing factor for determining the application of the appropriate law is not the date on which the policy of insurance came into force but the date on which the cause of action accrued for enforcing liability arising under the terms of the policy. That we consider to be a reasonable manner in which to understand and interpret the contract of insurance entered into by the insured and the insurer in this case. The contracting parties did not incorporate the provisions of Chapter VIII of the Act in their contract. That is to say, they did not identify the liability of the promisor on the basis of the provisions of Chapter VIII as they stood on the date when the contract was made. They merely referred to the provisions of Chapter VIII, which means "the provisions of Chap. VIII in force at any given time", the given time being the date on which the right to sue accrues or, correspondingly, the liability arises. If the parties to a contract agree that one shall pay to the other damages for breach of contract in accordance with the law contained in any particular statute, without identifying the law as the provision which is in force on the date of the contract, the law which will apply for determining the quantum of damages is the one which is in force on the date on which the breach of contract is committed, that being the date on which the cause of action arises, and not the law which was in force on the date on which the contract was made.

7. Thus, there is no question here, as the High Court thought, of giving retrospective operation to the amendment introduced by Amending Act 56 of 1969, by which the statutory liability of the insurer was increased from twenty thousand rupees to fifty thousand rupees with effect from March 2, 1970. That question would have arisen if the accident had happened prior to that date. The accident having happened on April 5, 1970, the question as to the extent of the insurer's

liability must be determined by the application of the law introduced by the Amendment which had come into force before the date of the accident. The application of a law to facts which come into existence after that law has come into force does not involve giving retrospective operation to the law, merely because the facts to which the law is being applied are relatable to a contract or an instrument which had come into operation prior to the date on which the law itself had come into force.

8. We endorse the view taken by the Full Bench of the Karnataka High Court in *Sanjiva Shetty S. v. Anantha*, (1978) 2 Kant LJ 226 : (AIR 1979 Kant 1). The Full Bench overruled the judgment which is under appeal in the instant case and held that the material date for ascertaining the extent of liability of the insurer is the date of the accrual of the cause of action for a claim arising out of an accident, which in general would be the date of the accident and therefore, the insurer's liability arising out of an accident which happens after March 2, 1970, has to be determined on the basis of the amended provisions of S. 95 (2) (a) of the Act, even though the policy of insurance may have been issued prior to the date of the amendment, that is, prior to March 2, 1970.

9. For these reasons, we set aside the judgment of the High Court, restore the award of the Tribunal dated Nov. 20, 1972 and allow the appeal with costs throughout. Appeal allowed.

AIR 1982 SUPREME COURT 839

(From : Bombay)*

S. MURTAZA FAZAL ALI, D. A. DESAI AND A. VARADARAJAN, JJ.

Criminal Appeal No. 4 of 1976, D/- 17-2-1982.

Mohanlal Gangaram Gehani, Appellant v. State of Maharashtra, Respondent.

(A) Evidence Act (1 of 1872), S. 145 — Applicability — Two contradictory statements must have been made by one person — Statement made by one contradicted by another — Section 145 is not attracted. Criminal Appeal No. 1639 of 1972, D/- 1-9-1975 (Bom), Reversed.

Section 145 applies only to cases where the same person makes two contradictory

*Criminal Appeal No. 1639 of 1972, D/- 1-9-1975 (Bom).

statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under S. 145. In other words, where the statement made by a person or witness is contradicted not by his own statement but by the statement of another prosecution witness, the question of the application of S. 145 does not arise. If it is assumed that a statement of a witness is contradicted by another the former witness should be cross-examined to explain the contradiction then it will be extremely difficult for an accused or a party to rely on the inter se contradiction of various witnesses and every time when the contradiction is made, the previous witness will have to be recalled for the purpose of contradiction. This is neither the purport nor the object of S. 145. Criminal Appeal No. 1639 of 1972, D/- 1-9-1975 (Bom), Reversed; AIR 1974 SC 117, Rel. on. (Paras 12, 13, 16, 17)

(B) Evidence Act (1 of 1872), Ss. 9, 3 — Identification of accused — Victim not knowing accused prior to occurrence — Test identification parade not held — Accused shown to victim by police before trial — His identification in Court by victim is valueless and cannot be relied upon. AIR 1980 SC 1382 and AIR 1944 FC 38, Rel. on.

(Paras 20, 25)

(C) Evidence Act (1 of 1872), S. 3 — Evidence — Appreciation of — Victim stating name of particular person as his assailant to the doctor who examined him — Subsequently giving another person's name as his assailant — Not knowing him before occurrence — Held that statement made by victim to Doctor being first in point of time must be preferred to his subsequent statement. Criminal Appeal No. 1639 of 1972, D/- 1-9-1975 (Bom), Reversed. (Penal Code (1860), Ss. 323, 326). (Para 17)

Cases Referred : Chronological Paras
AIR 1980 SC 1382 : (1980) 3 SCR 500 : 1980
Cri LJ 965 25
AIR 1974 SC 117 : (1974) 2 SCR 124 15
AIR 1944 FC 38 : (1944) 6 FCR 223 26

Mr. Ram Jethmalani, Sr. Advocate, Mrs. S. Bhandare, A. N. Karkhanis, T. Sridharan and C. K. Sucharita, Advocates with him, for Appellant; Mr. J. L. Nain, Sr. Advocate, M/s. H. R. Khanna and M. N. Shroff, Advocates with him, for Respondent.

FAZAL ALI, J. :— This appeal by special leave is directed against a judgment dated 29th Aug., 1975/1st Sept., 1975, of the Bombay High Court convicting the appellant, Mohanlal Gangaram Gehani (hereinafter re-

ferred to as A-1) under Sec. 326, I. P. C. and sentencing him to rigorous imprisonment for three years. He was also convicted under Section 323 read with S. 34, I. P. C. but no separate sentence was awarded.

2. The trial Court had convicted A-1 under S. 326/34, I. P. C. which was altered by the High Court to one under Section 326 simpliciter. The details of the prosecution case are to be found in the judgment of the High Court and it is not necessary for us to repeat the same. We shall, however, give a brief résumé of the important facts which are germane for deciding the short points raised by Mr. Jethmalani, counsel for the appellant.

3. The occurrence out of which the present appeal arises appears to have taken place on April 2, 1972 at about 11/11.30 p. m. According to the prosecution while Ishrat Malik Faqih (hereinafter referred to as 'Ishrat') was returning from a movie in Paradise Cinema, situated at Lady Jamshedji Road, Mahim at about 12.15 a. m. he met Salim, a friend of his, along with Sheikh Abdul Kalim alias Pappu (P. W. 4). He also saw another person standing with Salim and Pappu. All of them started talking to one another when suddenly they saw a black Fiat car coming from Lady Jamshedji Road and taking a turn to Chotani Road. The car stopped near the place where the aforesaid persons were talking and A-1, A-2 (Shashi) and A-3 (Kumar) emerged from the car. According to the informant, Ishrat, all the three accused were known to him before. These persons were dead drunk and asked Ishrat and party as to who amongst them was their leader. Some sort of an altercation took place in the course of which A-2 caught hold of the shirt of Shanker Shetty and assaulted him with fists. He was joined by A-3 and the altercation culminated in a murderous assault said to have been made by A-1 who took out a dagger and stabbed Shetty on the right side of the stomach below the chest. Shetty fell down. Thereafter A-1 ran back to his car and sped away leaving behind A-3 who could not get into the car. Ishrat immediately proceeded to the Mahim police station and lodged an F. I. R. with Sub-Inspector Sawant (P. W. 7) at 00.50 hrs. on April 3, 1972. According to the prosecution, the informant had rushed to the police station and lodged the FIR within an hour of the occurrence.

4. Subsequently, it appears that wireless police van which passed through the place of occurrence having found Shetty lying injured picked him up and removed him to K. E. M. Hospital. Dr. Heena (P. W. 11)

admitted Shetty and made a note of the injuries received by him in the note-sheet of the hospital register and also mentioned the fact that the injured had named his assailant as one Tiny. It was further alleged by the prosecution that Sawant after recording the FIR rushed to the hospital and contacted Shetty and recorded his statement at 1.45 a. m.

5. After the usual investigation, charge-sheet was submitted against A-1 to A-3 who were ultimately tried and convicted for an offence under S. 326 read with S. 34, I. P. C. and A-1 was sentenced as mentioned hereinbefore. A-2 and A-3 each was sentenced to suffer rigorous imprisonment for two years. A-1 pleaded innocence and his defence was that he was falsely implicated due to enmity because Ishrat and his friends were carrying on Matka business and the appellant being an informer of the Customs Department had made certain reports against the prosecution witnesses particularly Ishrat who was a smuggler. We need not refer to the defence of A-2 or A-3 as they have been acquitted by the High Court.

6. The appellant raised several points before the High Court which after hearing the parties confirmed his conviction but reduced his sentence to rigorous imprisonment for three years.

7. In support of the appeal Mr. Jethmalani has argued three important points relating to certain circumstances which completely demolish the entire prosecution case against the appellant. In the first place, it was argued that the FIR was not at all lodged at 00.50 hrs. as alleged by the prosecution but much later. Secondly, Shetty did not know the appellant before the occurrence and thirdly, Mr. Jethmalani argued, that his version that the name of the appellant was disclosed to him by Salim should not be accepted.

8. Another important circumstance to which our attention was drawn and which has greatly impressed us is that the hospital register (Ext. 22) shows that when Shetty was taken to the hospital and produced before Dr. Heena (P. W. 11) he gave the name of his assailant as one Tiny or Tony. The evidence further shows that Tiny or Tony was undoubtedly a known person who was living in a locality near the place of occurrence and was not a fictitious red herring as the prosecution would have us believe. According to Ext. 22 Shetty made a statement to Dr. Heena at 1.15 a. m. on April 3, 1972. Dr. Heena, who appeared as P. W. 11, fully supported the contents of Ext. 22.

9. It is manifest that once the statement of P. W. 11 is accepted then the entire prosecution case against the appellant falls. The High Court realising the importance of this document and the evidence of P. W. 11 seems to have explained it away on three main grounds. In the first place, the High Court laid great emphasis on the fact that where Dr. Heena had mentioned the name of Tiny, there was no particular column where the name of assailant could be given. We have examined the original document ourselves and we find that the entire part of the register where the statement has been recorded by P. W. 11 is described as Registrar's note which comprehends everything including the nature of injuries of the injured, any statement made by him or similar other matters. We are, therefore, unable to agree with the High Court that there was no particular column under which the name of the assailant could be mentioned. Moreover, there is absolutely no evidence on the record to show that P. W. 11 was in any way friendly with the appellant or had any animus against Shetty which might impel her to make false entries in order to oblige the appellant. P. W. 11 was an absolutely disinterested and independent witness. After going through her evidence we find no reason why her evidence should not be accepted in toto.

10. The High Court further observed that from the hospital register it appears that the word 'Tony' was first written, then crossed and changed into 'Tiny'. This may be a mistake in the pronunciation of the name and much significance cannot be attached to this circumstance because P. W. 11 had initialled the change and it is not a case of forgery at all. Moreover, P. W. 11 was examined as a prosecution witness and if the learned prosecutor had thought that she (P. W. 11) had given false evidence to help the appellant, he could have declared her hostile and sought the permission of the Court to cross-examine her but no such course was adopted. Hence, the mere change of the word 'Tony' to 'Tiny' can be explained on the basis of a bona fide mistake. There is no erasure. Both names are decipherable. What may have happened was that the injured may have pronounced Tiny in such a way that P. W. 11 thought it was Tony but on further clarification the injured must have said that it was Tiny.

11. P. W. 11 in her evidence has clearly stated that she had examined the patient and had given the history of the assault with knife by a person called Tiny and that the patient was fully conscious. There is

nothing in her evidence to show that her statement could be untrue.

12. The High Court then sought to exclude the evidence of P. W. 11 as being inadmissible as the provisions of S. 145 of the Evidence Act were not complied with. It was suggested that Shetty had mentioned the name of the appellant in his statement in Court but the statement of P. W. 11 shows that he had named Tiny as his assailant and, therefore, Dr. Heena (P. W. 11) should have been cross-examined on this point to explain the contradiction. With great respect, the High Court has erred on this point and has misconstrued the provisions of Section 145 of the Evidence Act which may be extracted thus:

"145. Cross-examination as to previous statements in writing.

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved, but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

13. It is obvious from a perusal of Section 145 that it applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under Section 145. In other words, where the statement made by a person or witness is contradicted not by his own statement but by the statement of another prosecution witness, the question of the application of S. 145 does not arise. To illustrate, we might give an instance — suppose A, a prosecution witness, makes a particular statement regarding the part played by an accused but another witness B makes a statement which is inconsistent with the statement made by A, in such a case Section 145 of the Evidence Act is not at all attracted. Indeed, if the interpretation placed by the High Court is accepted, then it will be extremely difficult for an accused or a party to rely on the inter se contradiction of various witnesses and every time when the contradiction is made, the previous witness would have to be recalled for the purpose of contradiction. This was neither the purport nor the object of S. 145 of the Evidence Act.

14. For instance, in the instant case, if P. W. 11 had been examined under S. 164

of the Criminal P. C. or before a committing Court and made a particular statement which was contradictory to a statement made in the Sessions Court, then S. 145 would have applied if the accused wanted to rely on the contradiction. Such, however, is not the position because the evidence of P. W. 11 is not only consistent throughout but the earlier statement recorded by her can be taken to corroborate her. There was no question of contradicting the statement of P. W. 11 by her previous or subsequent statement. On the other hand, Dr. Heena was a prosecution witness whose statement that Shetty had named Tiny on the earliest occasion, was an admission by a prosecution witness which threw considerable doubt on the complicity of the appellant in the occurrence. If Shetty stated in his evidence that he named A-1 (Mohanlal) then that would be a statement which was contradictory to that of P. W. 11 and the question will be which of the two statements should be preferred. If Dr. Heena had made two inconsistent statements then only Section 145 would have applied.

15. In *Bishwanath Prasad v. Dwarka Prasad*, (1974) 2 SCR 124: (AIR 1974 SC 117), while dwelling upon a distinction between an admission and a statement to which Section 145 would apply, this Court observed as follows (at p. 119 of AIR):

"In the former case an admission by a party is substantive evidence if it fulfills the requirements of S. 21 of the Evidence Act, in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore*: in the latter case the Court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by S. 145 of the Evidence Act."

16. The statement made by P. W. 11 was, therefore, an admission of a prosecution witness and if it was inconsistent with the statement made by another prosecution witness namely Shetty, there was no question of the application of S. 145 of the Evidence Act which did not apply to such a case in terms.

17. Thus, the reason given by the High Court for distrusting the evidence of Dr. Heena is wholly unsustainable. Moreover, the statement of the injured to Dr. Heena being the first statement in point of time must be preferred to any subsequent statement that Shetty may have made. In fact, the admitted position is that Shetty did not know

the appellant before the occurrence nor did he know his name which was disclosed to him by one Salim. Therefore, Salim who is now dead, being the source of information of Shetty would be of doubtful admissibility as it is not covered by S. 32 of the Evidence Act. And, once we believe the evidence of P. W. 11, as we must, then the entire bottom out of the prosecution case is knocked out.

18. Apart from this, there is another circumstance which renders the testimony of Shetty (P. W. 5) valueless. He admits in para 10 of his evidence (page 35 of the paperbook) that he had not seen the accused before the date of the incident, that he did not know him at all, and that he came to know the name of the accused on the date of the incident and that it was Salim who had given him the name of the accused while he was being taken to the hospital. The fact that Salim disclosed the name of the appellant to Shetty is falsified by the fact that he did not name the appellant to Dr. Heena when he reached the hospital but named one Tiny. It is also relevant to note that Tiny Advani is not an unknown figure but is a living person as would appear from the evidence of P. W. 3, Sheikh, where he says that he knew Tiny Advani who is also known to Ishrat, Salim and Pappu and they are on greeting terms.

19. Another important circumstance which discredits the testimony of P. W. 5 (Shetty) is that he admits that although he did not know the accused from before the occurrence yet the accused was shown to him by the police at the police station. The relevant statement of P. W. 5 may be extracted thus: "I had seen the accused before coming to the Court and after the incident, I had seen the accused ten days after I was discharged from the hospital. I was shown these accused by the police at the police station."

20. Thus, as Shetty did not know the appellant before the occurrence and no Test Identification parade was held to test his power of identification and he was also shown by the police before he identified the appellant in Court, his evidence becomes absolutely valueless on the question of identification. On this ground alone, the appellant is entitled to be acquitted. It is rather surprising that this important circumstance escaped the attention of the High Court while it laid very great stress in criticising the evidence of Dr. Heena when her evidence was true and straightforward.

21. For these reasons, therefore, we are unable to place any reliance on the evidence of Shetty so far as the identification of the appellant is concerned.

22. The other witness who knew the accused is P. W. 1 (Ishrat) who is said to have lodged the FIR at Mahim police station at 00.50 a.m. on 3-4-1972. There is clear intrinsic evidence in the case to show that the FIR was ante-timed and could not have been lodged at 12.50 a.m. P. W. 7, Sawant has clearly admitted in his evidence at page 41 of the Paperbook that the station diary entry which has to contain the contents of the FIR does not mention that Ishrat had visited the police station and lodged the complaint. The witness further admits that the station diary entry does not also mention anywhere that he (P. W. 7) had left the police station for K. E. M. Hospital accompanied by P. W. 1, Ishrat. He also admits that he knew the accused before the incident.

23. The witness further admits that although he had come to know the name of the assailant at 00.50 a.m. yet he did not take any step to arrest or cause the arrest of any one of the accused. He has not given any explanation for this unusual conduct. It is extremely doubtful if P. W. 1 had actually named the appellant, Inspector Sawant would not have arrested him immediately after the FIR was lodged or, at any rate, after he returned from the hospital. The evidence, however, shows that A-1 was arrested on 5-4-72, that is to say, two days after the occurrence. No explanation for this unusual phenomenon has been given by the prosecution.

24. For these reasons, therefore, the statement of P. W. 1 that he lodged the FIR at 00.50 a.m. on 3-4-72 and disclosed the name of the appellant becomes absolutely doubtful. If we reject this part of the evidence of P. W. 1, then his evidence on the question of complicity of the appellant in the crime also becomes extremely doubtful.

25. The only other evidence against the appellant is that of P. Ws. 3 and 4. So far as P. W. 3 is concerned his evidence also suffers from the same infirmity as that of Shetty. P. W. 3 (Sheikh) admits at page 22 of the Paperbook that he had not seen the accused or any of the three accused before the date of the incident and that he had seen all the three for the first time at the time of the incident. He further admits that the names of the accused were given to him by the police. In these circumstances, therefore, if the appellant was not known to him before the incident and was identified for the first time in the Court, in the absence of a test identification parade the evidence of P. W. 3 was valueless and could not be relied upon as held by this Court in *V. C. Shukla*

v. State (Delhi Administration), (1980) 3 SCR 500 : (AIR 1980 SC 1382), where this Court made the following observations (at p. 1396 of AIR):

"Moreover, the identification of Tripathi by the witness for the first time in the Court without being tested by a prior test identification parade was valueless."

26. Same view was taken in a Federal Court decision in *Sahdeo Gosain v. The King Emperor*, (1944) 6 FCR 223 : (AIR 1944 FC 38).

27. This, therefore, disposes of the evidence of P. W. 3. As regards the evidence of P. W. 4, the High Court itself found at page 129 of the Paperbook that the learned Additional Sessions Judge had disbelieved P. W. 4, Sheikh alias Pappu. Therefore, the evidence of P. W. 4 also goes out of consideration.

28. The position, therefore, is that there is absolutely no legal evidence on the basis of which the appellant could be convicted.

29. For the reasons given above, we are satisfied that the prosecution has not been able to prove its case against the appellant beyond reasonable doubt. The appeal is accordingly allowed and the appellant is acquitted of the charges framed against him. He will now be discharged from his bail bonds and need not surrender.

Appeal allowed.

AIR 1982 SUPREME COURT 843

(From : AIR 1982 All 76)

Y. V. CHANDRACHUD, C. J.,
O. CHINNAPPA REDDY AND
A. P. SEN, JJ.

Civil Appeals Nos. 228 and 229 of 1982 and Writ Petn. Nos. 8142 and 778 to 785 of 1982, D/- 21-1-1982.

Sarvesh Narain Mishra, Appellant v. The Vice-Chancellor, Aligarh Muslim University, Aligarh, Respondent.

And

Peerzada Ahmad Saleem Khan, Appellant v. The Vice-Chancellor, Aligarh Muslim University, Aligarh, Respondent.

And

Abbas Zamir, Petitioner v. The Vice-Chancellor, Aligarh Muslim University, Aligarh and others, Respondents.

And

Hafiz M. Ilyas and others, Petitioners v. The Vice-Chancellor, Aligarh Muslim University, Aligarh, Respondent.

Constitution of India, Art. 226 — Education — Student of B. Sc., Eng. 1st year — In-

BZ/CZ/A827/82/PGS/DVT-H

disciplined act of student — Authorities debaring him for five years — Supreme Court by its order permitted him to appear for fourth year Engineering examination as also for examinations for previous semesters of First three years subject to condition for approaching Supreme Court if necessary after result of examinations. (Education — Student Discipline). AIR 1982 All 76, Affirmed.

(Paras 4, 6)

ORDER:— The learned Attorney General appearing on behalf of the Vice-Chancellor, Aligarh Muslim University, says that the University has no objection to allowing the following eight students to take their examination for the final year as ex-students. The examination is due to be held in the normal course in about June 1982.

1. Irfanullah Khan, 2. Abbas Zameer, 3. Mohd. Azam Khan, 4. Mahboob Ahmad, 5. Laiq Ali, 6. Mohd. Furgan, 7. Manzar Alam Siddiqui, 8. Mujeebullah Khan.

The examination will be held for these eight students outside the University Campus at a convenient location near about Aligarh. The University agrees to provide the necessary facilities in order to enable the students to appear for the examination.

2. Shri Shanti Bhushan who appears on behalf of A. Z. Amani and Hafiz M. Ilyas, has given to this Court an undertaking on their behalf that they will not organize or participate in any kind of agitational activity, inside or outside the University Campus. On this undertaking, the learned Attorney General agrees on behalf of the University that these two students will be permitted to avail themselves of the necessary facilities at the Campus, including the use of the library and the laboratory, until the end of December, 1982. We are informed that A. Z. Amani is in receipt of a scholarship from the Government of India. If that be so, we hope that the Government will continue the scholarship for the remaining period in order to enable him to complete his Ph. D. thesis.

3. Insofar as the other students who are involved in these proceedings are concerned, namely, S. Ahmad Ali, Imtiaz Ahmad, M. A. A. Fatur and Mansoor Ahmed, the learned Attorney General agrees that they will be permitted to take the examinations for which they are due to appear. The Attorney General has assured us that on the conclusion of their examination, the aforesaid students will be given transfer certificates in order to enable them to obtain admission to any other university. They shall have no right and will not be allowed to continue their studies in the Aligarh Muslim University.

4. As regards Sarvesh Narain Mishra and Peerzada Salamat Khan, they will be permitted to appear for the Fourth Year Engineering Examination as also for the examinations for the previous semesters of the first three years. In respect of these two students, we will give further directions, if necessary, in case they pass the Fourth Year Examination and the examinations for the earlier semesters, by September 1982.

5. The following students, namely, A. Z. Amani, Hafiz M. Ilyas, S. Ahmad Ali, Imtiaz Ahmad, Sarvesh Narain Mishra, Peerzada Salamat Khan, M. A. A. Fatur and Mansoor Ahmad, will take the examinations as aforesaid in a place appointed for that purpose by the University, which, as far as possible, will be in the vicinity of the University Campus but not in the Campus itself.

6. The Writ Petitions and Special Leave Petitions will stand disposed of in accordance with this order except that Sarvesh Narain Mishra and Peerzada Salamat Khan may, if necessary, approach this Court after the result of the Fourth year examination and of the previous semester examinations is declared.

7. All the sixteen students shall leave the University Campus forthwith and shall have no access to it except to the extent indicated in this Order.

Order accordingly.

AIR 1982 SUPREME COURT 844

(From : Madhya Pradesh)

V. D. TULZAPURKAR AND

A. N. SEN, JJ.

Civil Appeals Nos. 1048 of 1970 and 845 and 1047 to 1049 of 1971, D/- 23-2-1982.

Municipal Council, Damoh, Appellant v. M/s. Vraj Lal Manilal and Co. and others, Respondents

And

Municipal Council, Damoh, Appellant v. Firm Prabhudas Kishoredas, Respondent.

(A) Damoh Municipal Council Octroi Rules, R. 27 (b) and Proviso thereto — Firm importing bidi leaves and tobacco within municipal limits and exporting finished product, i. e. bidis — It is entitled to refund of octroi duty paid on raw materials — Proviso to Cl. (b) not attracted — Manufacture — Meaning of. (Words and Phrases — Manufacture — Meaning of).

When raw materials like tobacco etc. were imported by the firms within the limits of Damoh, on which they paid octroi-duty and when they manufactured bidis out of such

raw materials and exported the same they were entitled to get refund to the extent of quantum mentioned in Cl. (b) of R. 27. In such a case, it could not be said that refund is available under Cl. (b) in cases where even after undergoing the manufacturing process the imported article or commodity retains its essential character as such article or commodity and the same is exported outside the Municipal limits. In the first place, though it is true that octroi by its nature is a levy on import within the municipal limits of articles or goods meant for use, consumption or sale therein that does not prevent a Municipal Council from framing a rule either granting exemption from that duty or refund of such duty after its collection in cases of certain type of use or consumption of the imported articles or goods for certain purposes. Secondly, a Municipal Council may do so for achieving certain objectives like increasing industrialisation by encouraging manufacturing activities within its limits. Clearly the avowed object of R. 27 (b) appears to be of this nature for in terms it provides for refund of octroi paid on imported raw materials when such raw material is actually used within the municipal limits for manufacturing the exported article and it is in the light of this objective that the said rule will have to be interpreted. Further Cl. (b) itself speaks of the raw materials being "used in the manufacture" so that use or consumption which a manufacturing process entails was present to the mind of the framers of the Rule when they provided for the refund on the export of finished goods manufactured within the municipal limits. Moreover, the well-settled connotation of the concept of 'manufacture' and 'manufacturing process' is that as a result of undergoing the process a distinct commercial commodity different from the raw material comes into existence.

(Para 5)

Further, the proviso to Cl. (b) by its very terms is not attracted to a case of manufactured goods falling under Cl. (b). If Cl. (b) confers the benefit of refund of octroi duty on the export of goods manufactured out of raw material then it cannot be said that the exporter will be able to satisfy the Municipal Committee that the exported goods are the same or identical on which duty has been paid, for admittedly the exported goods are the finished product and no import duty is paid thereon by the exporter. The proviso is applicable to cases where there is an export of the imported goods themselves without subjecting them to any manufacturing process and it is in such cases that the exporter has to satisfy the Committee that the

same goods on which import duty has been paid are being exported which would entitle the exporter to claim a refund; in other words it is not a proviso to Cl. (b) at all but will be applicable to the other parts of the Rule. (Para 5)

(B) Constitution of India, Art. 133 — Appeal under — New plea as to limitation — Permissibility.

Where the appellant Municipal Council acquiesced in the trial Court's finding on the question of limitation, namely, the cause of action in favour of the respondent-firm seeking refund arose on a particular date and while applying for a certificate from the High Court for appeal to Supreme Court the appellant-Council sought the certificate on points touching the merits of the claim and not on the question of limitation and further in the Memo of Appeal filed in Supreme Court the grounds did not include the point of limitation and the point raised being not a pure question of law as it required investigation into facts to ascertain the exact date or dates of accrual of the cause of action, it would not be fair or just to permit the appellant-Council to raise the plea of limitation in the Supreme Court, especially when the result of allowing such plea might be to defeat the just claim of the respondent-firm. (Para 9)

Cases Referred: Chronological Paras
1957 MPLJ 278 2, 3

TULZAPURKAR, J.:— The aforesaid five appeals, the first two on a certificate granted by the Madhya Pradesh High Court and the last three by special leave granted by this Court, raise a common question in regard to refund of octroi duty collected by the appellant-Council from the respondent firms and are, therefore, disposed of by common judgment. The principal question raised in these appeals relates to the proper construction of R. 27 of the Octroi Rules of Damoh Municipal Council (the appellant) framed in exercise of powers conferred by Ss. 71, 76 and 85 of the Central Provinces and Berar Municipalities Act, 1922 — which Rules were continued in operation even after the coming into force of the new Act, the Madhya Pradesh Municipalities Act, 1961 and the question arises in these circumstances:

2. The two respondent firms in the two sets of appeals (M/s. Vraj Lal Manilal and Co. and M/s. Prabhudas Kishoredas) carry on business of manufacturing and selling bidis in Damoh and other cities in Madhya Pradesh and for that purpose they import tobacco and other raw material into the municipal limits of Damoh city and after manufacturing bidis out of such imported

raw material they export their finished product (bidis) outside Damoh municipal limits. The respondents' case was that at the time of import of tobacco and other raw material into the municipal limits of Damoh they paid octroi duty as per Octroi Rules of the appellant Council and after utilising the said raw material for preparing bidis when they exported the manufactured bidis outside the limits of the appellant Council, they were entitled to a refund of the octroi duty paid by them on the raw material so utilized under R. 27 of the Octroi Rules but in spite of refund vouchers having been issued by the concerned official of the appellant council and in spite of having complied with the Rules and procedure prescribed in that behalf, the appellant Council refused to pay the amounts of the refund vouchers to them. In Civil Appeal No. 1048 of 1970 since the claim for refund to the sum of Rs. 33,409.52 based on 1866 refund vouchers relating to the period from 4-12-1952 to 12-12-1959 arose under the old Act, namely, Central Provinces and Berar Municipalities Act, 1922, the respondent firm, M/s. Vraj Lal Mani Lal & Co. filed an appeal before the Sub-Divisional Officer, Damoh under S. 83 (1-A) of the Act against the refusal of the appellant-Council to make the refund. Apart from raising technical pleas such as non-maintainability of the appeal, bar of limitation etc. the appellant Council resisted the claim on merits on the two grounds: (a) that since the raw material had been used or consumed in the manufacture of bidis and since the exported goods (finished products) were not the same or identical as the imported raw material on which the octroi duty had been paid no refund under R. 27 (b) was available to the respondent firm and (b) that the respondent firm had failed to prove to the satisfaction of the Municipal Council as required by the proviso to R. 27 (b) that the same or identical goods were being exported on which import octroi had been paid by them. The Sub Divisional Officer by his order dated 30th June, 1961 negatived the technical pleas of the appellant council, which order was finally confirmed by the High Court on 25th February, 1963. The Sub Divisional Officer also overruled the defences raised by the appellant Council on merits and by his final order dated 4th Apr., 1964 directed that the amount of 1866 refund, vouchers aggregating to Rs. 33,409.52 minus the amount recovered under 19 vouchers should be refunded to the respondent firm. The appellant Council went in revision to the State Government but the same was dismissed on 28th Sept., 1968. The Sub Divisional Officer's decision as well as the State

Government's order in revision were challenged by the appellant Council before the High Court by a writ petition (Miscellaneous Petition No. 96 of 1969) but the writ petition was dismissed by the High Court summarily and in doing so the High Court followed its earlier judgment in the case of Municipal Committee, Burhanpur v. Allauddin Aolia Saheb and Co. reported in 1957 MPLJ 278, where in regard to a similar refund rule obtaining in Burhanpur Municipal Committee the Court had taken the view that "Octroi duty paid on imported tendu leaves and tobacco is refundable under the provisions of R. 25 (b) of the Rules framed under S. 85 of the Act when bidis manufactured within the limits of the Municipal Committee are exported." In the remaining four matters, being Civil Appeals 845, 1047, 1048 and 1049 of 1971 the claims for refund made by the respondents in similar circumstances were required to be prosecuted by filing civil suits against the appellant Council, inasmuch as when action was contemplated by the respondents, the new Act, namely, Madhya Pradesh Municipalities Act, 1961 had come into force and no remedy by way of any appeal to Sub Divisional Officer was available. In each of these suits the appellant Council resisted the claims for refund on merits on the same grounds mentioned above. The respondents failed in their suits in the two lower Courts but succeeded in second appeals in the High Court.

3. In these appeals the self-same two contentions were urged before us on behalf of the appellant-council. First, since Octroi duty is a levy on imported goods meant for use, consumption and sale thereof within the Municipal Limits and since the raw material (tobacco) was used or consumed in the manufacture of bidis the same or identical goods were not exported by the respondent firms and so no refund under R. 27 (b) was available to the respondent firms. Secondly no attempt was made by the respondent firms to satisfy the Municipal Committee that the same or identical goods had been exported as required by the proviso to R. 27 (b). For both these reasons it was urged that the respondent firms' claim to refund of octroi should have been rejected. Counsel urged that these points did not arise and were not determined in Allaudin Saheb's case (supra).

4. The admitted facts in these appeals are that the respondent firms, who carry on the business of manufacturing and selling bidis imported or brought into the municipal limits of Damoh during the relevant period tobacco and other raw material, that they paid the

equisite octroi duty on such raw material on its import at the prescribed rates, that they utilised the said raw material for manufacturing bidis and they exported the finished product (bidis) outside the municipal limits of Damoh and it was at that stage of export of bidis that they claimed under R. 27 (b) a refund of Octroi duty paid by them on the raw material from the appellant Council. The question raised is whether under the said provision they are entitled to the refund of octroi as claimed by them. Rule 27 which deals with refund of octroi runs thus :

"27. Refund of octroi.— On the exportation of dutiable goods outside municipal limits, the exporter shall be entitled to a refund of duty paid on them at the time of their import, provided that,

(a) no refund shall be given, if the amount to be refunded be less than Re. 1 or if the claim be made after the expiry of two months from the date of export, unless the exporter is able to explain satisfactorily the reason for the delay,

(b) the refund on the exported goods which have been manufactured within the municipal committee from imported raw materials liable to octroi, shall not exceed the octroi on the raw materials used in the manufacture, and

Provided that the exporter shall not be entitled to a refund of octroi duty unless he proves to the satisfaction of the committee that the goods brought for export belong to him and are the same on which duty was paid by the importer in whose favour the octroi receipt is produced in support of the claim for refund of duty."

5. In support of their claim for refund the respondents obviously rely upon Cl. (b) of R. 27 under which refund is available on exported goods provided those have been manufactured within the municipal limits from out of the imported raw materials on which octroi has been paid and the clause indicates that the quantum of refund shall not exceed the octroi duty actually paid on such raw materials at the time of their import. Counsel for the appellants, however, contended that in its very nature octroi is a duty levied on import of goods which are meant for use, consumption or sale within the municipal limits and counsel urged that it cannot be disputed that when raw material like tobacco is utilized in the manufacture of bidis such raw material is used or consumed in the process of manufacture and it is such finished product (bidis), a distinct commercial commodity that is being export-

ed by the respondent-firms and, therefore, no refund under Cl. (b) of R. 27 would be available to them. Counsel urged that the word 'manufacture' occurring in the clause must be given a limited meaning, that is to say, only such manufacturing process is contemplated by that clause which does not alter or change the identity of the imported commodity and only in respect of the export of such manufactured goods the refund would be available and not where the imported commodity gets converted into an altogether different commercial article. Counsel also invited our attention to the proviso following Cl. (b) which states, that the exporter shall not be entitled to refund of octroi duty unless he proves to the satisfaction of the committee that the goods brought for export are the same on which duty had been paid by the importer and according to counsel the 'bidis' cannot be said to be the same goods on which the respondent-firms could be said to have paid the duty. In other words refund is available under Cl. (b) in cases where even after undergoing the manufacturing process the imported article or commodity retains its essential character as such article or commodity and the same is exported outside the Municipal limits. It is not possible to accept the aforesaid construction sought to be placed on Cl. (b) of R. 27 of the Octroi Rules by the appellant's counsel for reasons which we shall presently indicate. In the first place, though it is true that octroi by its nature is a levy on import within the municipal limits of articles or goods meant for use, consumption or sale therein that does not prevent a Municipal Council from framing a rule either granting exemption from that duty or refund of such duty after the collection in cases of certain type of use or consumption of the imported articles of goods for certain purposes. Secondly, a Municipal Council may do so for achieving certain objectives like increasing industrialisation by encouraging manufacturing activities within its limits. Clearly the avowed object of R. 27 (b) appears to be of this nature for in terms it provides for refund of octroi paid on imported raw materials when such raw material is actually used within the municipal limits for manufacturing the exported article and it is in the light of this objective that the said rule will have to be interpreted. Looked at from this angle it will be difficult to accept the narrow or limited construction of the word "manufacture" appearing in Cl. (b) as is suggested by Counsel for the appellant and the same could not have been intended by the framers of the rule. Further Cl. (b) itself speaks of the raw materials being "used

in the manufacture" so that use or consumption which a manufacturing process entails was present to the mind of the framers of the Rule when they provided for the refund on the export of finished goods manufactured within the municipal limits. Moreover, the well-settled connotation of the concept of 'manufacture' and 'manufacturing process' is that as a result of undergoing the process a distinct commercial commodity different from the raw material comes into existence; it is difficult to visualise degrees of manufacture as suggested by counsel for the appellant and in any case none could be attributed to the framers of the Rule. It is, therefore, not possible to accept the contention that the expression "manufacture" occurring in Cl. (b) of Rule 27 should be given a limited meaning as is suggested. Turning to the proviso on which strong reliance was placed by the counsel for the appellant, it seems to us that the proviso by its very terms is not attracted to a case of manufactured goods falling under Cl. (b). If Cl. (b) confers the benefit of refund of octroi duty on the export of goods manufactured out of raw material then it is difficult to appreciate how the exporter will be able to satisfy the Municipal Committee that the exported goods are the same or identical on which duty has been paid, for admittedly the exported goods are the finished product and no import duty is paid thereon by the exporter. The proviso in our view is applicable to cases where there is an export of the imported goods themselves without subjecting them to any manufacturing process and it is in such cases that the exporter has to satisfy the Committee that the same goods on which import duty has been paid are being exported which would entitle the exporter to claim a refund; in other words it is not a proviso to Cl. (b) at all but will be applicable to the other parts of the Rule. It is thus clear to us that when raw materials like tobacco etc. were imported by the respondent-firms within the limits of Damoh, on which they paid octroi-duty and when they manufactured bidis out of such raw-materials and exported the same they were entitled to get refund to the extent of quantum mentioned in Cl. (b) of R. 27.

6. In view of our aforesaid conclusion that the proviso is not applicable to cases of manufactured goods falling under Cl. (b) of the rule the second contention urged by the Counsel for the appellant that the respondent-firms were not entitled to refund as they failed to satisfy the Municipal Committee that the same or identical goods had been exported does not survive. That apart, the

High Court has on a conspectus of the Octroi Rules come to the conclusion and in our view rightly, that the Octroi Superintendent is responsible for the proper administration of the Octroi Department in all its branches which necessarily includes that it is he who should be satisfied as to the identity of the goods that are to be exported or that are utilized in the manufacture of goods which are to be exported.

7. The last contention sought to be urged on behalf of the appellant-Council before us related to the bar of limitation to the respondents' claim arising under S. 319 (2) of the Madhya Pradesh Municipalities Act, 1961 and counsel fairly stated that this arises only in Civil Appeal No. 845 of 1971. The facts in this behalf are these: Civil Suit No. 1-B of 1964, out of which the aforesaid appeal arises, was filed by the respondent-firm M/s. Vraj Lal Manilal & Co. on 7-5-1964 claiming refund in respect of goods exported during the years 1959-1964; in other words, part of the claim from 1959 to 31st January, 1962 arose under the 1922 Act while the claim pertaining to the period from 1-2-1962 to April 1964 arose under the 1961 Act, which came into force from 1-2-1962. The trial Court as well as the High Court took the view that non-payment of refund under the 1922 Act could be agitated only by way of an appeal under S. 83 and other remedies were barred under S. 84 of the Act and, therefore, that part of the respondent's claim was dismissed as being not tenable but both the Courts held that non-payment of refund after 1-2-1962 could be agitated by a suit and the same was tenable. On the question of limitation the trial Court held that that part of the claim was not barred but since it had negatived the respondent's claim for refund on merits it dismissed the respondent's suit entirely but the High Court, which reversed the trial Court's view on merits allowed the respondent's claim in respect of refund vouchers which had been certified and presented after 1-2-1962. Since, however, it was not possible for it to sort out the refund vouchers which had been certified the High Court by its judgment and decree dated 15-12-1969 remanded the matter to the trial Court for determining the amount payable to the respondent-firm. Upon remand the trial Court on the basis of statements made by the parties passed a decree in respondent's favour for Rs. 21,023.53 with interest thereon @ 4% and this decree was drawn up on 23-4-1970.

8. Section 319 (2) of the 1961 Act runs thus:

"Every such suit shall be dismissed unless it is instituted within 8 months from the date of the accrual of the alleged cause of action." Relying upon this provision counsel for the appellant urged that since the suit had been filed on 7-5-1964 the respondent's claim for refund during 8 months prior to 7-5-1964 would be within limitation but the rest of the claim from 1-2-1962 to 7-9-1963 would be barred by limitation and to that extent the decree in favour of the respondent-firm deserves to be modified.

9. We are not inclined to entertain this contention sought to be urged by counsel for the appellant before us for more than one reason. It is true that this bar of limitation under S. 319 (2) was pleaded by the appellant counsel in its written statement and an issue thereon was also raised at the trial but the trial Court held that the claim arising under the new Act after 1-2-1962 was not barred by limitation because cause of action arose on 24-9-1963 when there was refusal to pay or accede to the notice of demand but when the matter was carried in appeal to the High Court by the respondent firm against the dismissal of their claim on merits and the High Court reversed the trial Court's view on merits and held that the plaintiff's claim for the period subsequent to 1-2-1962 was liable to be decreed, this point of limitation arising under S. 319 (2) was neither raised nor pressed before the High Court. No contention was raised that the refusal to pay on 24-9-1963 did not give rise to the cause of action but that it arose on dates when goods were exported and refund vouchers were presented or certified. Had it been pressed the High Court would have, while remanding the matter given appropriate directions to the trial Court in that behalf. This shows that the appellant council acquiesced in the trial Court's finding on the question of limitation, namely, the cause of action arose on 24-9-1963. Secondly, while applying for a certificate from the High Court for appeal to this Court the appellant-Council sought the certificate on points touching the merits of the claim and not on the question of limitation. Further in the Memo of Appeal filed in this Court the grounds do not include the point of limitation. Lastly, the point raised cannot be said to be a pure question of law as it will require investigation into facts to ascertain the exact date or dates of accrual of the cause of action. When on the point of limitation the appellant-Council had at one stage acquiesced in the trial Court's finding and did not raise the question in appeal

before the High Court we do not think it would be fair or just to permit the appellant-Council to raise the plea of limitation in this Court, especially when the result of allowing such plea might be to defeat the just claim of the respondent-firm.

10. In the result the appeals are dismissed and each party will bear its own costs.

Appeals dismissed.

AIR 1982 SUPREME COURT 849

Y. V. CHANDRACHUD, C. J., D. A. DESAI AND AMARENDRA NATH SEN, JJ.*

Writ Petn. No. 7453 of 1981, D/- 12-2-1982.

Harbans Singh, Petitioner v. State of U. P. and others, Respondents.

Constitution of India, Arts. 32 and 72 — Penal Code (1860), Ss. 53 and 302 — Multiple murder case — Accused persons convicted and sentenced to death by common judgment — Death penalty commuted into imprisonment for life of one co-accused — Other co-accused is also entitled to commutation — Duty of prison authorities before execution of death sentence stated. (Criminal P. C. (1974), Ss. 368 and 434).

The petitioner and two other accused J and K were convicted in a multiple murder case and sentenced to death by a common judgment. J filed special leave petition to Supreme Court but was dismissed. K filed special leave petition and obtained leave on question of sentence. Ultimately his death sentence was commuted to imprisonment for life. The petitioner's special leave petition was dismissed by Supreme Court and his review petition was also dismissed. His petition before President was also dismissed. J did not file any review petition and he was executed. The petitioner was also to be executed on the same day but he filed a petition under Art. 32 and obtained stay of execution. It was clear that no distinction at all could be made between the part played by K on the one hand and the petitioner on the other.

Held that since K's death sentence was commuted by the Supreme Court, it would be unjust to confirm the death sentence im-

*The judgments are printed in the order in which they are given in the certified copy.

BZ/CZ/A696/82/MVJ

posed upon the petitioner. That would involve the Court as well as the authorities concerned in the violation of rudimentary norms governing the administration of justice. (Para 6)

In view of the background of the case it would not be wrong if the Supreme Court itself were to commute the sentence of death imposed upon the petitioner to imprisonment for life. But in the interest of comity between the powers of the Supreme Court and the powers of the President of India, it will be more in the fitness of things if the Court were to recommend that the President of India may be so good as to exercise his power under Art. 72 of the Constitution to commute the death sentence imposed upon the petitioner into imprisonment for life. This is so because the President of India had already considered the mercy petition of the petitioner once and had rejected it.

(Para 8)

The Supreme Court directed that prior to the actual execution of any death sentence, the Jail Superintendent should ascertain personally whether the sentence of death imposed upon any of the co-accused of the prisoner who is due to be hanged, has been commuted. If it has been commuted, the Superintendent should apprise the superior authorities of the matter, who, in turn, must take prompt steps for bringing the matter to the notice of the Court concerned.

(Para 9)

A. N. SEN, J. (concurring): It would be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the co-accused is spared.

(Para 18)

Very wide powers have been conferred on the Supreme Court for due and proper administration of justice, apart from the jurisdiction and powers conferred on the Supreme Court under Arts. 32 and 136 of the Constitution. The Supreme Court retains and must retain, an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for prevention of manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice.

(Para 20)

Cases Referred: Chronological Paras
AIR 1980 SC 898: (1980) 2 SCC 634: 1980
Cri LJ 636 14, 15, 16

CHANDRACHUD, C. J. (for himself and on behalf of Desai, J.):— By this writ petition, the petitioner Harbans Singh prays that the death sentence imposed upon him should not be executed in view of the following circumstances.

2. The petitioner and three other persons, Mohinder Singh, Kashmira Singh and Jeeta Singh were involved in the murder of Jindi Singh, Surjeet Singh, Bira Singh and Gurmeet Singh. Mohinder Singh died in an "encounter" with the police. The petitioner and the other two accused, Kashmira Singh and Jeeta Singh, were committed to stand their trial for the murder of the aforesaid four persons. By a judgment dated May 1, 1975 the learned Additional Sessions Judge, Pilibhit, convicted all of them for the murder of Jindi Singh, Surjeet Singh and Bira Singh and sentenced them to death. On Oct. 20, 1975 the High Court of Allahabad affirmed the judgment of the trial Court in Criminal Appeal No. 1080 of 1975.

3. Jeeta Singh filed Special Leave Petition No. 343 of 1976 in this Court which was dismissed on April 15, 1976. Kashmira Singh filed Special Leave Petition No. 104 of 1976 from jail and obtained leave on the question of sentence. By an order dated April 10, 1977 his appeal (No. 172 of 1977) was allowed by a Bench consisting of Bhagwati and Fazal Ali, JJ. who commuted his sentence of death into imprisonment for life. The petitioner, Harbans Singh, filed Special Leave Petition No. 658 of 1978 from jail which was dismissed by Sarkaria and Shinghal, JJ. on Oct. 16, 1978. His Review Petition (No. 140/79) was dismissed by Sarkaria and A. P. Sen, JJ. on May 9, 1980. It appears that though the Registry of this Court had mentioned in its Office Report that Kashmira Singh's death sentence was already commuted, that fact was not brought to the notice of the Court specifically when the petitioner's Special Leave Petition and his Review Petition were dismissed.

4. The petitioner had filed a petition to the President of India for commutation of his sentence, which was dismissed on August 22, 1981. Upon the dismissal of that petition, the execution of the death sentence imposed upon the petitioner was fixed for Oct. 6, 1981 whereupon he filed this petition in this Court.

5. The course which this case has taken makes a sad reading. Three persons were sentenced to death by a common judgment and, regretfully, each one has eventually met with a different fate. One of those three persons, Jeeta Singh, who did not file any Review Petition or Writ Petition in this Court, was

executed on Oct 6, 1981. The other person, Kashmira Singh, succeeded in having his death sentence commuted into life imprisonment. The petitioner was to be executed on the same day on which Jeeta Singh was executed but, fortunately, he filed this Writ Petition on which we passed an order staying the execution of his death sentence.

6. As we have stated earlier, the petitioner and the two other co-accused were sentenced to death by a common judgment. We have seen the facts from which it is clear that no distinction at all can be made between the part played by Kashmira Singh on the one hand and the petitioner on the other. Since Kashmira Singh's death sentence was commuted by this Court, it would be unjust to confirm the death sentence imposed upon the petitioner. That will involve the Court as well as the authorities concerned in the violation of rudimentary norms governing the administration of justice.

7. It is unfortunate that Jeeta Singh could not get the benefit of the commutation of Kashmira Singh's sentence. Were he to approach this Court like the petitioner, the sentence imposed upon him would have been commuted into life imprisonment because no distinction could have been made between his case and that of Kashmira Singh whose sentence was commuted prior to the execution of Jeeta Singh.

8. The question which then arises for consideration is as to the proper course to be adopted in the circumstances of the case. In view of the background of the case, to which we have referred above, it would not be wrong if we were ourselves to commute the sentence of death imposed upon the petitioner to imprisonment for life. But in the interest of comity between the powers of this Court and the powers of the President of India, it will be more in the fitness of things if we were to recommend that the President of India may be so good as to exercise his power under Art. 72 of the Constitution to commute the death sentence imposed upon the petitioner into imprisonment for life. This is so because of President of India has already considered the mercy petition of the petitioner once and has rejected it. We, therefore, recommend that for reasons aforesaid, which could not have been before the President of India when he rejected the mercy petition, he may commute the death sentence imposed upon the petitioner.

9. The fate of Jeeta Singh has a posthumous moral to tell. He cannot profit by the direction which we propose to give because

he is now beyond the processes of human tribunals. But we direct that prior to the actual execution of any death sentence, the Jail Superintendent should ascertain personally whether the sentence of death imposed upon any of the co-accused of the prisoner who is due to be hanged, has been commuted. If it has been commuted, the Superintendent should apprise the superior authorities of the matter, who, in turn, must take prompt steps for bringing the matter to the notice of the Court concerned.

10. Order accordingly. The execution of the death sentence is stayed until the decision of the President to whom a copy of this judgment should be forwarded forthwith.

AMARENDRA NATH SEN, J.:— 11. I have had the benefit of reading the judgment to be delivered by the learned Chief Justice. I agree with the order proposed by him. I, however, wish to make some observations of my own.

12. The relevant facts of the case have been succinctly and briefly stated by the learned Chief Justice in his judgment. Three persons, namely, the petitioner, Kashmira Singh and Jeeta Singh were convicted under S. 302 of the Penal Code and sentenced to death by the Additional Sessions Judge, Pilibhit by his judgment dated 1st May, 1975. The High Court of Allahabad affirmed the judgment of the trial Judge in Criminal Appeal No. 1080 of 1975 and confirmed the death sentence of the said three accused by its judgment dated 20th Oct., 1975. Jeeta Singh filed in this Court a Special Leave Petition (No. 343 of 1976) which was dismissed by this Court on 15th April, 1976. It appears that after the dismissal of the Special Leave Petition of Jeeta Singh by this Court, Jeeta Singh was executed on the 6th of Oct., 1981. Kashmira Singh filed a Special Leave Petition No. 104 of 1976 in this Court and leave was granted by this Court on the question of sentence only. By an order passed by this Court on the 10th April, 1977 this Court allowed the appeal of Kashmira Singh (172/1976) by leave of this Court and this Court commuted his sentence of death to one of imprisonment of life. The other accused Harbans Singh who has filed this petition had also filed a special leave petition No. 658 of 1978. The Special Leave Petition filed by Harbans Singh was dismissed by this Court on 16th Oct., 1978. It appears that Harbans Singh had applied for review of the said order of this Court and the review petition of Harbans Singh (140 of 1979) was also dismissed by this Court on 9th May, 1980. Harbans Singh had thereafter filed a petition

to the President of India under Art. 72 of the Constitution. The petition of Harbans Singh to the President of India was dismissed on the 22nd Aug., 1981. After the dismissal of the petition of Harbans Singh to the President, the date for execution of the death sentence imposed upon him was fixed and Harbans Singh, has thereafter moved this Court and has filed this writ petition praying for commutation of his death sentence and in the alternative praying for a direction to the authorities to allow him the facilities to meet his near and dear once before the sentence of death imposed upon him is actually executed.

13. The unfortunate position appears to be that in respect of the very same offence committed, one of the accused persons, namely, Jeeta Singh has already been hanged; the death sentence imposed on another accused, namely, Kashmira Singh, has been commuted to one of life imprisonment; and Harbans Singh, the present petitioner, is now awaiting death sentence to be executed.

14. When this Court dismissed the special leave petition of Jeeta Singh by its order dated 15th April, 1976, the decision of this Court in the case of Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : (AIR 1980 SC 898), was not there. It appears from the report that Bachan Singh's case in which constitutional validity of the death penalty was upheld by this Court came to be decided by this Court on 9th May, 1980. It further appears that in that case the validity of the death sentence was upheld by four of the learned Judges on the Bench, but Bhagwati, J. dissented from the view expressed by the majority and he was of the opinion that "Section 302 of the I. P. C. in so far as it provides for imposition of death penalty as an alternative to life sentence, is ultra vires and void as being violative of Arts. 14 and 21 of the Constitution, as it does not provide any legislative guidelines as to when life should be extinguished by imposition of death sentence". The majority judgment of the Bench was delivered by Sarkaria, J. on behalf of himself, Chandrachud, C. J. and Gupta and Untwalia, JJ. While upholding the constitutional validity of death sentence, this Court in Bachan Singh's case laid down certain principles on the basis of which capital punishment may normally be imposed, recognising at the same time that the punishment to be inflicted was a matter of judicial discretion to be exercised with due care and caution.

15. When a Bench of this Court dismissed the special leave petition of Jeeta Singh who

has since been executed, this Court must have on a consideration of the facts and circumstances come to the conclusion that death penalty had been rightly imposed on Jeeta Singh and there was no need for interference by this Court with the judgment or the sentence imposed. The special leave petition of Kashmira Singh was entertained by another Bench of this Court. Though arising out of the same offence, this Court must have felt that there were circumstances which did not justify the imposition of the extreme penalty of death and this Court commuted the sentence of death to one of life imprisonment. It may be noticed that at the time the special leave petition of Kashmira Singh was entertained by this Court and his death sentence was commuted by an order of this Court dated 10th April, 1977, the decision in the case of Bachan Singh was not there, though various other decisions which came to be considered in the case of Bachan Singh were there.

16. The Special Leave Petition of the Petitioner was dismissed by this Court on the 16th Dec., 1978. The review petition was also dismissed by a Bench presided over by Sarkaria, J. on the 9th of May, 1980, the very day of which Bachan Singh's case (AIR 1980 SC 898) appears to have been decided.

17. It unfortunately appears that the attention of the Bench which dismissed the special leave petition and also the review petition of the petitioner was not drawn to the fact that special leave petition of the co-accused Kashmira Singh had already been entertained by this Court and the death sentence imposed on Kashmira Singh had been commuted by this Court to one of life imprisonment. The Bench which dismissed the special leave petition and also the review petition of the present petitioner Harbans Singh must have felt on consideration of the facts and circumstances that death penalty had been rightly imposed on Harbans Singh and no interference by this Court was called for. Though the Bench must have come to its decision on a consideration of the facts and circumstances of the case, yet, to my mind, the Bench would not have dismissed the special leave petition and the review petition of Harbans Singh and would have commuted his death sentence to one of life imprisonment, had the Bench been informed that in the identical case, the co-accused of the petitioner had earlier filed a special leave petition which had already been entertained by this Court and the capital punishment of the co-accused Kashmira Singh had been commuted by this Court to one of life im-

prisonment. It may be noticed that the responsibility, involvement and complicity of the petitioner Harbans Singh in the commission of the offence is the same as that of the co-accused Kashmira Singh. As I have earlier noticed, Harbans Singh had filed a petition to the President of India after the dismissal of his petition for Special Leave and his petition for review by this Court for commutation of death sentence and the said petition of Harbans Singh has also been rejected by the President.

18. To my mind, it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the co-accused is spared. The case of the petitioner Harbans Singh appears, indeed, to be unfortunate, as neither in his special leave petition and the review petition in this Court nor in his mercy petition to the President of India, this all important and significant fact that the life sentence imposed on his co-accused in respect of the very same offence has been commuted to one of life imprisonment, has been mentioned. Had this fact been brought to the notice of this Court at the time when the Court dealt with the special leave petition of the petitioner or even his review petition, I have no doubt in my mind that this Court would have commuted his death sentence to one of life imprisonment. For the same offence and for the same kind of involvement, responsibility and complicity, capital punishment on one and life imprisonment on the other would never have been just. I also feel that had the petitioner in his mercy petition to the President of India made any mention of this fact of commutation of death sentence to one of life imprisonment on his co-accused in respect of the very same offence, the President might have been inclined to take a different view on his petition.

19. In the circumstances hereinabove stated, I am of the opinion that it will be manifestly unjust to allow the death sentence imposed on the petitioner to be executed. The question that, however, troubles me is whether this Court retains any power and jurisdiction to entertain and pass any appropriate orders on the question of sentence imposed on the petitioner in view of the fact that not only his special leave petition and review petition have been dismissed by this Court but also the further fact that his peti-

tion for clemency has also been rejected by the President.

20. Very wide powers have been conferred on this Court for due and proper administration of justice apart from the jurisdiction and powers conferred on this Court under Arts. 32 and 136 of the Constitution. I am of the opinion that this Court retains and must retain, an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice. Having regard to the facts and circumstances of this case, I am of the opinion that this is a fit case where this Court should entertain the present petition of Harbans Singh and this Court should interfere.

21. In the facts and circumstances of this case, this Court would have been justified in commuting the death sentence imposed on the petitioner to one of life imprisonment. As, however, the case of the petitioner had earlier been considered by the President of India to whom the petitioner had presented the petition for mercy, I am of the opinion that propriety and decorum require that the matter should be referred back to the President instead of this Court deciding to commute the death sentence of the petitioner to one of life imprisonment.

22. With these observations, I respectfully agree with the order passed by the learned Chief Justice.

Order accordingly.

AIR 1982 SUPREME COURT 853

(From : Allahabad)

S. MURTAZA FAZAL ALI, D. A. DESAI
AND A. VARADARAJAN, JJ.

Criminal Appeal No. 371 of 1980, D/-
5-1-1982.

Smt. Khatoon, Appellant v. Mohd. Yamin,
Respondent.

Criminal P. C. (2 of 1974), S. 125 -- Maintenance — Wife refusing to live with husband because he wrote a letter to her asking her to come back to him otherwise letter would be treated as a divorce — Held that such an unreasonable threat constitute a sufficient reason for the wife to refuse to live with her husband — She was entitled for maintenance. Decision of Allahabad

BZ/CZ/A829/82/LGC

High Court, D/- 19-11-1981, Reversed.

(Para 1)

FAZAL ALI, J.:— This appeal by special leave is directed against the judgment of the Allahabad High Court dated 19th Nov., 1981 setting aside in revision an order granting maintenance to the appellant while maintaining the order of maintenance to her two sons. The High Court set aside the maintenance so far appellant Mst. Khatoun is concerned but maintained the same so far her children were concerned. After going through the judgment of the High Court we are constrained to observe that the High Court seems to have interfered purely on facts although the order passed by the Sessions Judge was quite correct in law. The appellant had applied for grant of maintenance in the Court of District Magistrate under S. 125 of the Code of Criminal Procedure but the Magistrate refused application for maintenance on the ground that the wife refused to live with the husband without sufficient reason. In revision the Sessions Judge accepted the plea of the appellant and held that there was sufficient justification for the wife to refuse to live with the husband because the husband wrote a letter on 18th Dec., 1975 to the appellant asking her to come back to him otherwise the letter would be treated as a divorce. In other words the letter contained a clear threat to the wife to return to the husband on the pain of being divorced. The Sessions Judge rightly held that such an unreasonable threat would constitute sufficient reason for the wife to refuse to live with her husband. The High Court seems to have been under the impression that as the wife after 1975, herself went and lived with the husband and thereafter returned without any reason, she was not entitled to maintenance. There is no reliable evidence to support this conclusion reached by the High Court. It appears from the judgment of the Magistrate that the appellant had gone to the village to attend a marriage and there is nothing to show that she had actually lived with the husband and then returned. Even apart from that the very fact that the letter was couched in most discourteous terms and amounted to a clear threat to divorce the wife and sought to obtain her consent to live with him under duress, this was in our opinion a sufficient reason for the wife for refusing to live with her husband. On this ground alone the order of the Sessions Judge was fully supportable in law and the High Court erred in interfering in revision. For these

reasons, therefore, we are satisfied in the peculiar facts and circumstances of this case that there was sufficient reason for the wife to refuse to live with her husband. We, therefore, allow this appeal, set aside the order of the High Court and restore the order of maintenance passed by Sessions Judge. The appellant will be entitled to costs of Rs. 500/-.

Appeal allowed.

AIR 1982 SUPREME COURT 854

(From : 1979 Lab IC 1399 (Ker) (FB))

D. A. DESAI AND R. B. MISRA, JJ.

Civil Appeal No. 1613 of 1979, D/- 16-2-1982.

L. Robert D'Souza, Appellant v. The Executive Engineer, Southern Railway and another, Respondents.

(A) Industrial Disputes Act (14 of 1947), S. 2 (oo) — "Retrenchment" — Striking off name of workman from roll without anything more — It constitutes retrenchment. 1979 Lab IC 1399 (Ker) (FB), Reversed.

If termination of service of a workman is brought about for any reason whatsoever, it would be retrenchment except if the case falls within any of the excepted categories, i.e. (i) termination by way of punishment inflicted pursuant to disciplinary action; (ii) voluntary retirement of the workman; (iii) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; (iv) or termination of the service on the ground of continued ill-health. Once the case does not fall in any of the excepted categories the termination of service even if it be according to automatic discharge from service under agreement would nonetheless be retrenchment within the meaning of expression in S. 2 (oo). It must as a corollary follow that if the name of the workman is struck off the roll that itself would constitute retrenchment. 1979 Lab IC 1399 (Ker) (FB), Reversed. Case law discussed.

(Para 7)

(B) Industrial Disputes Act (14 of 1947), S. 9-A — Applicability — Termination amounting to retrenchment — Proviso (b) not attracted.

In order to attract S. 9-A the change proposed must be in the conditions of service applicable to the workman in respect of any

BZ/CZ/A695/82/CWM

matters specified in the Fourth Schedule. If the proposed change falls in any of the matters specified in the Fourth Schedule the change can be effected after giving notice in the prescribed manner and waiting for 21 days after giving such notice. When a workman is retrenched it cannot be said that change in his conditions of service is effected. The conditions of service are set out in Fourth Schedule. No item in Fourth Schedule covers the case of retrenchment. In fact, retrenchment is specifically covered by Item 10 of the Third Schedule. Now, if retrenchment which connotes termination of service, cannot constitute change in conditions of service in respect of any item mentioned in Fourth Schedule, S. 9-A would not be attracted. If the change proposed does not cover any matter in Fourth Schedule Section 9-A is not attracted and no notice is necessary. It is, therefore, futile to urge that even if termination of the service of the petitioner constitutes retrenchment it would nevertheless be valid because the notice contemplated by S. 25-F would be dispensed with in view of the provision contained in S. 9-A, Proviso (b). Case law discussed. (Para 9)

(C) Railway Establishment Manual, Rr. 2501 and 2505 — Casual or seasonal labour — When acquires status of temporary railway servant.

If a person belonging to the category of casual labour employed in construction work other than work-charged projects renders six months' continuous service without a break, by the operation of statutory rule the person would be treated as temporary railway servant after the expiry of six months of continuous employment. It is equally true of even seasonal labour. Once the person acquired the status of temporary railway servant by operation of law, the conditions of his service would be governed as set out in Chap. XXIII. (Para 11)

(D) Railway Establishment Manual, R. 2501 (b) (ii) — Labour on projects — Construction unit cannot be treated as project.

Every construction work does not imply project. Project is correlated to planned projects in which the workman is treated as work-charged. It will be doing violence to language to treat the construction unit as project. Expression 'project' is very well known in a planned development. (Para 20)

(E) Railway Establishment Manual, R. 2302 — Absence without leave — Ter-

mination without complying requirements of R. 2302 — Invalid.

Absence without leave constitutes misconduct and it is not open to the employer to terminate service without notice and inquiry or at any rate without complying with the minimum principle of natural justice. Further, R. 2302 clearly prescribes the mode, manner and methodology of terminating service of a temporary railway servant and admittedly the procedure therein prescribed having not been carried out, the termination is void and invalid. (Para 21)

Cases Referred: Chronological Paras

AIR 1981 SC 422 : (1980) 4 SCC 443 : 1980	
Lab IC 1292	6
AIR 1981 SC 1253 : (1981) 3 SCC 225 : 1981	
Lab IC 806	5, 6
AIR 1980 SC 1219 : (1980) 3 SCR 884 : 1980	
Lab IC 687	5, 6
AIR 1978 SC 8 : (1978) 1 SCR 591 : 1977	
Lab IC 1695	5, 6, 7
AIR 1977 SC 31 : (1977) 1 SCR 586 : 1976	
Lab IC 1766	5, 6
AIR 1976 SC 1111 : (1976) 3 SCR 160 : 1976	
Lab IC 769	5, 6
AIR 1973 SC 2155 : (1974) 1 SCR 116 : 1973	
Lab IC 1158	9
AIR 1972 SC 1917 : (1973) 1 SCR 594 : 1972	
Lab IC 1128	9
(1971) 1 Lab LJ 570 : 1969 UJ (SC) 236	9
AIR 1957 SC 95 : 1956 SCR 872	5
AIR 1957 SC 121 : 1957 SCR 121	5, 6

DESAI, J.:— Appellant L. Robert D'Souza joined service as a gangman at Mangalapuram in Southern Railway on July 1, 1948. In course of his service he was transferred to various places. When he was last working as Lascar at Ernakulam, on Oct. 8, 1974 the Executive Engineer (Construction), Ernakulam intimated to him that his services were deemed to have been terminated from Sept. 18, 1974, from which date the appellant was said to have absented himself from duty. This letter has an important bearing on the issues raised in this appeal, and, therefore, relevant portion may be extracted here:

"You have absented yourself unauthorisedly from 18-9-1974 and hence your services are deemed to have been terminated from the day you have absented yourself. Please note.

Since you are no longer on the rolls of this office you should vacate the quarters allotted to you immediately failing which action will be taken to evict you."

According to the appellant, up to the date of unauthorised and illegal termination of

his service he had rendered continuous service for a period of 26 years yet the Railway administration wrongfully denied him the status of a temporary and/or regular workman and treated him a daily rated casual labourer. This treatment according to the appellant was so unfair that it prompted persons who were victims of this unfair treatment by the Railway administration to form a Union named Southern Railway Construction Workers Union, Ernakulam, of which the appellant was the General Secretary. The Union submitted a charter of demands which presumably irritated the authorities and chagrined by it, the appellant was transferred to Padannur in Tamil Nadu by way of punishment. As the late Shri A. K. Gopalan, who was a renowned trade union leader, espoused the cause of the appellant, his transfer was cancelled and he was reposted and allowed to continue at Ernakulam after paying the arrears of wages and granting continuity of service for the period he did not join duty at the place of his transfer. This is quite evident from the letter of the Under Secretary, Ministry of Labour, dated April 23, 1974, which reads as under :

"With reference to your letter dated the 28th May, 1973, on the above subject, I am directed to say that it has been reported by the Ministry of Railways that the Southern Railway Administration has been advised that as you were transferred back to Ernakulam on 19th March, 1971, you should be deemed to have been on duty for the intervening period from 8th March, 1970 to 19th Feb., 1971, and your wages paid accordingly."

2. The local superiors of the appellant were annoyed by the success of the appellant and they were on a look out for settling the score with the appellant. In the meantime the appellant approached the Labour Court for recovering some of his dues which remained pending for a long time. As the appellant and those similarly situated were likely to reach the age of superannuation and by the unfair labour practice of the Railway administration they were likely to be denied the full retirement benefits, appellant and several others filed a writ petition in the High Court of Kerala. According to the appellant, for the various reasons stated in the petition, appellant and those similarly situated could not be treated as daily rated casual labour and under the relevant rules appellant and his co-workers would at least acquire the status of temporary railway servants and their services

could not be terminated in the manner in which the appellant's service was terminated and that they would be entitled to all the retiral benefits. The petition came up before a learned single Judge who dismissed the same. The matter was taken in appeal before the Division Bench. In the appeal it was contended that the termination of service of the appellant in the circumstances as set out earlier would constitute retrenchment within the meaning of S. 25-F of the Industrial Disputes Act, 1947 ('Act' for short), and therefore, the order of termination, inter alia, is invalid. The Division Bench found the question raised before it of such importance and magnitude that it referred the same to the Full Bench.

3. In the meantime the appellant was actively pursuing his trade union activities. A demand was made that all the benefits granted by the Central Pay Commission be extended to the category of employees to which the appellant belonged and when these demands fell on deaf ears, it was resolved to give a strike notice. The matter was taken in conciliation which ultimately resulted in failure. The appellant approached the Central Government to make a reference under S. 10 of the Act in respect of the demands for adjudication by National Tribunal. As the Central Government was wobbling in its approach, the appellant declared his intention to go on fast unto death for redressal of the grievances suffered for decades by the lowest category of railway employees. At that stage the Assistant Labour Commissioner intervened and persuaded the appellant not to precipitate the matter. The appellant accordingly broke his fast on Sept. 28, 1974, in the hospital where he was confined during his fast. Taking advantage of his absence during the fast immediately the order of termination of his service was served and this led to the present proceedings which have culminated in this appeal.

4. The appellant, inter alia, contended before the Full Bench of Kerala High Court that the termination of his service for the reasons and in the manner brought about is illegal and invalid, that it was victimisation for trade union activities; that it was unfair labour practice and that it was mala fide. It was also contended that in view of his long uninterrupted service admittedly over twenty years he was at the minimum a temporary railway servant and, therefore, his service cannot be terminated unless he was rendered surplus or by way of disciplinary measure after complying with Arti-

cle 311 of the Constitution. The legal submission put in the forefront was that in the circumstances herein mentioned the termination of service constituted 'retrenchment' within the meaning of S. 25-F of the Act and as the pre-condition to valid retrenchment having not been satisfied, the termination is illegal and invalid. The Full Bench answered the point referred to it against the appellant holding that there is no retrenchment as contended for, on behalf of the appellant and finally dismissed the petition. Hence this appeal by special leave.

5. At the outset it must at once be pointed out that the construction put by the Full Bench of the Kerala High Court on the expression 'retrenchment' in S. 2 (oo) of the Act that it means only the discharge of surplus labour or staff by the employer for any reason whatsoever is no more good law and in fact the decision of the Full Bench of Kerala High Court in *L. Robert D'Souza v. Executive Engineer, Southern Railway*, (1979) 1 Lab LJ 211 : (1979 Lab IC 1399) has been specifically overruled by this Court in *Santosh Gupta v. State Bank of Patiala*, (1980) 3 SCR 884 at p. 892 : (AIR 1980 SC 1219 at p. 1223). This Court has consistently held in *State Bank of India v. N. Sundera Money*, (1976) 3 SCR 160 : (AIR 1976 SC 1111); *Hindustan Steel Ltd. v. Presiding Officer, Labour Court*, (1977) 1 SCR 586 : (AIR 1977 SC 31) and *Delhi Cloth & General Mills Ltd. v. Shambhu Nath Mukherji*, (1978) 1 SCR 591 : (AIR 1978 SC 8), that the expression 'termination of service for any reason whatsoever' now covers every kind of termination of service except those not expressly included in S. 25-F or not expressly provided for by other provisions of the Act such as Ss. 25-FF and 25-FFF. It was attempted to be urged that in view of the decision of this Court in *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union*, 1956 SCR 872 : (AIR 1957 SC 95), the ratio of which was re-affirmed by a Constitution Bench of this Court in *Hariprasad Shivshankar Shukla v. A. D. Divikar*, 1957 SCR 121 : (AIR 1957 SC 121), all the later decisions run counter to the ratio of the Constitution Bench and must be treated per in curiam. This contention need not detain us because first in *Hindustan Steel Ltd.* case, then in *Santosh Gupta's* case and lastly in *Mohan Lal v. Bharat Electronics Ltd.*, (1981) 3 SCC 225 : (AIR 1981 SC 1253) it was in terms held that the decision in *Sundera Money's* case was not at all inconsistent with the decision of the Constitution Bench in *Hariprasad Shukla's* case and

not only required no reconsideration but the decision in *Sundera Money's* case was approved in the aforementioned three cases. This position is further buttressed by the decision in *Delhi Cloth and General Mills Ltd.* case wherein striking off the name of a workman from the roll was held to be retrenchment. It is, therefore, the settled law that the expression 'termination of service for any reason whatsoever' in the definition of the expression 'retrenchment' in S. 2 (oo) of the Act covers every kind of termination of service except those not expressly included in S. 25-F or not expressly provided for by other provisions of the Act such as Ss. 25-FF and 25-FFF. Two things thus emerge, firstly, that the decision of the Full Bench of Kerala High Court under appeal has been specifically overruled by this Court in *Santosh Gupta's* case and secondly, in view of the decision in *Delhi Cloth & General Mills Ltd.* case striking off the name of a workman from the rolls without anything more constitutes retrenchment within the meaning of the expression 'retrenchment' in S. 2 (oo). This emerging legal position alone would be sufficient for us to allow the appeal and set aside the decision of the Kerala High Court.

6. Sheet anchor of Mr. Francis's submission is that this Court should proceed on the construction of expression 'retrenchment' as set out in *Hariprasad Shukla's* case (AIR 1957 SC 121) and ignore the construction of the expression 'retrenchment' put in the decisions of this Court in *Sundera Money's* case (AIR 1976 SC 1111), *Hindustan Steel Ltd.* case (AIR 1977 SC 31), *Santosh Gupta's* case (AIR 1980 SC 1219), *Delhi Cloth & General Mills Ltd.* case (AIR 1978 SC 8) as being per in curiam. We are not disposed to undertake this recurring futile exercise for the obvious reason that on four different occasions, in *Hindustan Steel Limited* case, a Division Bench of this Court consisting of Chandrachud, Goswami and Gupta, JJ.; in *Sundera Money's* case, a Bench consisting of Chandrachud, Krishna Iyer and Gupta, JJ.; in *Santosh Gupta's* case, a Bench consisting of Krishna Iyer and O. Chinnappa Reddy, JJ. and a Bench of two Judges consisting of Gupta, J. and one of us in *Mohanlal's* case (AIR 1981 SC 1253), have repeatedly undertaken this very detailed exercise and held that there is no inconsistency of any nature and kind nor any conflict, contradiction or repugnancy between the decision of the Constitution Bench in *Hariprasad Shukla's* case and aforementioned later four decisions and they

stand in harmony with each other and the later decisions take note of an amendment in the relevant provisions of Industrial Disputes Act and, therefore, the construction put on the expression 'retrenchment' in the aforementioned decisions pronounced the settled view of this Court. We, therefore, consider it futile and waste of precious time of the Court to re-examine the submission of Mr. Francis negatived on four different occasions in the past. Undoubtedly, Mr. Francis pointed out that in *Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi*, (1980) 4 SCC 443 : (AIR 1981 SC 422), Pathak, J. in his concurring judgment has stated that his concurrence with the majority view propounded by Reddy, J. should not be taken to imply his agreement with the interpretation of S. 2 (oo) rendered in *Santosh Gupta's case*. It may, however, be mentioned that the majority in that case has affirmed the earlier decision. Therefore, after meticulously examining on five distinct and different occasions, it is clearly and unequivocally stated that there is neither apparent nor real conflict between the decision of the Constitution Bench in *Hariprasad Shukla's case* and the later five decisions commencing from *Sundera Money* and ending with *Mohanlal's case*, it would be sheer waste of time and merely adding to the length of the judgment to re-examine this contention over again, so as to cover the familiar ground.

7. As we are not prepared to examine the contention over again, the submission of Mr. Francis that 'retrenchment' contemplates some overt act on the part of the employer, that it inheres the principle of last come first go, which again requires an overt act on the part of the employer; that when retrenched workmen are required to be re-employed, first option for re-employment has to be given to the retrenched workmen, which necessitates some overt act on the part of the employer, would be beside the point and of no relevance and significance. The reference to Rr. 76, 77 and 78 of the Industrial Disputes (Central Rules), 1957, does not advance his case a step further. The definition of expression 'retrenchment' in S. 2 (oo) is so clear and unambiguous that no external aids are necessary for its proper construction. Therefore, we adopt as binding the well settled position in law that if termination of service of a workman is brought about for any reason whatsoever, it would be retrenchment except if the case falls within any of the excepted

categories, i.e. (i) termination by way of punishment inflicted pursuant to disciplinary action; (ii) voluntary retirement of the workman; (iii) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; (iv) or termination of the service on the ground of continued ill-health. Once the case does not fall in any of the excepted categories the termination of service even if it be according to automatic discharge from service under agreement would nonetheless be retrenchment within the meaning of expression in Section 2 (oo). It must as a corollary follow that if the name of the workman is struck off the roll that itself would constitute retrenchment, as held by this Court in *Delhi Cloth & General Mills Ltd. case* (AIR 1978 SC 8). We specifically refer to this case because the facts in the case before us are on all fours with the facts in the aforementioned cases and on parity of reasoning and judicial comity the same conclusion must follow unless something to the contrary is indicated. In that case respondent S. N. Mukherji who was recruited as a labourer came to be promoted in course of time to the post of Motion Setter. On Oct. 1, 1964, pursuant to some re-organisation in the establishment the post of Motion Setter was abolished. The management offered employment to the respondent S. N. Mukherji on any other suitable post, which was indicated to be the post of Assistant Line Fixer (Assistant Grade I) without loss of wages. He was to be on probation. The management found him unsuitable for this post even after extending the period of probation by 9 months and therefore offered him post of Fitter on the same pay which he, as a Motion Setter, used to get. The response of S. N. Mukherji to this offer was that he should be given a further opportunity to show his efficiency in his job and if he fails to improve, he would tender his resignation voluntarily. The management did not reply to the letter with the result that the workman did not report for work at the newly offered post. On Jan. 19, 1966, the management wrote to the workman that his name has been struck off from the rolls with effect from Aug. 24, 1965, for continued absence without intimation. Such termination of service was held to be covered by the expression 'retrenchment' and it was struck down on the ground that the pre-condition to valid retrenchment was not complied with. It would thus ap-

pear that it is consistently held by this Court that termination of service for any reason whatsoever except the excepted categories would constitute retrenchment within the meaning of the expression in the Act. And here recall the order of termination of service of the appellant wherein it is stated that "you have absented yourself unauthorisedly from 19-8-1974 and hence your services are deemed to have been terminated from the day you have absented yourself". Is any other conclusion possible save and except the one recorded by this Court in Delhi Cloth & General Mills Ltd. case that this constitutes retrenchment and for non-compliance with pre-condition, it is invalid.

8. Before referring to other contentions of Mr. Francis, we may dispose of one contention based upon construction of S. 9-A of the Act as in our opinion, it is utterly untenable. Mr. Francis says that if valid retrenchment presages a notice contemplated by S. 25-F, the same would stand dispensed with in view of the Proviso (b) of Sec. 9-A of the Act and therefore even if the termination is held to be retrenchment, the same would be valid. There are two basic fallacies in this submission. Retrenchment to be valid must comply with three conditions set out in S. 25-F. They are, (a) subject to the proviso to clause (a), one month's notice in writing specifying the reasons for retrenchment or wages in lieu of notice; (b) compensation to be paid according to the measure provided in the clause, the payment to be simultaneous with the retrenchment; and (c) the notice in the prescribed manner to be served on the appropriate Government. If the termination in this case otherwise constitutes retrenchment admittedly clauses (b) and (c) of S. 25-F have not been complied with. That apart, the submission that in view of the provision contained in proviso (b) of S. 9-A, the notice contemplated by clause (a) of S. 25-F would be dispensed with, is without merits. Section 9-A imposes an obligation on the employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule to give notice as therein provided and the employer is precluded from effecting the change without giving to the workman likely to be affected by such change, notice in the prescribed manner of the nature of the change proposed to be effected, and the change cannot be effected within 21 days of the giving of such notice. In order to attract S. 9-A the change proposed must be in the conditions of service

applicable to the workman in respect of any matters specified in the Fourth Schedule. If the proposed change falls in any of the matters specified in the Fourth Schedule the change can be effected after giving notice in the prescribed manner and waiting for 21 days after giving such notice. There is a proviso to S. 9-A which exempts the employer from giving the notice of change if the case falls in any of the two provisos. According to Mr. Francis the case would be covered by proviso (b). It reads as under :

"9-A. No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change—

(a) to (b) xx xx xx

Provided that no notice shall be required for effecting any such change :

(a) xx xx xx xx

(b) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Services Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules, or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply."

9. It was obligatory upon the employer, who wants to retrench the workmen to give notice as contemplated by clause (a) of Section 25. When a workman is retrenched it cannot be said that change in his conditions of service is effected. The conditions of service are set out in Fourth Schedule. No item in Fourth Schedule covers the case of retrenchment. In fact, retrenchment is specifically covered by Item 10 of the Third Schedule. Now, if retrenchment which connotes termination of service, cannot constitute change in conditions of service in respect of any item mentioned in Fourth Schedule, S. 9-A would not be attracted. In order to attract S. 9-A, the employer must be desirous of effecting a change in conditions of service in respect of any matter specified in Fourth Schedule. If the change proposed does not cover any matter in Fourth Schedule S. 9-A is not attracted and no notice is necessary. (See *Workmen of Sur Iron & Steel Co. (P.) Ltd. v. Sur Iron & Steel Company (P.) Ltd.*, (1971) 1 Lab LJ 570 (SC); *Tata Iron & Steel Co. Ltd. v. Workmen*, (1973) 1 SCR 594; (AIR

1972 SC 1917) and Assam Match Co. Ltd. v. Bijoy Lal Sen, (1974) 1 SCR 116: (AIR 1973 SC 2155). Thus if S. 9-A is not attracted, the question of seeking exemption from it in the case falling under the proviso would hardly arise. Therefore, neither Section 9-A nor the proviso is attracted in this case. The basic fallacy in the submission is that notice of change contemplated by Section 9-A and notice for a valid retrenchment under S. 25-F are two different aspects of notice, one having no correlation with the other. It is, therefore, futile to urge that even if termination of the service of the petitioner constitutes retrenchment it would nevertheless be valid because the notice contemplated by S. 25-F would be dispensed with in view of the provision contained in S. 9-A, proviso (b). That apart, it is an indisputable position that none of the other pre-conditions to a valid retrenchment have been complied with in this case because the very letter of termination of service shows that services were deemed to have been terminated from a back date which clearly indicates no notice being given, no compensation being paid and no notice being given to the prescribed authority. Therefore, termination of service, being retrenchment, for failure to comply with Sec. 25-F, would be void ab initio.

10. Mr. Francis next contended that as the appellant belongs to the category of casual labour as defined in R. 2501 in Chapter XXV of the Indian Railway Establishment Manual ('Manual' for short), no notice prior to termination of his service is necessary or required by law in view of the provision contained in Rule 2505. The submission is that in the case of casual labour the service will be deemed to have been terminated when such employee absents himself or on the close of the day. Rule 2501 reads as under:

"2501. Definition —

(a) Casual labour refers to labour whose employment is seasonal, intermittent, sporadic or extends over short periods. Labour of this kind is normally recruited from the nearest available source. It is not liable to transfer, and the conditions applicable to permanent and temporary staff do not apply to such labour.

(b) The casual labour on railways should be employed only in the following types of cases, namely:—

(i) Staff paid from contingencies except those retained for more than six months continuously — Such of those persons who

continue to do the same work for which they were engaged or other work of the same type for more than six months without a break will be treated as temporary after the expiry of the six months of continuous employment.

(ii) Labour on projects, irrespective of duration, except those transferred from other temporary or permanent employment.

(iii) Seasonal labour who are sanctioned for specific works of less than six months duration. If such labour is shifted from one work to another of the same type, e.g., relaying and the total continuous period of such work at any one time is more than six months' duration, they should be treated as temporary after the expiry of six months of continuous employment. For the purpose of determining the eligibility of labour to be treated as temporary, the criterion should be the period of continuous work put in by each individual labour on the same type of work and not the period put in collectively by any particular gang or group of labourers.

xx xx xx xx
Note: (1) xx xx xx xx

(2) Once any individual acquires temporary status, after fulfilling the conditions indicated in (i) or (iii) above, he retains that status so long as he is in continuous employment on the railways. In other words, even if he is transferred by the administration to work of a different nature he does not lose his temporary status.

(3) xx xx xx xx

(4) Casual labour should not be deliberately discharged with a view to causing an artificial break in their service and thus prevent their attaining the temporary status.

(5) xx xx xx xx"

Rule 2505 may as well be extracted. It reads as under:

"2505. Notice of termination of service — Except where notice is necessary under any statutory obligation, no notice is required for termination of service of the casual labour. Their services will be deemed to have terminated when they absent themselves or on the close of the day.

Note:— In the case of a casual labourer who is to be treated as temporary after completion of six months' continuous service, the period of notice will be determined by the rules applicable to temporary Railway servants."

11. In order to satisfactorily establish that the applicant belonging to the category of casual labour whose service by deeming

fiction enacted in Rule 2505 will stand terminated by the mere absence, it must be shown that the appellant was employed in any of the categories set out in clause (b) of Rule 2501. What has been urged on behalf of the respondent is that the appellant was employed in construction work and, therefore, labour on projects irrespective of duration would belong to the category of casual labour. That, however, does not mean that every construction work by itself becomes a work-charged project. On the contrary sub-clause (1) of clause (b) of Rule 2501 would clearly show that such of those persons belonging to the category of casual labour who continued to do the same work for which they were engaged or other work of the same type for more than six months without a break will be treated as temporary after the expiry of the six months of continuous employment. Similarly, seasonal labour sanctioned for specific works for less than six months' duration would belong to the category of casual labour. However, sub-clause (iii) of clause (b) of R. 2501 provides that if such seasonal labour is shifted from one work to another of the same type, as for example, 'relaying' and the total continuous period of such work at any one time is more than six months' duration, they should be treated as temporary after the expiry of six months of continuous employment. The test provided is that for the purpose of determining the eligibility of casual labour to be treated as temporary, the criterion should be the period of continuous work put in by each individual labour on the same type of work and not the period put in collectively by any particular gang or group of labourers. It is thus abundantly clear that if a person belonging to the category of casual labour employed in construction work other than work-charged projects renders six months' continuous service without a break, by the operation of statutory rule the person would be treated as temporary railway servant after the expiry of six months of continuous employment. It is equally true of even seasonal labour. Once the person acquired the status of temporary railway servant by operation of law, the conditions of his service would be governed as set out in Chapter XXIII.

12. Rule 2301 in Chap. XXIII defines a temporary railway servant. It reads as under :

"2301. Definition — A 'temporary railway servant' means a railway servant without a lien on a permanent post on a Railway or

any other administration or office under the Railway Board. The term does not include 'casual labour', a 'contract' or 'part-time' employees or an 'apprentice'."

13. The service of a temporary railway servant may be terminated as provided in R. 2301. The benefits which a temporary railway servant enjoys are set out in the same chapter.

14. The question, therefore, is whether the appellant who was recruited as casual labour continued to be the same or he had acquired the status of temporary railway servant at the time of termination of his service. In the affidavit filed in the High Court the respondents contended that the appellant was employed in construction work on work-charged project. The High Court did not examine this contention on merits and, therefore, it has become obligatory upon us to probe it.

15. The appellant has stated that he joined as a Gangman on July 1, 1948 at Mangalapuram and he was transferred in 1953 to Pindur in Mysore State. He confessed that he does not have any record to show this employment but urged that if the pay roll of the relevant period would be produced by the Railway administration, the fact alleged would be completely borne out. We would bypass this controversial period, without recording any finding on it one way or the other. The appellant further contends that on November 15, 1954, on transfer he joined in the office of Inspector of Works at Mangalore and since then he has been in continuous employment in the construction branch of the Southern Railway till the date of his illegal termination of service on Oct. 8, 1974. These averments are incontrovertible and have not rightly been controverted before us, in view of unimpeachable evidence produced by the appellant. The Executive Engineer, Ernakulam, where the appellant at the relevant time, i.e. September 5, 1966, was working, addressed a letter to various Executive Engineers inquiring from them whether the surplus staff on his establishment could be absorbed by any of them. The material portion of the letter reads as under :

Ext. P-3

Executive Engineer's Office,
Ernakulam

Dated 5-9-1966

Subject:— Surplus staff (Casual labour staff) absorption of

"Since the major portion of the work in this construction unit is over the list of the C. L. Staff who are likely to be rendered sur-

plus by 30-9-1966 and 31-12-1966 due to expiry of sanction to the post held by them, is enclosed.

(contd. on col. 2)

Please advise whether you can absorb any of these personnel in your construction division so that they may be relieved in time if they are willing".

Enclosures :

1) List.

List of C. L. Staff working in Xen's Office/Ers.

Sr. No.	Name	Presently working as	Date of appointment
	X	X	X
10.	Robert D'Souza	Peon/Lascar.	15-11-54
	X	X	X

This evidence furnished from the record of the respondent and not controverted by any affidavit to the contrary would establish that the appellant was in continuous service from November 15, 1954. Recall here, the fact that his service was terminated by the impugned order contained in the letter Annexure 1 dated October 8, 1974. Therefore, apart from the period in controversy from 1948 to 1964 it is unquestionably established that the appellant was in continuous uninterrupted service from November 1954 to October 1974, a period of 20 years and he was working as Peon/Lascar. Undoubtedly he has been referred to as belonging to casual labour staff but would it be fair to hold that after 20 years of continuous service, he would still continue to be a casual labour and therefore, his service could be terminable at will, and he would not be entitled to any of the benefits which a temporary or a permanent railway employee would enjoy?

16. There is, however, one more aspect to which we would refer before we proceed to pronounce upon the status of the appellant. The definition of casual labour extracted by us above clearly indicates that person belonging to casual labour is not liable to transfer. The appellant has stated that he was transferred to Madras in 1957, to Tuni in Andhra Pradesh in 1958, to Rajahmundry in 1960, to Samalkhotan in 1961, to Virudhnagar in 1962 and to Manamadurai in 1965 and then to Ernakulam in August 1965. It appears that he was again transferred from Ernakulam which was seriously objected and he took up the matter with the higher authorities when he was re-transferred to Ernakulam on March 19, 1971. This appears from the letter of the Under Secretary in the Ministry of Labour addressed to the appellant in which it is stated that the Ministry of Railways was advised that the appellant be transferred back to Ernakulam, which advice has been carried out and the intervening period for which he did not report for duty, i. e. from March 6,

1970 to February 19, 1971, he would be paid the wages as if he was on duty. In the face of these incontrovertible facts could it at all be said that the appellant though transferred ad nauseum still continued to belong to the category of casual labour?

17. An additional fact which buttresses this conclusion may be referred to. The appellant and several others filed petition in the High Court of Kerala from which the present appeal arises. All the petitioners before the High Court contended that each of them having rendered continuous service for decades they could not be said to be belonging to the category of casual labour and if anything all of them had acquired status of temporary employees. The respondent filed counter-affidavit and contended that the appellant and his co-petitioners in the High Court never acquired the status of temporary railway servant and each of them belonged to the category of casual labour. During the pendency of the petition in the High Court service of the appellant was terminated but his co-petitioners continued in service. After the dismissal of the writ petition by the learned single Judge appellant and three others preferred Writ Appeal No. 218 of 1973 in the same High Court. By the time the appeal came up for hearing three co-appellants of the present appellant who were appellants before the Division Bench were informed that they were treated as on regular employment and ceased to belong to the category of casual labour. Unfortunately as the service of the appellant was already terminated he was not given this benefit. This fact clearly emerges from the manner in which the Division Bench disposed of the appeal before it. The relevant observation is as under :

"In view of the letters received from the Executive Engineer, Southern Railway, addressed to Shri K. P. Pathrosa, advocate, appearing for respondents in the writ appeal, it has become unnecessary to consider this writ appeal on merits".

With reference to the appellant it was stated as under :

"As regards the first appellant, it is stated that he absented himself from duty and so he had been denied employment. Since then another Writ Petition O. P. No. 4401/74 has been filed by the first appellant and is now pending before this Court. The contention of the first appellant including what has been raised in this petition will be considered in O. P. 4401/74."

18. By the letters referred to by the Division Bench, the Executive Engineer informed the advocate appearing for Railway administration that appellants other than the present appellant were absorbed as regular railway employees and hence the appeal has become infructuous. Unfortunately for the appellant he was denied this benefit as his service was already terminated. If his service was not terminated, his case was not distinguishable from the case of his co-appellants and he would have been entitled both in law and facts to the same treatment. The approach of the Railway administration to say the least is amazing. For years they did not act according to law and confers status of temporary railway servant on the appellant and his colleagues in the High Court. When appellant espoused this cause he was thrown out but his colleagues were given the benefit richly deserved in law. This discriminatory treatment cannot help the respondent because appellant's case cannot be distinguished. If the status of temporary railway employee was already acquired before the termination of service in the manner brought about, the same would be ipso facto invalid. At this stage we would again revert to the annexure to the letter of Executive Engineer dated September 5, 1966, in which the name of the appellant appears at Serial No. 10. One of the co-petitioners of the appellant in the High Court, who got the benefit of regular employment pursuant to the writ petition was one Shri K. N. Balakrishna. His name appears at Serial No. 1 in the annexure to the letter of Executive Engineer referred to above. His date of appointment is shown to be March 24, 1954. It would thus appear at a glance that the case of the appellant could not be distinguished from the case of Shri K. N. Balakrishna and if Shri Balakrishna was accorded the status of regular employee, the appellant could not be treated otherwise, but for a singular unfortunate event of his termination of service. He could not be singled out for such treatment. Had his service not been terminated, the Railway administration could not have denied him the

status and this status he would have acquired long back. If by operation of law, to wit, Rule 2501 the appellant had acquired the status of temporary railway servant by rendering continuous uninterrupted service for more than six months, his service could not have been terminated under Rule 2505. It, however, needed moral force of fast and costly court proceedings by a low daily paid workman against the Railway administration in the High Court to obtain such meagre benefit. It would thus clearly appear that even the appellant would have acquired the status of at least a temporary railway servant. But we would rather like to refer to the legal position in this behalf more accurately.

19. To start with, let us recall the Rule 2501 (b) (i) and (iii) and note below Rule 2505. The underlying intendment of the provision is that a casual labourer who has rendered six months' continuous service would be placed in the category of temporary railway servant unless he is employed on work-charged project.

20. Rule 2501 (b) (i) clearly provides that even where staff is paid from contingencies, they would acquire the status of temporary railway servants after expiry of six months of continuous employment. But reliance was placed on Rule 2501 (b) (ii) which provides that labour on projects, irrespective of duration, except those transferred from other temporary or permanent employment would be treated as casual labour. In order to bring the case within the ambit of this provision it must be shown that for 20 years appellant was employed on projects. Every construction work does not imply project. Project is correlated to planned projects in which the workman is treated as work-charged. The letter dated September 5, 1966, is by the Executive Engineer, Ernakulam, and he refers to the staff as belonging to construction unit. It will be doing violence to language to treat the construction unit as project. Expression 'project' is very well known in a planned development. Therefore, the assertion that the appellant was working on the project is belied by two facts: (i) that contrary to the provision in Rule 2501 that persons belonging to casual labour category cannot be transferred, the appellant was transferred on innumerable occasions as evidenced by orders Ext. P-1 dated January 24, 1962, and Ext. P-2 dated August 25, 1964, and the transfer was in the office of the Executive Engineer (Construction); (ii) there is absolutely no reference to project in the letter, but the department is described as construction unit. If

he became surplus on completion of project there was no necessity to absorb him. But the letter dated September 5, 1966, enquires from other executive engineers, not attached to projects, whether the surplus staff including appellant could be absorbed by them. This shows that the staff concerned had acquired a status higher than casual labour, say temporary railway servant. And again construction unit is a regular unit all over the Indian Railways. It is a permanent unit and cannot be equated to project. Therefore, the averment of the Railway administration that the appellant was working on project cannot be accepted. He belonged to the construction unit. He was transferred fairly often and he worked continuously for 20 years and when he questioned the bona fides of his transfer he had to be re-transferred and paid wages for the period he did not report for duty at the place where he was transferred. Cumulative effect of these facts completely belie the suggestion that the appellant worked on project. Having rendered continuous uninterrupted service for over six months, he acquired the status of a temporary railway servant long before the termination of his service and, therefore, his service could not have been terminated under R. 2505.

21. Once it is held that by operation of statutory rule in the Manual, the appellant had acquired a status of temporary railway servant and assuming, as contended by Mr. Francis, that the termination of service in the circumstances alleged does not constitute retrenchment *stricto sensu*, would the termination be still valid? The answer is an emphatic no. On the admission of the Railway administration, service was terminated on account of absence during the period appellant was on fast. Absence without leave constitutes misconduct and it is not open to the employer to terminate service without notice and inquiry or at any rate without complying with the minimum principal of natural justice. Further, Rule 2302 clearly prescribes the mode, manner and methodology of terminating service of a temporary railway servant and admittedly the procedure therein prescribed having not been carried out, the termination is void and invalid. Accordingly, the same conclusion would be reached even while accepting for the purpose of the facts of this case simultaneously rejecting it in law that the termination does not constitute retrenchment yet nonetheless it would be void and inoperative.

22. We would be guilty of turning a blind eye to a situation apart from being highly

unethical, wholly contrary to constitutional philosophy of socio-economic justice if we fail to point out that Rule 2501 which permits a man serving for 10, 20, 30 years at a stretch without break being treated as daily rated servant, is thoroughly opposed to the notions of socio-economic justice and it is high time that the Railway administration brings this part of the provision of the Manual and antidiluvian, inconformity with the Directive Principles of State Policy as enunciated in Part IV of the Constitution. It may be necessary for a big employer like the railway to employ daily rated workmen but even here it is made distinctly clear that in case of casual labour, the daily wage is fixed by dividing monthly minimum wage by 25 so as to provide a paid holiday. May be, for seasonal employment, or for other intermittent work daily rated workmen may have to be employed. It may as well be that on projects workcharged staff may have to be employed because on the completion of the projects the staff may become surplus. That was at a time when planning and projects were foreign to the Indian economy. Today, Railways have perspective plans spreading over decades. If one project is complete another has to be taken over. Railway administration has miles to go and promises to keep and this becomes clear from the fact that the appellant, a daily rated workman, continued to render continuous service for twenty years which would imply that there was work for a daily rated workman everyday for twenty years at a stretch without break and yet his status did not improve and continued to be treated as daily rated casual labour whose service can be terminated at the whim and fancy of the local satraps. It is high time that these utterly unfair provisions wholly denying socio-economic justice are properly modified and brought in conformity with the modern concept of justice and fairplay to the lowest and the lowliest in Railway administration.

23. Now, if appellant had become at least a temporary railway servant he is entitled to many benefits set out in Rule 2303 onwards. We have no doubt in our minds that the appellant whose case was on par with Shri K. N. Balakrishna who had already been offered regular employee status, would be entitled to be placed in the same category and that too from the date much earlier to the date of termination of his service. In this situation termination of his service not being covered by any of the excepted categories and not after notice would be retrenchment within the meaning of the expression as used in the Act.

and for failure to comply with the pre-condition the termination of service would be void.

24. Assuming we are not right in holding that the appellant had acquired the status of a temporary railway servant and that he continued to belong to the category of casual labour, would the termination of service in the circumstances mentioned by the Railway administration constitute retrenchment under the Act?

25. Section 25-F of the Act provides that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until the conditions set out in Act are satisfied. The expression 'workman' is defined as under:

"In this Act, unless there is anything repugnant in the subject or context:

" "Workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute; or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950 or the Navy (Discipline) Act, 1934; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) Who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

26. There is no dispute that the appellant would be a workman within the meaning of the expression in S. 2 (s) of the Act. Further, it is incontrovertible that he has rendered continuous service for a period over twenty years. Therefore, the first condition of Section 25-F that appellant is a workman who has rendered service for not less than one year under the Railway administration, an employer carrying on an industry, and that his service is terminated which for the reasons hereinbefore given would constitute retrenchment. It is immaterial that he is a

daily rated worker. He is either doing manual or technical work and his salary was less than Rs. 500/- and the termination of his service does not fall in any of the excepted categories. Therefore, assuming that he was a daily rated worker, once he has rendered continuous uninterrupted service for a period of one year or more, within the meaning of S. 25-F of the Act and his service is terminated for any reason whatsoever and the case does not fall in any of the excepted categories, notwithstanding the fact that Rule 2505 would be attracted, it would have to be read subject to the provisions of the Act. Accordingly the termination of service in this case would constitute retrenchment and for not complying with pre-conditions to valid retrenchment, the order of termination would be illegal and invalid.

27. Accordingly, we allow this appeal, set aside the order of the High Court and declare that the termination of service of the appellant was illegal and invalid and the appellant continues to be in service and he would be entitled to full back wages and costs quantified at Rs. 2,000/-.

Appeal allowed.

AIR 1982 SUPREME COURT 865

(From : Bombay)

E. S. VENKATARAMIAH AND
A. VARADARAJAN, JJ.

Civil Appeal No. 1667 of 1981, D/- 11-2-1982.

Bhikoba Shankar Dhumal (dead) by Lrs. and others, Appellants v. Mohan Lal Panchand Tathed and others, Respondents.

(A) Constitution of India, Art. 227 — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Ss. 12 and 33 — Proceedings under Act — Dropping of proceedings on death of tenure-holder — Appeal and writ petition against order — Locus standi.

Any person who is entitled to grant of land under the provisions of the Act may question an order which would have the effect of reducing the extent of total surplus land in any village. Persons who were the former landlords of the land which formed part of the holding of a tenure-holder cannot, therefore, be characterised as just strangers to these proceedings. It cannot, therefore, be

* Spl. Civil Appln. No. 1931 of 1975, D/- 30-7-1980 (Bom).

BZ/CZ/A697/82/MVJ

said that such persons had no locus standi to file an appeal before the Maharashtra Revenue Tribunal and then a petition under Art. 227 of the Constitution before the High Court. (Para 11)

(B) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Ss. 12 and 21 — Determination of proprietary rights under — Decisions under Taxation Laws cannot be basis. (1) Precedents; (2) Interpretation of Statutes).

It is very hazardous to decide cases in which proprietary rights arise for determination on the basis of decisions rendered under taxation laws which have their own peculiarities. The Maharashtra Ceiling Act is not one levying tax on the income during the previous year or previous years or of a period other than the previous year in the hands of an assessee but a law imposing a ceiling on the holding of a person or a family as on a specified date. The Act has to be construed in accordance with its scheme and object which is equitable distribution of land amongst the landless by taking over surplus land in the hands of those who held land in excess of the ceiling limit on the appointed day, or those who would acquire subsequently land in excess of the ceiling or those who own lands which exceed the ceiling limit by reason of their conversion into a different class. (Para 12)

(C) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Ss. 12 (1) (a) (b) and 21 — Commencement of proceedings on filing of return — Death of tenure-holder prior to notification of declaration as to surplus land under S. 21 — Proceedings do not become infructuous and cannot be dropped. AIR 1970 Bom 144, Overruled.

The proceedings commenced with the filing of a return by a person holding on the appointed day land in excess of the ceiling area prescribed by the Act would not become infructuous and would not have to be dropped if such person dies before a notification containing the declaration regarding surplus land held by him is published in the official Gazette under S. 21 of the Act and possession of such surplus land is taken over by the concerned authorities. AIR 1970 Bom 144, Overruled. (Para 19)

In such a case the proceedings have to be continued and the surplus land in the hands of the tenure-holder as on the appointed day should be determined and taken possession of in accordance with law. The heirs of the tenure-holder are entitled to participate in the proceedings representing the estate of the tenure-holder. They would be entitled as

heirs at law only to such land that may remain after surrendering the surplus land as may be determined under the Act.

(Para 18)

The liability to surrender surplus land would not in any way come to an end by reason of the death of such holder before the actual extent of surplus land is determined and notified under S. 21 of the Act. It is no doubt true that S. 21 of the Act states that the title of the holder in the surplus land would become vested in the State Government only on such land being taken possession of after a declaration regarding the surplus land is published in the Official Gazette. But the liability to surrender the surplus land, however, relates back to the appointed day in the case of those who fall under S. 12 (1) (a) of the Act, to the date of taking possession of any land in excess of the ceiling area in the case of those who come under S. 12 (1) (b) of the Act and to the date of conversion of land into a different class in the case of those who come under S. 12(2) of the Act. Any other construction would make the Act unworkable and the determination of the extent of surplus land of a holder ambulatory and indefinite.

(Para 13)

The surplus land in the case of a person who at any time after the fourth day of Aug., 1959 but before the appointed day held any land (including any exempted land) in excess of the ceiling area has got to be determined as on the appointed day even though such person may die before the actual extent of surplus land is determined and notified under S. 21 of the Act. The persons on whom his 'holding' devolves on his death would be liable to surrender the surplus land as on the appointed day because the liability attached to the holding of the deceased would not come to an end on his death. The heirs of the deceased cannot be permitted to contend to the contrary and allowed to get more land by way of inheritance than what they would have got if the death of the person had taken place after the publication of the notification under S. 21. AIR 1971 SC 2137, Foll. (Para 15)

No change has been brought by substituting second para of S. 3 (2) of new Chap. II of the Act in the place of original Chap. II by the Maharashtra Act 21 of 1975.

(Para 17)

Cases Referred: Chronological Paras
AIR 1971 SC 2137 : (1972) 1 SCR 48

14, 17

AIR 1970 Bom 144 : 72 Bom LR 246

10, 12, 17, 18

AIR 1963 SC 1448 : (1963) Supp (1) SCR 699 12

AIR 1931 Bom 333 12

VENKATARAMIAH, J.:— This appeal by special leave is directed against the judgment and order dated July 30, 1980 of the High Court of Judicature at Bombay in Special Civil Application No. 1931 of 1975.

2. The question for consideration in this appeal is whether the proceedings commenced with the filing of a return by a person holding on the appointed day land in excess of the ceiling area prescribed by the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (hereinafter referred to as the 'Act') would become infructuous and would have to be dropped if such person dies before a notification containing the declaration regarding surplus held by him is published in the official Gazette under S. 21 of the Act and possession of such surplus land is taken over by the authorities concerned.

3. An extent of land measuring 21 A. 28 G. bearing Survey No. 34 situated in village Manori, Taluka Rahuri of Ahmednagar district in the State of Maharashtra belonged to respondents 1 to 4 but was in the possession of their tenant by name Bhikoba on the date of the commencement of the Act, i. e. Jan. 26, 1962, which was the appointed day as defined by S. 2 (4) of the Act.

4. The Act was passed for the purpose of imposing a maximum limit (or ceiling) on the holding of agricultural land in the State of Maharashtra; to provide for the acquisition and distribution of land held in excess of such ceiling; and for matters connected with the purposes aforesaid. Section 2 (16) of the Act defined the expression "land" as land which was used or capable of being used for purposes of agriculture and included the sites of farm buildings on, or appurtenant to such land and land on which grass grows naturally. Chap. II of the Act contained the provisions (Ss. 3 to 7) prescribed the ceiling on holding of land, Chap. III contained the provisions (Ss. 8 to 11) imposing restriction on alienation and acquisitions of land and laying down the consequences of the contraventions of those provisions, Chap. IV contained provisions (Ss. 12 to 21) for determining the extent of surplus land, Chap. V contained provisions (Ss. 22 to 26) for determination of compensation payable to expropriated persons and Chap. VI which included (Ss. 27 to 29) dealt with the mode of distribution of surplus land amongst those who were landless and who otherwise deserved to be granted land. These and the other provisions in the Act were enacted with the object of pro-

viding for the more equitable distribution of agricultural land amongst the peasantry in the State of Maharashtra.

5. It may be mentioned here that Chapters II and III of the Act came to be substituted by new Chaps. II and III by S. 4 of the Maharashtra Act 21 of 1975. S. 5 of the said Act, however, reads as follows:—

"5. Notwithstanding the substitution of the Chapters II and III by S. 4 of this Act all proceedings pending immediately before the commencement date in any Court or tribunal or before any authority for the purpose of determining the ceiling area in respect of any holdings and the surplus land in such holdings in pursuance of the provisions in the original Chaps. II and III shall be continued and disposed of by or under the principal Act, as if that Act had not been amended by the Amending Act, 1972; and the amount of compensation for such surplus land acquired by the State Government under sub-s. (4), or as the case may be, sub-s. (5), of S. 21 shall be at the rate provided in the principal Act as unamended by this Act.

After the ceiling area is determined and the area delimited as surplus land is declared finally under S. 21 of the principal Act, then, subject as aforesaid, the provisions of the principal Act as amended by this Act shall apply to such holding and land declared as surplus land."

6. There was a further modification made in the new Chaps. II and III by the Maharashtra Act 47 of 1975. In view of the saving clause contained in S. 5 of the Maharashtra Act 21 of 1975 reproduced above this case has to be decided in accordance with the provisions contained in Chaps. II and III as they stood before their substitution since the proceedings with which we are concerned had already commenced and were pending immediately before the commencement of the said Amending Act. Hence reference will be made hereafter to the provisions contained in Chaps. II and III as they stood before their substitution.

7. Section 3 of the Act as it was originally enacted reads as follows:—

"3. In order to provide for the more equitable distribution of agricultural land amongst the peasantry of the State of Maharashtra (and in particular, to provide that landless persons are given land for personal cultivation), on the commencement of this Act, there shall be imposed to the extent, and in the manner hereinafter provided, a maximum limit (or ceiling) on the holding of agricultural land throughout the State."

8. Section 4 of the Act prohibited holding of land by any person in excess of the ceiling area and declared that subject to the provisions of the Act, all land held by a person in excess of the ceiling area should be deemed to be surplus land and dealt with in the manner provided by the Act. Sections 5 to 7 of the Act laid down the principles for the computation of the ceiling area in various cases.

9. As required by S. 12 of the Act as it stood at the commencement of the Act Bhikoba, the tenant concerned in this case, filed before the Special Deputy Collector (especially empowered by the State Government to exercise the powers and perform the functions of the Collector under the Act) a return in the prescribed form furnishing particulars of land including the extent of 21 A. 28 G bearing Survey No. 34 referred to above in his possession on the appointed day. After recording the statement of Bhikoba and considering all the other relevant material before him the Special Deputy Collector found that Bhikoba was in possession of surplus land to the extent of 132 A. 1 G. and he made an order accordingly on March 27, 1965. Against that order Bhikoba filed an appeal and the appellate authority by its order dated April 13, 1966 partly allowed the appeal and remanded the matter with some directions. Thereafter Bhikoba died on Jan. 31, 1969. On June 27, 1969, the Special Deputy Collector after hearing the legal representatives of Bhikoba held that Bhikoba was a surplus holder of land to the extent of 16 A. and 26 G. Against that order Daulatram, Trinbak, Dattatraya and Madhukar, the four sons of Bhikoba who are shown as the legal representatives (a. to d) in this case filed an appeal before the Maharashtra Revenue Tribunal. That appeal was dismissed on Nov. 4, 1970 on the ground that it was a premature one as the holders had not yet exercised their choice under S. 16 (2) of the Act and a declaration under S. 21 had not yet been made. Thereafter a notice was issued to the heirs of Bhikoba under S. 16 of the Act to exercise their choice in respect of land to be retained by them out of Bhikoba's holding to the extent of the ceiling area. The heirs of Bhikoba filed objections to the said notice on Nov. 23, 1971 pleading *inter alia* that a holder of land in excess of the ceiling prescribed by the Act would be divested of his title to the surplus land only when its possession was taken from him after the publication of the notification under S. 21 of the Act and since such notification had not yet been published and possession of surplus land had not been taken, Bhikoba

continued to be the owner of the entire land (including the extent determined as surplus land) till his death and that as inheritance could not remain in abeyance, his heirs at law became entitled to the entire land. They contended that if a fresh determination was then made there would be no surplus land at all in their hands, which had to be surrendered. They, therefore, prayed that the proceedings which were commenced with the return filed by Bhikoba should be dropped as they had become infructuous. The Special Deputy Collector accepted the plea of the heirs of Bhikoba and dropped further proceedings as prayed for by them by his order dated March 13, 1973.

10. The respondents 1 to 4 who would have become entitled to a claim relief under the Act at the time when the distribution of surplus land held by Bhikoba was taken up for consideration preferred an appeal against the order of Special Deputy Collector dropping the proceedings as mentioned above before the Maharashtra Revenue Tribunal. The Tribunal by its judgment dated Jan. 31, 1975 dismissed the appeal following the decision of the High Court of Bombay (Nagpur Bench) in *Dadarao Kashiram v. State of Maharashtra*, 72 Bom LR 246: (AIR 1970 Bom 144). Aggrieved by the decision of the Tribunal, respondents 1 to 4 filed a petition under Art. 227 of the Constitution in Special Civil Application No. 1931 of 1975 before the High Court of Bombay. That petition was allowed by the High Court by its judgment dated July 30, 1980 by which the order of the Tribunal was set aside and the matter was remanded to the Special Deputy Collector to continue the proceedings commenced on the basis of the return filed by Bhikoba in the presence of his legal representatives to determine the surplus land held by Bhikoba as on the appointed day and to dispose of the same in accordance with law. This appeal by special leave is filed against the aforesaid judgment of the High Court.

11. There is no merit in the first contention urged in support of the above appeal viz. that respondents 1 to 4 had no *locus standi* to file an appeal against the order of the Special Deputy Collector dated March 13, 1973 dropping the proceedings which commenced with the return filed by Bhikoba. It is no doubt true that at the first instance the land which is declared as surplus land in the hands of any person would vest in the State Government. But the said land has to be distributed in accordance with the provisions contained in Chap. VI of the

Act. Any person who is entitled to grant of land under any of the provisions of the Act may question any order which would have the effect of reducing the extent of total surplus land in any village. Respondents 1 to 4 were the former landlords of the land bearing Survey No. 34 which formed part of the holding of Bhikoba. They cannot, therefore, be characterised as just strangers to these proceedings. It cannot, therefore, be said that respondents 1 to 4 had no locus standi to file an appeal before the Maharashtra Revenue Tribunal and then a petition under Art. 227 of the Constitution before the High Court. This contention is, therefore, rejected.

12. The next contention of the appellants is based on the judgment of the High Court of Bombay in Dadarao Kashiram's case (AIR 1970 Bom 144) (supra). It is no doubt true that the said decision supports the contention of the appellants that the proceedings initiated by a return filed by a holder of land would become infructuous on his death if it takes place before a notification is issued under S. 21 of the Act. The said decision was rendered by the High Court relying upon the decision of the Bombay High Court in *Commr. of Income-tax v. Ellis C. Reid*, AIR 1931 Bom 333 and the decision of this Court in *Commr. of Income-tax, Bombay City v. Amarchand N. Shroff*, (1963) Supp (1) SCR 699 : (AIR 1963 SC 1448), both of which arose under the Income-tax Act, 1922. We do not have provisions corresponding to the Income-tax Act, 1922 in the Act. It is very hazardous to decide cases in which proprietary rights arise for determination on the basis of decisions rendered under taxation laws which have their own peculiarities. The Act is not one levying tax on the income during the previous year or previous years or of a period other than the previous year in the hands of an assessee but a law imposing a ceiling on the holding of a person or a family as on a specified date. The Act has to be construed in accordance with its scheme and object which, as stated earlier, is equitable distribution of land amongst the landless by taking over surplus land in the hands of those who held land in excess of the ceiling limit on the appointed day, or those who would acquire subsequently land in excess of the ceiling or those who own lands which exceed the ceiling limit by reason of their conversion into a different class. In order to achieve that object, the Legislature enacted Ss. 3 and 4 of the Act declaring that no person could on or after the appointed

day hold land in excess of the ceiling area and compelling every person acquiring or coming into possession of any land in excess of the ceiling area on or after the appointed day to file a return before the Collector furnishing particulars of all land held by him. Section 18 of the Act requires the Collector to hold an enquiry into the several matters set out therein including the total area of land held by a person on the appointed day. Sections 19 and 20 of the Act provide for the restoration of land to a landlord in certain cases. Section 21 provides that, as soon as may be, after the Collector has considered the matters referred to in S. 18 and the questions, if any, under sub-section (3) of S. 20, he shall make a declaration stating therein his decision on (a) the total area of land which the person (who has filed a return) is entitled to hold as the ceiling area, (b) the total area and particulars of land which is in excess of the ceiling area, (c) the name of the person to whom possession of land is to be restored under Sec. 19, and area and particulars of such land, (d) the area, description and full particulars of the land which is delimited as surplus land and (e) the area and particulars of land which is to be forfeited to the State Government under sub-section (3) of S. 10 or under the provisions of sub-section (3) of S. 13 of the Act. After a declaration under sub-section (1) of S. 21 is made, as stated above, the Collector has to notify in the prescribed form in the Official Gazette the area, description and full particulars of the land which is delimited as surplus land, and also of the land which is to be forfeited to the State Government. Any declaration made under S. 21 of the Act is subject to the decision of the Maharashtra Revenue Tribunal in appeal and subject to any decision that may be made in such appeal, the Collector is empowered to take possession of the surplus land and with effect from the date of taking over possession, such surplus land vests in the State Government.

13. A close reading of the aforesaid provisions of the Act shows that the determination of the extent of surplus land of a holder has to be made as on the appointed day. If any person has at any time after the fourth day of Aug., 1959 but before the appointed day held any land (including any exempted land) in excess of the ceiling area, such person should file a return within the prescribed period from the appointed day furnishing to each of the Collectors within whose jurisdiction any land in his holding is situated, in the form prescribed containing the particulars of all land held by him.

If any person acquires, holds or comes into possession of any land (including any exempted land) in excess of the ceiling area on or after the appointed day, such person has to furnish a return as stated above within the prescribed period from the date of taking possession of any land in excess of the ceiling area. If any person whose land is converted into another class of land in the circumstances described in Sec. 11-A (formerly numbered as Section 11) thereby causing his holding to exceed the ceiling area then such person has to file a return as mentioned above within the prescribed period from the date of such conversion (such date being a date to be notified in the Official Gazette by the State Government in respect of any area). It is obvious from the foregoing requirements prescribed under Section 12 of the Act that the crucial date with reference to which the extent of the surplus land held by a person is to be determined is the appointed day in the case of persons holding land in excess of the ceiling area at any time after the fourth day of August, 1959 but before the appointed day and in the case of those acquiring, holding or coming into possession of such excess land on or after the appointed day, the day on which they acquire possession of any land in excess of the ceiling area. In the case of those who are affected by Sec. 11-A of the Act, the crucial date is the date of conversion. If a person is found to be in possession of land in excess of the ceiling area at any time after the fourth day of August, 1959 but before the appointed day, he incurs the liability to surrender any surplus land as on the appointed day on the appointed day itself even though the actual extent of such surplus land is determined on a subsequent date. Similarly those who acquire land in excess of the ceiling area on or after the appointed day would become liable to surrender surplus land on the date of taking possession of any land in excess of the ceiling area. A person whose case falls under S. 11-A of the Act becomes liable to surrender any surplus land in his possession as on the date of conversion of land into irrigable land. This liability to surrender surplus land would not in any way come to an end by reason of the death of such holder before the actual extent of surplus land is determined and notified under S. 24 of the Act. It is no doubt true that Section 21 of the Act states that the title of the holder in the surplus land would become vested in the State Government only on such land being taken possession of after a declaration regarding the surplus

land is published in the Official Gazette. But the liability to surrender the surplus land, however, relates back to the appointed day in the case of those who fall under Section 12 (1) (a) of the Act, to the date of taking possession of any land in excess of the ceiling area in the case of those who come under S. 12 (1) (b) of the Act and to the date of conversion of land into a different class in the case of those who come under S. 12 (2) of the Act. Any other construction would make the Act unworkable and the determination of the extent of surplus land of a holder ambulatory and indefinite. It is significant that Section 8 of the Act prohibits transfer or partition of any land held by a person holding land in excess of the ceiling area on or after the appointed day until the land in excess of the ceiling is determined under the Act. Section 10 provides that if any person after the 4th day of Aug., 1959 but before the appointed day transferred or partitioned any land in anticipation of or in order to avoid or defeat the objects of the Act or any land is transferred or partitioned in contravention of provisions of S. 8 then in calculating the ceiling area which that person is entitled to hold the area so transferred or partitioned should be taken into consideration and land exceeding the ceiling area so calculated should be deemed to be in excess of the ceiling area for that holding — notwithstanding the land remaining with him, may not in fact be in excess of the ceiling area. The expression 'holding' used in Ss. 3, 5, 6 and 10 shows that the statute treats a holding as a unit for purposes of determination of surplus land which can be acquired from such holding. Section 2 (14) which defines the expression 'to hold land' as 'to be lawfully in actual possession of land as owner or tenant' requires that the expression 'holding' should be construed accordingly. Section 3 of the Act expressly imposes a limit on the holding of agricultural land on the commencement of the Act. The extent of surplus land which the Government can acquire under the Act from a holder cannot therefore be made to depend upon the date on which a declaration indicating the extent of surplus land is notified in the Official Gazette under S. 21 and the date on which such surplus land is taken possession of. It cannot also be made to depend upon the holder who has incurred the liability on the relevant date being alive on the date on which the declaration is made under Section 21 and possession of surplus land is taken. The acceptance of the contention urged on behalf of the appellants that the

proceedings initiated by a return filed by a holder have to be dropped if such holder dies before a declaration is made under Section 21 and surplus land is taken possession of would frustrate the very object and purposes of the Act.

14. In *Raghunath Laxman Wani v. State of Maharashtra*, (1972) 1 SCR 48 : (AIR 1971 SC 2137, this Court had to examine the scheme of the Act while considering the question whether in the case of a family, the ceiling area would be liable to fluctuations with the subsequent increase or decrease in number of the family members. Dealing with that question the Court observed thus :

"The scheme of the Act seems to be to determine the ceiling area of each person (including a family) with reference to the appointed day. The policy of the Act appears to be that on and after the appointed day no person in the State should be permitted to hold any land in excess of the ceiling area as determined under the Act and that ceiling area would be that which is determined as on the appointed day. Therefore, if there is a family consisting of persons exceeding five in number on Jan. 26, 1962, the ceiling area for that family would be the basic ceiling area plus 1/6th thereof per member in excess of the number five. The ceiling area so fixed would not be liable to fluctuations with the subsequent increase or decrease in the number of its members, for, there is, apart from the explicit language of Ss. 3 and 4, no provision in the Act providing for the redetermination of the ceiling area of a family on variations in the number of its members. The argument that every addition or reduction in the number of the members of a family requires redetermination of the ceiling area of such a family would mean an almost perpetual fixation and re-fixation in the ceiling area by the Revenue authorities, a state of affairs hardly to have been contemplated by the Legislature. The argument would also mean that where a surplus area is already determined and allotted to the landless persons such area would have to be taken back and given to a family, the number of whose members subsequently has augmented by fresh births."

15. The above view supports our conclusion that the surplus land in the case of a person who at any time after the fourth day of August, 1959 but before the appointed day held any land (including any exempted land) in excess of the ceiling area has got to be determined as on the appointed day even though such person may die

before the actual extent of surplus land is determined and notified under S. 21 of the Act. The persons on whom his 'holding' devolves on his death would be liable to surrender the surplus land as on the appointed day because the liability attached to the holding of the deceased would not come to an end on his death. The heirs of the deceased cannot be permitted to contend to the contrary and allowed to get more land by way of inheritance than what they would have got if the death of the person had taken place after the publication of the notification under S. 21.

16. At this stage it is necessary to refer to another contention of the appellants based on the second para of sub-section (2) of Sec. 3 of the new Chap. II of the Act which was substituted in the place of the original Chap. II by the Maharashtra Act 21 of 1975. The relevant part of the said para reads :

"In determining surplus land from the holding of a person, or as the case may be, of a family unit, the fact that the person or any member of the family unit has died (on or after the commencement date or any date subsequent to the date on which the holding exceeds the ceiling area, but before the declaration of surplus land is made in respect of that holding) shall be ignored; and accordingly, the surplus land shall be determined as if that person, or as the case may be, the member of a family unit had not died."

17. It is contended that because for the first time the Legislature by introducing the abovesaid para directed that if a person dies after the commencement of the Act but before the declaration of surplus land is made in respect of his holding, the fact of his death should be ignored and the surplus land should be determined as if that person had not died, it should be held that before the introduction of that para the proceedings needed to be dropped on the death of the person taking place before the declaration was made. It appears to us that the said para was introduced by way of abundant caution to get over the possible objection raised on the basis of the decision in the case of *Dadarao Kashiram* (AIR 1970 Bom 144) (supra). The said para is merely declaratory of what the true legal position had always been even from the commencement of the Act. The introduction of an express provision to the above effect does not have the effect of altering the true legal position as explained by us above even without the aid of such express provision. This becomes

further clear from the observations found in the decision of this Court in Raghunath Laxman Wani's case (AIR 1971 SC 2137) (supra). It may be noticed that the said para in the new S. 3 (2) refers to two contingencies — (i) the death of a person who was holding land in excess of the ceiling limit and (ii) the death of any member of a family unit owning land in excess of the ceiling on the appointed day. It provides that the death of the person or the death of a member of the family unit as the case may be should be ignored. One of the contentions urged before this Court in that case was that the Tribunal was wrong in not taking into consideration the three children born in the family after the appointed day while determining the ceiling area to which the family of the appellants therein was entitled to. This Court rejected that plea and upheld the decision of the Tribunal observing that "the argument that every addition or reduction in the number of the members of the family requires re-determination of the ceiling area of such a family would mean an almost perpetual fixation and re-fixation in the ceiling area by the Revenue authorities, a state of affairs hardly to have been contemplated by the Legislature". This conclusion was reached by this Court without the aid of any provision in the Act at the relevant time corresponding to the second para of the new Section 3 (2) of the Act. This case was no doubt one relating to a claim based on the birth of three children. In principle it applies to the case where the number of members of a family decreases on account of death of any of its members, as observed by the Court. On the same analogy it has to be held that the death of a person after the appointed day also would make no difference so far as the liability of his holding to part with the surplus land is concerned. Hence it has to be held that the introduction of the second para of the new Section 3 (2) does not lead to any conclusion different from the one which we have reached in this appeal.

18. In view of the foregoing, the decision of the High Court of Bombay in Dadarao Kashiram's case (AIR 1970 Bom 144) (supra) cannot be considered as a correct one and we, therefore, overrule it.

19. The High Court was right in the present case in holding that the proceedings commencing with the return filed by Bhikoba could not be dropped merely because he died before a notification was issued under Section 21 of the Act. The proceedings have

to be continued and the surplus land in the hands of Bhikoba as on the appointed day should be determined and taken possession of in accordance with law. The heirs of Bhikoba are entitled to participate in the said proceedings representing the estate of Bhikoba. They would be entitled as heirs at law only to such land that may remain after surrendering the surplus land as may be determined under the Act.

20. In the result, the appeal fails and is hereby dismissed. No costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 872

(From : Bombay)*

R. S. PATHAK AND O. CHINNAPPA
REDDY, JJ.

Civil Appeal No. 440 (N) of 1970, D/-17-2-1982.

Parashram Thakur Dass and others, Appellants v. Ram Chand and others, Respondents.

M. P. Land Revenue Code (2 of 1955), S. 149 (as applied to Vidarbha Region) — M. P. Land Revenue Code Rules, Rr. 22 and 26 — Grant of Bhumidhari rights in nazul land — Normal rule is to grant by auction — Government can dispose of such lands without auction but only after complying with R. 26 (1). (Constitution of India, Arts. 14, 226).

Under the Rules as a general principle, leasehold rights in nazul land are to be disposed of by public auction. If in any particular case the State Government or, as the case may be, the Collector considers that there is good reason for granting the land without auction the reasons must be recorded in writing. The existence of good reason for departing from the general principle, and the recording of the reason in writing are essential prerequisites which must be satisfied before leasehold rights are granted without auction. It is true that under Cl. (vii) of R. 22 (1) the State Government is empowered to dispose of nazul plots without auction, but it can do so only after full compliance with R. 26 (1). Rule 26 (1) controls power of the State Govt. conferred by R. 22 (1), Cl. (vii). The two Rules have to be read together. (Para 9)

In the instant case the State Government had decided earlier, as a matter of policy,

*Misc. Civil Appln. No. 139 of 1968, D/-18-6-1969 (Bom).

BZ/CZ/A824/82/MVJ

not to allot nazul land to displaced persons, and pursuant to that decision all the applications for allotment were rejected. The applications were not rejected on the merits of the respective claims set out therein. Subsequently when the State Government made an allotment of the plots to the appellants, it was consequent to a decision which analytically must be regarded as a composite of two decisions, one, a policy decision to throw open the land to allotment in reversal of the earlier policy and, two, to allot the land to the appellants. The applications of the respondents for allotment of plots were rejected on the ground that the land was not available for allotment. That was a policy decision. When it was reversed, it was incumbent on the State Government to reconsider those applications or to notify that the land was available for allotment and to invite fresh applications in that behalf. It was not open to the State Government to allot the plots to the appellants in disregard to the claims of others who had also applied for allotment.

(Para 11)

The change of policy altered the situation completely, and all the claimants were entitled to the benefit of that change. By adopting the new policy, the State Government must be taken to have declared that the land was now open to allotment to the claimants who were found most deserving. There were several applicants for allotment, and a selection had to be made. It cannot be contended that the appellants constitute a distinct and separate class from the respondents only because the appellants agitated against the rejection of their applications while the respondents did not.

(Para 13)

It was also apparent that the grant cannot be attributed to Cl. (c) of sub-section (2) of Section 149. The land was disposed of in Bhumidhari right. Moreover, it was not given on favourable terms to the appellants; the market value of the plots was taken for fixing the premium.

(Para 8)

Naunit Lal, for Appellants; A. G. Ratnaparkhi (for Nos. 1-6), M. N. Shroff (for Nos. 17-19), for Respondents.

PATHAK, J.:— This appeal by special leave is directed against the judgment of the Nagpur Bench of the Bombay High Court quashing the grant of Nazul land to the appellants on a writ petition filed by the respondents Nos. 1 to 16.

2. The respondents Nos. 1 to 16 applied on March 15, 1963 for the grant of sixteen plots of land included in Government Nazul

Plot No. 31/1 (Sheet No. 49-D) in Yeotmal Town for the purpose of constructing shops thereon. They alleged that they had not been allotted any land yet for carrying on business at Yeotmal, and inasmuch as land sites were being released to refugees or displaced persons they claimed that having been compelled to migrate from West Pakistan to India during the partition of 1947 they were entitled to the grant of such plots. The appellants made a similar application on May 16, 1964 and it is their case that they had also applied earlier in the same behalf on Feb. 27, 1962. There were applications from other claimants also. The State Government, acting on the report of the Commissioner, Nagpur Division, rejected all the applications. The appellants say that they sought a review of the order of the Government, and on June 28, 1965 the Government reversed its order and decided to grant plots on permanent lease to the appellants. The Collector, Yeotmal submitted a report to the Government pointing out that each plot would be 192 sq. ft. in area and having regard to its market value each allottee should be required to pay a premium of Rs. 960/-. The State Government granted the plots to the appellants as shop sites in Bhumidhari right without auction on payment of premium, and the decision was conveyed in a Memorandum dated March 3, 1966. The allotment was assailed by the respondents, and they represented to the State Government that after further inquiry the land should be reserved for deserving claimants.

3. The respondents filed a writ petition before the Nagpur Bench of the Bombay High Court challenging the allotment made by the Government in favour of the appellants. They urged that no reasonable opportunity had been given to them to press their claims for grant of plots after the Government had reversed its earlier decision not to grant land, that the appellants had been unduly favoured and that the order was bad in law because the plots had been granted without holding an auction. It was also contended that the power to grant the plots was vested in the Collector and not the State Government.

4. During the pendency of the writ petition a statement was made on behalf of the State Government that it was prepared to consider the claims of the respondents. The appellants, however, maintained that they had acquired a right to the land in terms of the order dated March 3, 1966 and that they could not be divested of those rights.

5. By its judgment dated March 14, 1968 the High Court allowed the writ petition, quashed the order granting plots to the appellants and directed the State Government and its officers to take appropriate action on the several claims for allotment of land. The High Court held that in view of sub-section (2) of S. 149 read with sub-section (3) of S. 164 of the Madhya Pradesh Land Revenue Code, 1954, as applied to the Vidharba region of Maharashtra, and Rr. 22 and 26 framed under the Code, it was not open to the State Government to dispose of the plots without holding a public auction unless there were reasons recorded in writing for doing so, and that after initially deciding not to grant the plots the subsequent decision to allot them to the appellants was contrary to law inasmuch as the claims of others had not been considered.

6. In this appeal, it is urged by the appellants that the High Court erred in applying sub-section (3) of S. 164 and R. 26, and therefore in holding that the lease of the plots without auction and without recording any reasons was invalid.

7. When the Government decided to grant land to the appellants, it thought that the grant should take the form of a permanent lease in their favour. The Collector was requested to frame suitable proposals and to submit them to the Government. The Collector submitted a report dated Nov. 23, 1965 suggesting the allotment of plots for the construction of shops on the footing that each plot would measure 192 sq. ft. and its market value, worked out on the basis of recorded sale transactions, and taking into regard the commercial purpose for which the land was intended, indicated a premium of Rs. 960/-. He recommended further that the plots may be granted without auction and in Bhumidhari right on payment of premium for constructing shops thereon for carrying on business. On March 3, 1966 the State Government made an order accordingly.

8. Now S. 149 of the Madhya Pradesh Land Revenue Code 1954 provides:

"149. (1) Subject to rules made under this Code, land belonging to the State Government, not being land hereinafter mentioned in sub-section (2), shall be disposed of in Bhumidhari or Bhumiswami rights by the Deputy Commissioner who may require payment of a premium for such right or sell the same by auction.

(2) The land referred to in sub-section (1) shall be the following, namely:—

(a) land situate in the bed of a river or a tank;

(b) land reserved for communal purposes such as common grazing ground and cremation grounds;

(c) land given out on favourable terms for the promotion of religious, charitable, educational, public or social purposes;

(d) land given out to persons on the condition that it shall be used only for grazing cattle;

(e) land given out for temporary purposes or for limited periods or for mining and purposes subsidiary thereto or for industrial or commercial purposes;

(f) land given out to persons on favourable terms for rendering service as a kotwar;

(g) any other land which the State Government may, by notification issued in this behalf, specify."

Section 164 of the Code may also be set forth:

"164. (1) Every person who holds land from the State Government or to whom a right to occupy land is granted by the State Government or the Deputy Commissioner and who is not entitled to hold land as a tenure-holder shall be called a Government lessee in respect of such land.

(2) The Government lessee shall, subject to any express provision in this Code, hold his land in accordance with the terms and conditions of the grant which shall be deemed to be a grant within the meaning of the Government Grants Act, 1895.

(3) The State Government or the Deputy Commissioner may, subject to rules made under this Code, dispose of the right to occupy the land specified in sub-section (2) of S. 149 on payment of a premium or by auction or on such terms and conditions as may be prescribed."

It is apparent that the grant cannot be attributed to clause (c) of sub-section (2) of Section 149. The land was disposed of in Bhumidhari right. Moreover, it was not given on favourable terms to the appellants; the market value of the plots was taken for fixing the premium. From the nature of the grant, it is clear that action under sub-section (1) of S. 149 was intended. Now Part III of the Notification No. 1118-1832-55-XXVIII dated May 22, 1956 sets forth the rules framed with reference to sub-section (1) of S. 149. These rules provide for the grant of Bhumiswami and Bhumidhari rights in nazul land for dwelling houses and ancillary purposes. Rule 24 defines the expression "Nazul Land" to mean land belonging to the State Government which is used for building on, or for roads, markets and

other public purposes. Rule 26 applies the provisions of Rr. 18 to 36 contained in Part V of the Notification No. 1119-1832-55-XXVIII dated May 22, 1956 to the disposal of nazul land under Part III. The proviso to R. 26 declares that where nazul land is put to auction it should normally be granted in Bhumiswami right, and where it is disposed of without auction it should normally be granted in Bhumidhari right. Rule 22 of Part V defines the power of the State Government and of the Collector to dispose of nazul plots with or without auction. Rule 22 provides :—

“22. Power to dispose of nazul plots with or without auction shall be exercised in accordance with these Rules—

(1) by the State Government in the case of:

(i) plots of which the freehold market value is not less than Rs. 5,000;

(ii) plots within the limits of the Municipal Corporation of the City of Nagpur, whether or not included in the Schemes of Nagpur Improvement Trust;

(iii) plots reserved for specific purposes under R. 20;

(iv) strips of land not being independent plots to be settled with the occupants of adjoining land where the freehold value of the strip is not less than Rs. 5,000/-;

(v) small strips of land adjacent to occupied plot, which cannot be disposed of as a separate site and in respect of which there is a difference of opinion between the Collector and the Officer-in-charge, Town Planning and Valuation;

(vi) independent plots not included in the approved lists where there is a difference of opinion between the Collector and the Officer-in-charge, Town Planning and Valuation;

(vii) plots granted without auction.

(2) by the Collector, in case of the other plots.”

Sub-rule (1) of Rule 26 in Part V declares :—

“26. (1) Leasehold rights in nazul land shall be disposed of by public auction except when in any particular case the State Government or as the case may be, the Collector thinks for reasons to be recorded in writing that there is good reason for granting the land without auction.”

9. It seems indisputable that under the Rules as a general principle leasehold rights in nazul land are to be disposed of by public auction. If in any particular case the State Government or, as the case may be, the Collector considers that there is good reason for granting the land without auction

the reasons must be recorded in writing. The existence of good reason for departing from the general principle, and the recording of the reason in writing are essential prerequisites which must be satisfied before leasehold rights are granted without auction. It is pointed out that under clause (vii) of sub-rule (1) of R. 22 the State Government is empowered to dispose of nazul plots without auction. We have no doubt it can do so, but only after full compliance with sub-rule (1) of R. 26. The sub-rule (1) controls the power of the State Government conferred by clause (vii) of sub-rule (1) of Rule 22. To hold otherwise would be to confer an arbitrary power on the State Government to dispose of nazul plots. It would be in the absolute discretion of the State Government to decide whether nazul plots should be granted with auction or without auction. If that construction is accepted, it is clear that sub-rule (1) of R. 26 would be negated. The only reasonable construction, it seems to us, is to read the two provisions together.

10. In the present case there is no evidence that the State Government has recorded any reasons in writing for preferring the mode of disposing of the land without auction and we are not satisfied that it had good reason for favouring that mode. In the circumstances the grant of land to the appellants has been rightly quashed by the High Court.

11. There is also sufficient justification in the grievance of the respondents that the State Government did not consider the claims of other persons, including the respondents, when making an allotment of the plots. The State Government had decided earlier, as a matter of policy, not to allot nazul land to displaced persons, and pursuant to that decision all the applications for allotment were rejected. The applications were not rejected on the merits of the respective claims set out therein. Subsequently when the State Government made an allotment of the plots to the appellants, it was consequent to a decision which analytically must be regarded as a composite of two decisions, one, a policy decision to throw open the land to allotment in reversal of the earlier policy and, two, to allot the land to the appellants. It will be remembered that the applications of the respondents for allotment of plots were rejected on the ground that the land was not available for allotment. That was a policy decision. When it was reversed, it was incumbent on

the State Government to reconsider those applications or to notify that the land was available for allotment and to invite fresh applications in that behalf. It was not open to the State Government to allot the plots to the appellants in disregard of the claims of others who had also applied for allotment.

12. In quashing the order granting plots to the appellants and directing the State Government or its appropriate officers to consider the several claims for allotment the High Court, in our opinion, did that which was plainly right.

13. The appellants say that the respondents must be taken to have accepted the rejection of their applications for allotment, and it was only the appellants who pursued the matter and obtained a reversal of the order of the Government and therefore the appellants alone were entitled to the allotment of plots. The submission would have had force but for the circumstance that the State Government effected what was a change of general policy. The change of policy altered the situation completely, and all the claimants were entitled to the benefit of that change. By adopting the new policy, the State Government must be taken to have declared that the land was now open to allotment to the claimants who were found most deserving. There were several applicants for allotment, and a selection had to be made. It cannot be contended, as indeed it is urged before us, that the appellants constitute a distinct and separate class from the respondents only because the appellants agitated against the rejection of their applications while the respondents did not.

14. The controversy which remains is whether it is the State Government or the Collector who has power to dispose of the plots in view of their market value. That is a matter on which we need express no opinion, having regard to the quashing of the entire allotment proceeding from its inception. It will be for the Government or the appropriate authority to decide what should be the nature of the rights to be conferred on the allottees and, therefore, what should be the premium to be fixed.

15. In the result, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 876

(From: Allahabad High Court)

V. D. TULZAPURKAR AND AMARENDRANATH SEN, JJ.

Civil Appeal No. 1922 of 1970, D/- 19-1-1982.

State of U. P., Appellant v. Major Jitendra Kumar and others, Respondents.

Land Acquisition Act (1 of 1894), Ss. 23 and 54 — Acquisition of land — Compensation — Appeal — Enhancement — Powers of Appellate Court to enhance.

Where land was acquired for the benefit of the Co-operative Housing Society under a Notification issued under S. 4 on 6-1-1948 and in appeal by the claimant for enhancement of compensation the High Court relied upon a sale deed dated 11-7-1951 whereunder the Co-operative Society had itself purchased land in the neighbourhood of the land for which enhancement of compensation was claimed, the High Court could not be said to have committed any error by relying upon the sale deed even though the sale deed was of a date three years later than the Notification under S. 4 when no material was produced before the Court to suggest that there was any fluctuation in the market rate from 1948 onwards till 1951 and if so to what extent. (Para 3)

TULZAPURKAR, J.:— The only question raised in this appeal pertains to adequacy of compensation and the points raised before us really dwell on appreciation of evidence on record and hence we are not inclined to interfere with the High Court's appreciation, especially as no breach of any principle is involved.

2. About 80 bighas and 19 biswas of land in the town of Meerut was acquired for the benefit of the Meerut Co-operative Housing Society, Meerut under a Notification issued under S. 4 of the Land Acquisition Act on 6th Jan., 1948 and the Notification under S. 6 followed on 12th Feb., 1949. The Land Acquisition Officer made his award fixing the compensation at Rs. 1/0/6 per sq. yd. which was confirmed by the Civil Court in the land reference made to it. When the matter was carried in appeal to the High Court by the claimants, the High Court enhanced the rate of compensation from Rs. 1/0/6 to Rs. 2/12/- per sq. yd. It is this enhancement that is challenged before us.

3. Principally the High Court relied upon a sale deed dated July 11, 1951 (Ex. 21)

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whereunder the Co-operative Society itself had purchased a part of this land at a price calculated at the rate of Rs. 2/12/- per sq. yd. for enhancing the rate of compensation. Other sale deeds at Exts. 1, 2, 3, 4, 5 and 6 under which the prices varying from Rs. 5/- per sq. yd. to Rs. 2/12/- per sq. yd. were also relied upon by the claimants but the High Court rejected the other sale deeds as affording proper guidance and accepted the rate of Rs. 2/12/- per sq. yd. at which land under Ex. 21 was purchased by the Society itself. Counsel for the State contended that the other sale deeds had been rejected on the ground that they pertained to comparatively smaller area of land but the same reason was applicable to Ex. 21 also, for Ex. 21 also related to a smaller area. Secondly, counsel contended that Ex. 21 was of a date three years later than the relevant date of the Notification under S. 4. As against Ex. 21, on which the High Court has relied, counsel for the State urged before us that there were two compromise documents of the year 1949 Ex. A and Ex. B under which the Housing Society had purchased land from one Khan Bahadur Sheikh Wahiduddin and his tenants and the rate of Rs. 1/-/6 per sq. yd. at which the land under these two documents had been purchased ought to have been accepted by the High Court. The High Court has pointed out that at the material time of the compromise deeds Khan Bahadur Sheikh Wahiduddin was heavily indebted to the tune of Rupees 1,33,000/- and was financially embarrassed and, therefore, it felt that it would be improper to rely upon these deeds as affording proper guidance. It is true that the sale deed Ex. 21 upon which the High Court has relied is of a date three years later than the Notification under S. 4 but no material was produced before the Court to suggest that there was any fluctuation in the market rate at Meerut from 1948 onwards till 1951 and if so to what extent. In the absence of any material showing any fluctuation in the market rate the High Court thought it fit to rely upon Ex. 21 under which the Housing Society itself had purchased land in the neighbourhood of the land in dispute. On the whole we are not satisfied that any error was committed by the High Court in relying upon the sale deed Ex. 21. We do not think any case for interference is made out. The appeal is, therefore, dismissed, but since the respondents have not appeared there will be no order as to costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 877

V. D. TULZAPURKAR AND
AMARENDRA NATH SEN, JJ.

Civil Appeals Nos. 1307 and 2174 of 1970,
D/- 5-1-1982.

Krapa Rangiah, Appellant v. Special Deputy Collector, Land Acquisition, Respondent.

Land Acquisition Act (1 of 1894), S. 23 — Acquisition of land — Compensation — Land in question acquired under notification for Housing Scheme — Grant of compensation at rate of 7% by High Court — High Court in subsequent case awarding compensation at rate of 9% for similarly situated land acquired under same notification and for same Housing Scheme — Held, it would be proper that rate of compensation at rate of 9% should be awarded to owner of land in question.
(Para 3)

TULZAPURKAR, J.:— The only question raised in these appeals is whether the High Court was justified in reducing the rate at which compensation was granted by the City Civil Court for the lands acquired for the A. P. Housing Board for construction of houses under the Composite Housing Scheme. Two pieces of lands were acquired bearing Survey No. 114 admeasuring 4 acres 25 guntas and Survey No. 115 measuring 6 acres 21 guntas (totalling to 51366 square yards) under the Notification in question along with 15 other survey numbers. The Land Acquisition Officer granted compensation at the rate of Rs. 6/- per sq. yd. for 21385 sq. yds. comprising S. No. 114 and at the rate of Rs. 6/50 per sq. yd. for 29981 sq. yds. comprising S. No. 115. The claimant got a reference made to the City Civil Court which enhanced the compensation at a uniform rate of Rs. 10 per sq. yd. The State preferred an appeal to the High Court while the claimant also preferred his appeal claiming still higher compensation over and above that was granted by the City Civil Court. The High Court dismissed the claimant's appeal but allowed the State's appeal granting compensation at Rs. 7/- per sq. yd. It is this judgment of the High Court that has been challenged by the claimant in the appeals before us.

2. Counsel for the claimant has urged that the High Court has in another claim proceeding in respect of certain lands which had been acquired under the self same

Notification granted compensation at the rate of Rs. 9/- per sq. yd. It has been pointed out that in Appeal No. 50 of 1970 decided subsequently in respect of lands covered by Survey Nos. 173, 101, 112 and 121-B acquired under the same Notification compensation has been awarded by the High Court at the rate of Rs. 9/- per sq. yd. and since these lands, particularly land covered by S. No. 112, are adjoining the lands in question it would be rather inequitable and discriminatory to grant lesser compensation at the rate of Rs. 7/- per sq. yd. as has been done by the High Court in the instant case. It is further pointed out that area of Survey No. 112 is also large, comparable to the area covered by the two survey Nos. in question and in view of this subsequent judgment of the High Court which has become final, there being no appeal preferred by the State to this Court, the same rate should be granted to the present claimant. We find considerable force in the contention of the claimant.

3. Counsel for the State however contended before us that the Judgment under appeal according to him is a more reasoned one than the judgment of the High Court in which compensation at the rate of Rs. 9/- per sq. yd. has been awarded and on merits the rate of Rs. 7/- per sq. yd. at which the compensation has been awarded is justified and should not be interfered with. It is not possible for us to accept this contention. Having gone through both the judgments we are not impressed by the argument that the judgment of the High Court in the subsequent case in which compensation at the rate of Rs. 9/- was awarded is not a reasoned judgment or that it is any less reasoned than the judgment under appeal. The area being comparable, the situation also being the same and all the plots having been acquired under the self-same notification for Housing Scheme it seems to us proper that the same rate of compensation should be awarded to the claimant herein as was awarded by the High Court in Appeal No. 50 of 1970. We accordingly enhance the compensation granted to the claimant by Rs. 2/- per sq. yd. with consequential increase in solatium and interest. There will be no order as to costs.

4. The judgment disposes of both the appeals.

Order accordingly.

AIR 1982 SUPREME COURT 878

S. MURTAZA FAZAL ALI,
E. S. VENKATARAMIAH AND
A. VARADARAJAN, JJ.

Writ Petn. No. 9373 of 1981, D/- 2-2-1982.

Munna Tuin, Petitioner v. District Magistrate, Lucknow and others, Respondents.

Constitution of India, Art. 22 — Detention — Inquiry report not supplied to detenu along with grounds for detention — Counter affidavit filed by clerk in judicial section and not by District Magistrate — It cannot be proper explanation or return to rebut allegations made by detenu — Consequently order of detention set aside. (National Security Act (65 of 1980), S. 3).

FAZAL ALI, J.:— In this petition the detenu Munna alias Mohsin Raza was detained by an order dated 15th Apr., 1981 passed by District Magistrate, Lucknow. The detenu was arrested on 18th Apr., 1981 and was supplied the grounds of detention at the time of his arrest. In support of the rule. Mr. Goyal has raised two short points. In the first place he submitted that one of the important documents on which reliance was placed by the detaining authority was an inquiry report which was not supplied to him along with grounds and this is sufficient to vitiate the order of detention. Secondly, it was argued that the counter affidavit was filed by an incompetent person, namely Shri Pratap Chandra Saxena who was a mere clerk in the Judicial Section and was not therefore authorised to file counter affidavit in the highest Court of the country and could not be expected to know the truth and the details of the matter. The District Magistrate should have filed counter affidavit himself. In fact by an order of this Court dated 8-1-1982 the District Magistrate was directed to file counter affidavit which alone could be treated as a proper return. Despite this direction, no counter-affidavit has been filed by the District Magistrate. Thus, in short there is no proper explanation or return before us to rebut the allegations made by the detenu. On this ground alone, we are of the opinion that the petitioner should be released. We, therefore, allow the petition, set aside the order of detention and direct the petitioner to be released forthwith. Order to be communicated today itself.

Petition allowed.

AIR 1982 SUPREME COURT 879

**O. CHINNAPPA REDDY A. P. SEN AND
BAHARUL ISLAM, JJ.**

Writ Petn. No. 4676 of 1978, D/- 22-2-1982.

Randhir Singh, Petitioner v. Union of India and others, Respondents.

Constitution of India, Pre. and Arts. 14, 16 and 39 (d) — Provisions contemplate the principle "Equal pay for equal work".

Construing Articles 14 and 16 in the light of the Preamble and Art. 39 (d), it is clear that the principle "Equal pay for Equal work" is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer. (Para 8)

It is true that equation of posts and equation of pay are matters primarily for the Executive Government and expert bodies like the Pay Commission and not for Courts but where all things are equal that is, where all relevant considerations are the same, persons holding identical posts may not be treated differentially in the matter of their pay merely because they belong to different departments. Of course, if officers of the same rank perform dissimilar functions and the powers, duties and responsibilities of the posts held by them vary, such officers may not be heard to complain of dissimilar pay merely because the posts are of the same rank and the nomenclature is the same.

(Para 6)

It is well known that there can be and there are different grades in a service, with varying qualifications for entry into a particular grade, the higher grade often being a promotional avenue for officers of the lower grade. The higher qualifications for the higher grade, which may be either academic qualifications or experience based on length of service, reasonably sustain the classification of the officers into two grades with different scales of pay. The principle of equal pay for equal work would be an abstract doctrine not attracting Art. 14 if sought to be applied to them. AIR 1962 SC 1139, Distinguished.

(Para 7)

It is true that the principle of "equal pay for equal work" is not expressly declared by our Constitution to be a fundamental right. But it certainly is a Constitutional goal.

(Para 8)

Cases Referred: Chronological Paras

ILR (1975) 1 Delhi 227 : (1975) 77 Pun LR (D) 85 7

ILR (1973) 1 Delhi 427 : 1973 Serv LJ 438 7

AIR 1962 SC 1139 7

Mr. M. S. Ganesh Advocate, for Petitioner; Mr. N. C. Talukdar, Sr. Advocate, Mr. R. N. Poddar and Miss. A. Subhashini, Advocates with him, for Respondents.

CHINNAPPA REDDY, J.:— 'Equal pay for equal work' is not a mere demagogic slogan. It is a constitutional goal capable of attainment through constitutional remedies, by the enforcement of constitutional rights. So the petitioner claims; so the petitioner asserts. Article 39 (d) of the Constitution proclaims, as a Directive Principle, the Constitutional goal of 'equal pay for equal work for both men and women'. Articles 14 and 19 guarantee respectively the fundamental rights to equality before the law and equality of opportunity in the matter of public employment and Art. 32 provides the remedy for the enforcement of the fundamental rights. So the petitioner has invoked the jurisdiction of this Court under Art. 32 and has asked us to direct the respondents to give him his due, the same as they have given others like him. True, he is the merest microbe in the mighty organism of the State, a little clog in a giant wheel. But, the glory of our Constitution is that it enables him to directly approach the highest Court in the land for redress. It is a matter of no little pride and satisfaction to us that he has done so. Hitherto the equality clauses of the Constitution, as other articles of the Constitution guaranteeing fundamental and other rights, were most often invoked by the privileged classes for their protection and advancement and for a 'fair and satisfactory' distribution of the buttered loaves amongst themselves. Now, thanks to the rising social and political consciousness and the expectations roused as a consequence, and the forward looking posture of this Court, the underprivileged also are clamouring for their rights and are seeking the intervention of the Court with touching faith and confidence in the Court. The Judges of the Court have a duty to redeem their constitutional oath and do justice no less to the pavement dweller than to the guest of the five star hotel.

2. The petitioner is a Driver-Constable in the Delhi Police Force under the Delhi Administration and he demands that his scale of pay should at least be the same as the scale of pay of other drivers in the service of the Delhi Administration. The scale of

pay of a Driver-Constable in the Delhi Police Force is Rs. 210-270 in the case of non-matriculantes and Rs. 225-308 in the case of matriculantes. The scale of pay of a Driver in the Railway Protection Force is Rupees 260-400. The scale of pay of drivers in the non-Secretariat offices in Delhi is Rs. 260-6-326-EB-8-350. The scale of pay of drivers in the Secretariat offices in Delhi is Rs. 260-6-290-EB-6-326-8-366-EB-8-8-390-10-400. The scale of pay of drivers in the office of the Language Commission is Rs. 260-350. The pay scale of drivers of heavy vehicles in the Fire Brigade and the Department of Light House is Rs. 330-480. The case of the petitioner is that he discharges the same duties as the rest of the drivers in the other offices; in fact he claims that he discharges more onerous duties than the others. He complains that there is no reason whatsoever to discriminate against the petitioner and other driver-Constables merely because he and his ilk happen to be described as constables as indeed they are bound to be so described, belonging as they do to the Police Force.

3. It appears that the Third Pay Commission considered the claims of all drivers as a common category under the head "the pay scales appropriate for drivers of motor vehicles operating on roads... .." After considering the qualifications etc. possessed by drivers the Commission proposed pay scales for various categories of drivers like drivers of light motor vehicles, drivers of heavy motor vehicles, drivers employed in organisations with large fleet of vehicles, drivers of staff cars etc. The pay scales were professed to be fixed with reference to the qualifications for driving, the nature and the arduousness of the duties and responsibilities, the non-availability of adequate promotional avenues and such other usual considerations. The Pay Commission, however, while considering the question of scales of pay of drivers separated the case of constable-drivers on the ground that their case would be considered along with the cases of other police personnel. The grievance of the petitioner is that while considering the question of the scales of pay of the police personnel, the Pay Commission failed to consider the drivers as a separate category and ignored the special considerations which prevailed in the case of drivers in other departments and which should have, therefore, prevailed in the case of driver-constables also. The driver-constables were not only required to possess heavy transport driving licence, they were further required to undergo a test of proficiency in driving before they were appointed as driver-con-

stables in the police force. Their duties were no less arduous and their responsibilities no less heavy than the duties and responsibilities of drivers in other departments. Their hours of work were long and inconvenient and there was constant exposure to security risks. The petitioner and other driver-constables made a representation to the authorities that their case was omitted to be considered separately by the Pay Commission and that their scales of pay should be the same as the drivers of heavy vehicles in other departments. As their claims for better scales of pay did not meet with any success, the present application has been filed for the issue of a writ under Art. 32 of the Constitution.

4. Among the submissions made on behalf of the respondents, it was suggested that the petitioner was no more and no less than a constable of the Delhi Police Force and that there was no such category of Drivers in the Delhi Police Force. The hollowness of this submission is exposed by a reference to the facts relating to the individual petitioner. The petitioner who was an ex-gunner (driver) in the artillery corps of the Indian Army and who was experienced in the driving, operation and maintenance of jeeps, trucks and heavy armoured vehicles was allowed to retire from the Army on compassionate grounds. He held an Army driving licence as also a Civil Heavy Transport Driving Licence. After he was discharged from the Army his nominal roll was forwarded by the Director General Resettlement, Ministry of Defence to the Commandant, Delhi Armed Police, Delhi. The question of his employment as a driver in the Delhi Police Force was considered and he was informed that a test of proficiency in driving would be held. He was required to produce his Civil Heavy transport driving licence at the time of the test. It is of interest to note that the subject of the communication sent by the Delhi Police establishment to the petitioner was "Employment of ex-servicemen in Delhi Police as N. T. Driver (Const)". He appeared at the test. By a communication dated March 29, 1968, he was informed by the Commandant, Delhi Armed Police, Delhi that his name had been "approved for enlistment as driver in the Delhi Police". Thereafter a certificate in the prescribed form was issued to him vesting him with the powers, functions and privileges of a police officer. It is clear and it cannot be seriously disputed that the petitioner was appointed as a driver in the Delhi Police Force. He was designated as constable because, for the purposes of the discipline of the Force and appointment as driver in the Delhi Police

Force, he had to be made a member of the Delhi Police Force and had to be assigned a rank in the Force. The investiture of the petitioner with the "powers, functions and privileges of a police officer" was a consequence of his becoming a member of the Force.

5. The main defence taken by the respondents is, in the words of the deponent of the counter-affidavit, as follows:

"It is submitted that there can be no comparison between the different departments of the Government of India for the purpose of fixation of pay scale. A pay scale has been fixed upon consideration of various factors. The pay scales of the drivers of the Delhi Police has been fixed after duly considering all the circumstances. The drivers in the other departments are not similarly situated as the petitioner and there is no question of any hostile discrimination. It is, however, denied that the drivers have been treated as a separate class. It is also denied that the designation of the petitioner is N. T. Driver (Constable)."

6. The counter-affidavit does not explain how the case of the drivers in the police force is different from that of the drivers in other departments and what special factors weighed in fixing a lower scale of pay for them. Apparently in the view of the respondents, the circumstance that persons belong to different departments of the Government is itself a sufficient circumstance to justify different scales of pay irrespective of the identity of their powers, duties and responsibilities. We cannot accept this view. If this view is to be stretched to its logical conclusion, the scales of pay of officers of the same rank in the Government of India may vary from department to department notwithstanding that their powers, duties and responsibilities are identical. We concede that equation of posts and equation of pay are matters primarily for the Executive Government and expert bodies like the Pay Commission and not for Courts but we must hasten to say that where all things are equal that is, where all relevant considerations are the same, persons holding identical posts may not be treated differentially in the matter of their pay merely because they belong to different departments. Of course, if officers of the same rank perform dissimilar functions and the powers, duties and responsibilities of the posts held by them vary, such officers may not be heard to complain of dissimilar pay merely because the posts are of the same rank and the nomenclature is the same.

7. Our attention was drawn to Binoy Kumar Mukherjee v. Union of India, ILR (1973) 1 Delhi 427, Makhan Singh v. Union of India, ILR (1975) 1 Delhi 227 where reference was made to the observations of this Court in Kishori Mohanlal Bakshi v. Union of India, AIR 1962 SC 1139 describing the principle of equal pay for equal work as an abstract doctrine which had nothing to do with Art. 14. We shall presently point out how the principle, "equal pay for equal work", is not an abstract doctrine but one of substance. Kishori Mohanlal Bakshi v. Union of India is not itself of any real assistance to us since what was decided there was that there could be different scales of pay for different grades of a service. It is well known that there can be and there are different grades in a service, with varying qualifications for entry into a particular grade, the higher grade often being a promotional avenue for officers of the lower grade. The higher qualifications for the higher grade, which may be either academic qualifications or experience based on length of service, reasonably sustain the classification of the officers into two grades with different scales of pay. The principle of equal pay for equal work would be an abstract doctrine not attracting Art. 14 if sought to be applied to them.

8. It is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right. But it certainly is a Constitutional goal. Art. 39 (d) of the Constitution proclaims "equal pay for equal work for both men and women" as a Directive Principle of State Policy. 'Equal pay for equal work for both men and women' means equal pay for equal work for everyone and as between the sexes. Directive principles, as has been pointed out in some of the judgments of this Court have to be read into the fundamental rights as a matter of interpretation. Art. 14 of the Constitution enjoins the State not to deny any person equality before the law or the equal protection of the laws and Art. 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. These equality clauses of the Constitution must mean something to everyone. To the vast majority of the people the equality clauses of the Constitution would mean nothing if they are unconcerned with the work they do and the pay they get. To them the equality clauses will have some substance if equal work means equal pay.

Whether the special procedure prescribed by a statute for trying alleged robber-barons and smuggler kings or for dealing with tax evaders is discriminatory, whether a particular Governmental policy in the matter of grant of licences or permits confers unfettered discretion on the Executive, whether the take-over of the empires of industrial tycoons is arbitrary and unconstitutional and other questions of like nature, leave the millions of people of this country untouched. Questions concerning wages and the like, mundane they may be, are yet matters of vital concern to them and it is there, if at all that the equality clauses of the Constitution have any significance to them. The preamble to the Constitution declares the solemn resolution of the people of India to constitute India into a Sovereign Socialist Democratic Republic. Again the word 'Socialist' must mean something. Even if it does not mean 'To each according to his need', it must at least mean 'equal pay for equal work'. The principle of 'equal pay for equal work' is expressly recognized by all socialist systems of law, e. g., Section 59 of the Hungarian Labour Code, para 2 of Section 111 of the Czechoslovak Code, Section 67 of the Bulgarian Code, Section 40 of the Code of the German Democratic Republic, para 2 of Section 33 of the Rumanian Code. Indeed this principle has been incorporated in several western labour codes too. Under provisions in S. 31 (g. No. 2d) of Book I of the French Code du Travail, and according to Argentinian law, this principle must be applied to female workers in all collective bargaining agreements. In accordance with Section 3 of the Grundgesetz of the German Federal Republic, and Clause 7, Section 123 of the Mexican Constitution, the principle is given universal significance (vide: International Labour Law by Istvan Szaszy p. 265). The preamble of the Constitution of the International Labour Organisation recognises the principle of 'equal remuneration for work of equal value' as constituting one of the means of achieving the improvement of conditions "involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled". Construing Articles 14 and 16 in the light of the Preamble and Art. 39 (d), we are of the view that the principle 'Equal pay for Equal work' is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.

9. There cannot be the slightest doubt that the drivers in the Delhi Police Force perform the same functions and duties as other drivers in service of the Delhi Administration and the Central Government. If anything, by reason of their investiture with the 'powers, functions and privileges of a police officer', their duties and responsibilities are more arduous. In answer to the allegation in the petition that the driver-constables of the Delhi Police Force perform no less arduous duties than drivers in other departments, it was admitted by the respondents in their counter that the duties of the driver-constables of the Delhi Police Force were onerous. What then is the reason for giving them a lower scale of pay than others? There is none. The only answer of the respondents is that the drivers of the Delhi Police Force and the other drivers belong to different departments and that the principle of equal pay for equal work is not a principle which the Courts may recognise and act upon. We have shown that the answer is unsound. The clarification is irrational. We, therefore, allow the writ petition and direct the respondents to fix the scale of pay of the petitioner and the drivers-constables of the Delhi Police Force at least on a par with that of the drivers of the Railway Protection Force. The scale of pay shall be effective from 1st Jan., 1973 the date from which the recommendations of the Pay Commission were given effect.

Petition allowed.

AIR 1982 SUPREME COURT 882

(1982 B. L. J. 85)

P. N. BHAGWATI AND
R. S. PATHAK, JJ.

Civil Appeal No. 3420 of 1981, D/-
1-3-1982.

State of Bihar, Appellant v. Dr. Yogendra Singh Col. (Retd.) and others, Respondents.

Bihar Private Medical Colleges (Taking Over) Act (5 of 1978), Ss. 3 and 6 — Take over of Medical College under S. 3 — Age of superannuation of staff of college reduced — Reduction held, valid, 1982 B. L. J. 85, Reversed.

A professor of Surgery in Magadh Medical College had joined his post be-

CZ/CZ/B17/82/SMA

fore the commencement of the Act and his letter of appointment provided that the appointment would be subject to such regulations as might be in force from time to time in the Magadh University to which the Magadh Medical College was affiliated and these regulations provided that the age of superannuation shall be 62 years. When a notification was issued by the State Government under S. 3 taking over the Magadh Medical College the result was that the management and control of the Magadh Medical College became exercisable by the State Government and all the assets and properties of the Magadh Medical College stood transferred to and became vested in the State Government and all its liabilities and obligations also devolved on the State Government. The State Government thereafter appointed the Screening Committee under sub-sec. (2) of S. 6 and on the basis of the recommendation of the Screening authority issued a circular letter dated 3rd Sept., 1980 addressed to the Principals of various Medical Colleges taken over by the State Government which included the Magadh Medical College, advising the Principals that "services of all the directly appointed teachers in the Medical Colleges who have attained the age of 62 years or more than 58 years but less than 62 years be terminated after giving them one month's notice," and as the Professor had already attained the age of 58 years, his service was terminated after 30 days' notice.

Held that the termination of services of the Professor before he reached the age of 62 years could not be said to be invalid, 1982 B. L. J. 85, Reversed.

(Paras 4, 5)

Sub-section (3) of S. 3 provided for devolution of all the liabilities and obligations of Magadh Medical College on the State Government and therefore, if sub-sec. (3) were the only provision in the statute, it could have been said that by virtue of the contract contained in the letter of appointment, of the Professor he was entitled to continue in service until the age of 62 years and this obligation of the Magadh Medical College devolved on the State Government. But S. 6 dealt specifically with the subject of determination of terms of the teaching staff and other em-

ployees of the Magadh Medical College and if this special enactment contained any provision relating to termination of service of the Professor in question, it would obviously prevail over the general provision enacted in sub-sec. (3) of S. 3. Sub-sec. (1) of S. 6 provided in clear and explicit terms that as from the date of the notification issued under sub-sec. (1) of S. 3 "all the staff employed in the college shall cease to be employees of the College body." The direct effect of this provision was that the Professor ceased to be the employee of the owners of the Magadh Medical College. The proviso to sub-sec. (1) of S. 6 proceeded to declare that the staff employed in the College "shall continue to serve the College on an ad hoc basis till a decision under sub-secs. (3) and (4) is taken by the State Government". The Professor, therefore, continued to serve the Magadh Medical College on an ad hoc basis from and after the date of the notification under sub-sec. (1) of S. 3. The result was that the contract of the Professor with the owners of the Magadh Medical College under the letter of appointment given to him, did not devolve on the State Government but came to an end and he became an employee of the State Government on an ad hoc basis. He could not thereafter contend that he was entitled to continue in service until he reached the age of 62 years. That would be directly contradictory of the position that he continued to serve the State Government on an ad hoc basis. It is elementary that when a person is appointed on an ad hoc basis, his tenure is precarious and he cannot claim to continue in service until the age of superannuation.

(Para 4)

The Committee of Experts appointed under sub-sec. (2) of S. 6 can also make recommendations in regard to "the rank, pay, allowances and other conditions of service" of the teaching staff. It was, therefore, not beyond the competence of the Screening Committee to make recommendations in regard to the age of superannuation of the teaching staff of the Medical Colleges taken over by the State Government. Even otherwise under sub-sec. (3) of S. 6 the State Government had power to redetermine the rank, pay, allowances and other conditions of service of the teaching

staff and "other conditions of service" would include the age of superannuation. The State Government was therefore, clearly within its power under sub-section (3) of S. 6 to redetermine the age of superannuation and provide that the services of all teachers in the Medical Colleges taken over by the State Government shall be terminated after giving them one month's notice, if they have attained the age of 62 years or more than 58 years, but less than 62 years.

(Para 5)

Mr. L. N. Sinha, Attorney General of India, Mr. K. G. Bhagat and Mr. D. Goburdhan, Advocates with him, for Appellant; Dr. Y. S. Chitale, Sr. Advocate M/s. B. P. Singh, Ranjit Kumar and S. Goswami, Advocates, with him (for No. 1), Mr. P. P. Singh, Advocate (for No. 2) and Mr. R. P. Singh, Advocate (for No. 3), for Respondents.

BHAGWATI, J.:— This is an appeal by special leave directed against a judgment of the Patna High Court quashing and setting aside the termination of service of the 1st respondent and directing that the 1st respondent shall continue in service until he reaches the age of 62 years. The facts giving rise to the appeal are few and may be briefly stated as follows.

2. The 1st respondent was appointed Professor of Surgery in the Magadh Medical College, Gaya in Dec. 1975 and he joined his post as Professor of Surgery on 27th Dec. 1975. The letter of appointment which set out the terms and conditions of service provided that the appointment would be subject to such regulations as might be in force from time to time in the Magadh University to which the Magadh Medical College was affiliated. These regulations provided that the age of superannuation shall be 62 years, and, therefore, the 1st respondent was entitled to continue as Professor of Surgery until he reached the age of 62 years. But in or about the middle of 1976 a drastic change took place, as the Bihar Private Medical Colleges (Taking Over of Management) Ordinance, 1976 (hereinafter referred to as the Ordinance) was promulgated by the Governor of Bihar authorising the State Government by a notification to take over the management of any private Medical College and to exercise such functions of management in regard

to such College as might be specified in the notification. Pursuant to the Ordinance a notification was issued by the State Government taking over the management of the Magadh Medical College with effect from 1st July, 1978. The Ordinance was subsequently replaced by the Bihar Private Medical Colleges (Taking Over) Act, 1978 (hereinafter referred to as the Act). Section 3 of the Act provided for taking over of private Medical Colleges and it read as follows:—

"3. (1) The State Government may, by a notified order and from the date mentioned therein, take over a College and the management and control thereof shall thereupon be exercised by the State Government in such manner as may be laid down in the said Order;

(2) All the assets and properties of the College and the College body whether movable or immovable including lands, buildings, workshops, stores, instruments, machinery, vehicles, cash balance, reserve fund, investments, taxes, furniture and others shall, on the date of take over, stand transferred to and vested in, and be deemed to have come into the possession of the State Government;

(3) All the liabilities and obligations of the College under any agreement or contract entered into bona fide before the date of taking over shall devolve and shall be deemed to have devolved on the State Government."

Section 6 dealt with the determination of terms of teaching staff and other employees of the Medical College taken over by the State Government and since the controversy in the present case has turned, almost entirely upon the true meaning and effect of the provisions of this section, it would be convenient to set it out in full:

"6. Determination of terms of the teaching staff and other employees of the College— (1) As from the date of the notified order, all the staff employed in the College shall cease to be the employees of the College body:

Provided that they shall continue to serve the College on an ad hoc basis till a decision under sub-secs. (3) and (4) is taken by the State Government.

(2) The State Government will set up one or more Committees of experts and knowledgeable persons which will ex-

examine the bio data of each member of the teaching staff and ascertain whether appointment, promotion or confirmation was made in accordance with the University Regulations and in keeping with the guidelines laid down by the Medical Council of India and take into consideration all other relevant materials including length of service in the College, and submit its report to the State Government.

(3) The State Government on receipt of the report of the Committee or Committees, as the case may be, will decide in respect of each member of teaching staff on the merits of each case, whether to absorb him in Government service or whether to terminate his service or to allow him to continue on an ad hoc basis for a fixed term or on contract and shall, where necessary, determine the rank, pay, allowances and other conditions of service.

(4) The State Government shall similarly determine the term of appointment and other conditions of service of other categories of staff of the College on the basis of facts to be ascertained either by a Committee or by an officer entrusted with the task and the provisions of sub-secs. (2) and (3) shall apply mutatis mutandis to such cases."

It appears that pursuant to S. 3 of the Act, a notification was issued by the State Government, taking over the Magadh Medical College with the result that the management and control of the Magadh Medical College became exercisable by the State Government and all the assets and properties of the Magadh Medical College stood transferred to and became vested in the State Government and all its liabilities and obligations also devolved on the State Government. The State Government thereafter appointed a Committee called the Screening Committee under sub-sec. (2) of S. 6 and the Screening Committee made a report which contained inter alia the following recommendations:—

(a) All teachers beyond the age of 62 years may be retired subject to re-employment if there are no qualified substitutes. This should apply to all State Medical Colleges and the re-employment may be made up to maximum of 62 years of age.

(b) In no case service of teachers who have already attained the age of 62 years be retained.

The State Government on the basis of this recommendation issued a circular letter dated 3rd Sept. 1980, addressed to the Principals of various Medical Colleges taken over by the State Govt. which included the Magadh Medical College, advising the Principals that "services of all the directly appointed teachers in the Medical Colleges who have attained the age of 62 years or more than 58 years but less than 62 years be terminated after giving them one month's notice." Now the 1st respondent had already attained the age of 58 years and the Principal of the Magadh Medical College, therefore, addressed a letter dated 11th Sept. 1980 to the 1st respondent informing him that since his age was more than 58 years, his service was being terminated after 30 days from the date of issue of that letter as per the order of the State Government. The result was that by virtue of this letter addressed by the Principal to the 1st respondent, the service of the 1st respondent was terminated with effect from 10th Oct. 1980.

3. The first respondent thereupon filed a writ petition in the High Court of Patna challenging the termination of his service by the Principal of the Magadh Medical College and claiming a declaration that he is entitled to continue in service until he reaches the age of 62 years. The High Court of Patna upheld the contention of the first respondent, and took the view that by virtue of sub-sec. (3) of S. 3, the obligation to continue the first respondent in service up to the age of 62 years devolved on the State Government on the taking over of the Magadh Medical College under sub-sec. (1) of S. 3 and the State Government had no power under sub-sec. (3) of S. 6 to terminate the service of the first respondent prior to his reaching the age of superannuation and the termination of his service by the Principal of Magadh Medical College was therefore, invalid. The writ petition filed by the first respondent was accordingly allowed and a writ was issued quashing and setting aside the termination of service of the first respondent and declaring that he is entitled to continue in service until he reaches the age of 62 years. The State of Bihar

thereupon preferred the present appeal after obtaining special leave from this Court.

4. We are of the view that it is impossible to sustain the judgment of the High Court. It proceeds upon a complete misapprehension of the true meaning and effect of the relevant provisions of Ss. 3 and 6 of the Act. Sub-sec. (1) of S. 3 provides for taking over of private medical colleges and by virtue of the notification issued by the State Government under that provision, the Magadh Medical College was taken over by the State Government and its management and control became exercisable by the State Government. Whatever assets and properties appertained to the Magadh Medical College became vested in the State Government under sub-sec. (2) of S. 3. Section 3 sub-section (3) provided for devolution of all the liabilities and obligations of Magadh Medical College on the State Government, and therefore, if sub-sec. (3) were the only provision in the statute, it would have been possible for the first respondent to contend that by virtue of the contract contained in his letter of appointment, he was entitled to continue in service until the age of 62 years and this obligation of the Magadh Medical College devolved on the State Government. But Sec. 6 dealt specifically with the subject of determination of terms of the teaching staff and other employees of the Magadh Medical College and if this special enactment contained any provision relating to termination of service of the first respondent, it would obviously prevail over the general provision enacted in sub-sec. (3) of S. 3. Now sub-sec. (1) of S. 6 provided in clear and explicit terms that as from the date of the notification issued under sub-sec. (1) of S. 3 "all the staff employed in the college shall cease to be employees of the college body." The direct effect of this provision was that the first respondent ceased to be the employee of the owners of the Magadh Medical College. The proviso to sub-sec. (1) of S. 6 proceeded to declare that the staff employed in the College "shall continue to serve the College on an ad hoc basis till a decision under sub-secs. (3) and (4) is taken by the State Government." The first respondent, therefore, continued to serve the Magadh Medical College on an ad

hoc basis from and after the date of the notification under sub-sec. (1) of S. 3. The result was that the contract of the first respondent with the owners of the Magadh Medical College under the letter of appointment given to him, did not devolve on the State Government but came to an end and the first respondent became an employee of the State Government on an ad hoc basis. The first respondent could not thereafter contend that he was entitled to continue in service until he reaches the age of 62 years. That would be directly contradictory of the position that he continued to serve the State Government on an ad hoc basis. It is elementary that when a person is appointed on an ad hoc basis, his tenure is precarious and he cannot claim to continue in service until the age of superannuation.

5. Now the State Government appointed a Committee called the Screening Committee under sub-sec. (2) of S. 6 and the Screening Committee recommended that all teachers beyond the age of 58 years may be retired subject to reappointment, if there are no qualified substitutes. The argument of the first respondent which appealed to the High Court was that the Screening Committee had no power under sub-sec. (2) of S. 6 to make a recommendation in regard to the age of superannuation of the teaching staff of the Medical College taken over by the State Government. This argument is, in our opinion, fallacious, in as much as it is based on reading of sub-sec. (2) of S. 6 as if it stood alone and does not take into account the effect of sub-sec. (3) upon it. Sub-s. (2) of S. 6 undoubtedly provides that the Committee of Experts appointed under that provision will examine the bio data of each member of the staff and ascertain whether appointment, promotion or confirmation of such person was made in accordance with the University Regulations and in keeping with the guidelines laid down by the Medical Council of India and will also take into consideration all other relevant material including length of service in the college and submit its report to the State Government. But it is clear from sub-sec. (3) of S. 6 that the Committee of Experts appointed under sub-sec. (2) of Section 6 can also make recommendations in regard to "the

rank, pay, allowances and other conditions of service" of the teaching staff. It was therefore, not beyond the competence of the Screening Committee to make recommendations in regard to the age of superannuation of the teaching staff of the Medical Colleges taken over by the State Government. But, even if we are wrong in taking this view, it is clear that under sub-sec. (3) of S. 6 the State Government had power to redetermine "the rank, pay, allowances and other conditions of service" of the teaching staff and "other conditions of service" would include the age of superannuation. The State Government was therefore, clearly within its power under sub-sec. (3) of S. 6 to redetermine the age of superannuation and provide that the services of all teachers in the Medical Colleges taken over by the State Government shall be terminated after giving them one month notice, if they have attained the age of 62 years or more than 58 years, but less than 62 years. Obviously, when a member of the teaching staff becomes an employee of the State Government, he would be governed by the same age of superannuation which is applicable to other Government servants, namely, 58 years and it was for this reason that the State Government redetermined the age of superannuation of the teaching staff of the Medical Colleges taken over by it at 58 years and directed that the services of those who have attained the age of 58 years should be terminated after giving one month's notice. We may point out that, quite apart from the power expressly conferred under sub-sec. (3) of S. 6, the State Government would have power to terminate the services of any person employed on an ad hoc basis. The termination of service of the first respondent was therefore, perfectly valid and the High Court was in error in granting relief to the first respondent.

6. We accordingly allow the appeal, set aside the order passed by the High Court and dismiss the writ petition of the first respondent. Having regard to the fact that the first respondent is merely a teacher in a Medical College, we direct that there will be no order as to costs throughout.

Appeal allowed.

AIR 1982 SUPREME COURT 887

O. CHINNAPPA REDDY, A. P. SEN
AND BAHARUL ISLAM, JJ.

Civil Appeals Nos. 615 to 617, 618 to 620 of 1973 and 1850 to 1852 of 1972,
D/- 2-3-1982.

Nagesh Bisto Desai etc etc., Appellants v. Khando Tirmal Desai etc. etc, Respondents.

(A) Hindu Law — Impartible estate — Incidents of — Mere fact that an estate is impartible does not make it separate and exclusive property of holder. (Bombay Hereditary Offices Act (3 of 1874), S. 4).

The mere fact that an estate is impartible does not make it the separate and exclusive property of the holder; where the property is ancestral and the holder has succeeded to it, it will be part of the joint estate of the undivided family. The grant of watan to the eldest member of a family does not make the watan properties the exclusive property of the person who is the watandar for the time being. AIR 1921 PC 62, Rel. on. (Paras 16, 19)

The property though impartible may be the ancestral property of the joint Hindu family. The impartibility of property does not per se destroy its nature as joint family property or render it the separate property of the last holder, so as to destroy the right of survivorship; hence the estate retains its character of joint family property and devolves by the general law upon that person who being in fact and in law joint in respect of the estate is also the senior member in the senior line.

(Para 18)

In order to establish that an impartible estate has ceased to be joint family property for purposes of succession, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and an intention to impress upon the zamindari the character of separate property. AIR 1952 SC 29, Rel. on.

(Para 22)

It cannot be said that the junior members of a joint family in the case of an ancient impartible joint family estate take no right in the property by birth and therefore have no right of partition having regard to the very character of the estate that it is impartible. AIR 1964 SC 118 and AIR 1970 SC 1795, Disting. (Para 23)

(B) Bombay Pargana and Kulkarni Watans Abolition Act (60 of 1950), Sections 3, 4 — Bombay Merged Territories Miscellaneous Alienations Abolition Act (22 of 1955), Ss. 4, 7 — Bombay Hereditary Offices Act (3 of 1874), Ss. 4, 15 — 'Watandar' — Definition of — It includes members of joint Hindu family — Resumption of watan land — Effect — It does not lose character of being joint family — Re-grant of watan land to the holder for the time being — Must enure to the benefit of entire joint Hindu family — Transfer or partition of such property on re-grant — Not barred. (Hindu Law — Impartible estate — Partition).

A person who acquired watan property or held hereditary interest in it without acquiring the hereditary office and without being under an obligation to perform the services attached to such office is also a 'watandar' within the meaning of the Watan Act. The term 'watandar' as defined in S. 4 includes the members of a joint Hindu family. It must follow as a necessary corollary that the expression 'watandar of the same watan' would include members of the family other than the watandar, who were entitled to remain in possession and enjoyment of the watan property. AIR 1949 Bom 314, Approved. (Paras 27, 28)

The effect of Act No. 60 of 1950 and Act No. 22 of 1955 was to bring about a change in the tenure or character of the holding as watan land but they did not affect the other legal incidents of the property under personal law. (Para 34)

The Watan Act contemplated two classes of persons. One is a larger class of persons belonging to the watan families having a hereditary interest in the watan property as such and the other a smaller class of persons who were appointed as representative watandars and who were liable for the performance of duties connected with the office of such watandars. It would not be correct to limit the word "watandar" only

to this narrow class of persons who could claim to have a hereditary interest both in the watan property and in the hereditary office. Watan property had always been treated as property belonging to the family and all persons belonging to the watan family who had a hereditary interest in such watan property were entitled to be called "watandars of the same watan" within the Watan Act. That being so, the members of a joint Hindu family must be regarded as holders of the watan land along with the watandar for the time being, and therefore the re-grant of the lands to the watandar under sub-sec. (1) of S. 4 of Act No. 60 of 1950 and under S. 3 of Act No. 22 of 1955 must enure to the benefit of the entire joint Hindu family. (Para 38)

Hence, on re-grant of watan lands, after its resumption, to the holder for the time being of the hereditary office, the watandar is not entitled to remain in full and exclusive possession and enjoyment thereof to the exclusion of the other members of the joint Hindu family. (Para 26)

The commutation of service under sub-sec. (3) of S. 15 of Act 3 of 1874 of the watan lands by which the watandars were relieved in perpetuity from liability to perform the services attached to their offices in consideration of 'judi' or quit-rent charged upon the watan land, unless where it was otherwise provided for, had not the effect of converting watan land into the private property of the watandars with the necessary incident of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of services, remained intact. Despite commutation of service, the office of watandars ordinarily survived without liability to perform service, and on that account the character of the watan lands still remained attached to the grant. (Para 32)

The impartibility of the watan properties or the applicability of the rule of lineal primogeniture regulating succession to the estate, being nothing more than incidents of the watan, stand abrogated by sub-sec. (4) of S. 3 of Act No. 60 of 1950 and S. 4 of Act No. 22 of 1955. Therefore, it cannot be said that on re-grant of watan lands, the property cannot be partitioned between

the members of the joint family.

(Para 33)

The condition for the grant of sanction by the Collector as a pre-requisite for a valid transfer of a holding or the making of a partition by metes and bounds, under S. 4 of Act No. 60 of 1950 and sub-sec. (3) of S. 7 of Act No. 22 of 1955, is to ensure that the actual tiller of the soil is not deprived of his land except for valid consideration, or that the partition effected between the members of a family is not unfair or unequal. These provisions, therefore, do not create a statutory bar to a transfer or a partition once the conditions mentioned therein are fulfilled. (Para 43)

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(PC) 19, 21

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(PC) 19, 21

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(PC) 16, 17

(1867) 12 Moo Ind App 523 (PC) 19

SEN, J.:— These nine consolidated appeals on certificate are directed from:

a common judgment and decree of the High Court of Mysore at Bangalore dated June 22, 1962, which affirmed, subject to a modification, the judgment and decree of the Civil Judge, Senior Division, Dharwar, dated July 5, 1956, substantially dismissing the plaintiff's claim for declaration of title to, and possession of, certain watan properties and decreeing instead his alternative claim for partition and separate possession of his one-sixth share therein.

2. The principal question in controversy in these appeals is whether Ss. 3 and 4 of the Bombay Paragana and Kulkarni Watans Abolition Act, 1950 (for short 'Act No. 60 of 1950') and Ss. 4 and 7 of the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955 (for short 'Act No. 22 of 1955'), which provided for abolition of watans and alienations in the merged territories, resumption of watan land and its re-grant, to the holder for the time being, which brought about a change in the tenure or the character of holding as watan land, affect the other legal incidents of the property under personal law.

3. The suit out of which these appeals arise, was instituted by the appellant Nagesh Bisto Desai, as plaintiff, claiming against his two brothers Ganesh Bisto Desai and Gopal Bisto Desai, defendants Nos. 2 and 3, mother Smt. Akkavva alias Parvathibai, defendant No. 4, brother Bhimaji Martand Desai, defendant No. 5 who had gone in adoption to Martand, member of a junior branch, and father's brother's son Khando Tirmal Desai, defendant No. 1, a declaration that the properties described in Schedules B and C appended to the plaint, called the Kundgol Deshgat Estate, situate in the district of Dharwar, in the State of Karnataka, formed an impartible estate and governed by the rule of lineal primogeniture and that the plaintiff being the present holder of the office of Desai was entitled to remain in full and exclusive possession and enjoyment of the suit properties and that the other members of the family had no right, title or interest therein but were only entitled to maintenance and residence, for exclusive possession of the family residential house at Kundgol known as Wada described in Schedule B Part 2

from the defendants Nos. 2 to 5, for exclusive possession of insignia of honour described in Schedule E and one-third share in the family movables described in Schedule D. Alternatively, in the event of the Court holding that the properties described in Schedules B, C and D were properties belonging to the joint Hindu family, the plaintiff claimed partition and separate possession of his one-sixth share therein.

4. It will be convenient, in the first place, to refer briefly to the history of the estate, to set out the pedigree showing the descent from a common ancestor and to show how the present case arose.

5. The plaintiff's suit is brought on the allegation that the Deshgat family of Kundgol Paragana of which the plaintiff and the defendants 1 to 4 are members is a very ancient and respectable one in the State of Jamkhadi which has now merged in the then Province of Bombay. The lands and cash allowances described in Schedule B paras (i) and (ii) are the emoluments of the district hereditary office of Desai. Abkari is the compensation given to the Desai family by the British Government when it took over the control of toddy and liquor in Hanchinal Inam village from the Deshgat family. This amount, together with the cash allowance and the service lands appurtenant to the office of Desai and the houses and open sites form the impartible estate called

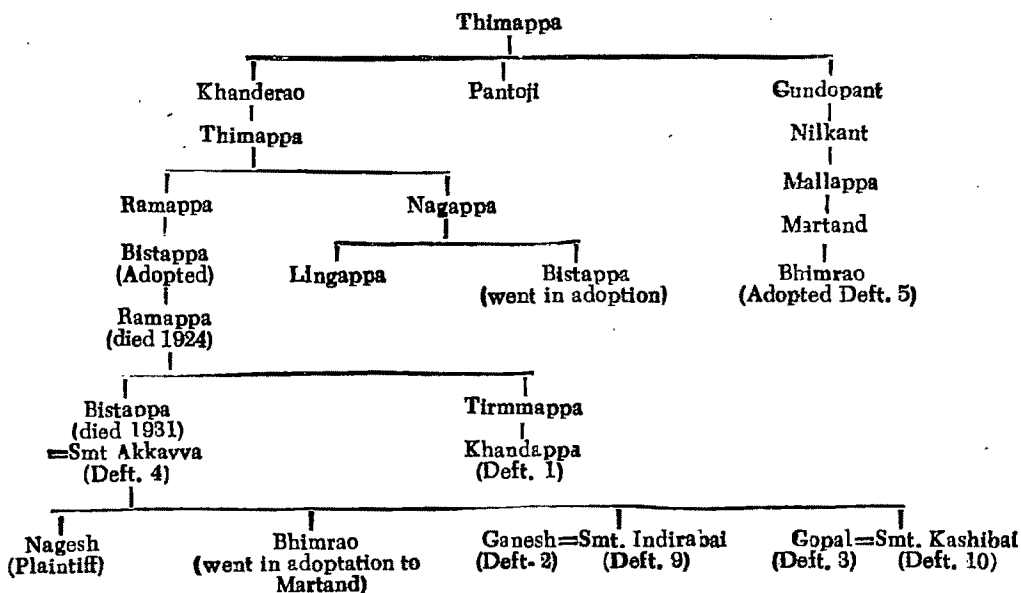
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the Kundgol Deshgat Estate. The first inam was granted at the time of Thimappa in 1575. All the properties constituting the Deshgat were acquired under grants made by the Sultans and Rulers of Bijapur during the period from 1575 A.D. to 1694 A.D. with a couple of other grants received from the Chief of Jamkhadi during the period from 1820 A.D. to 1826 A.D. The watan has remained with the family which held the hereditary office of Desai for over four centuries. In 1904, service appurtenant to the office of Desai was commuted by the imposition of a "judi" or quit-rent. Properties described in Schedules F and G have been in possession of the two junior branches descended from Gundopant and Lingappa from 1825 A.D. and 1854 A.D. respectively and are being enjoyed by them even now.

6. The plaintiff's father, Bistappa, the last holder of the office of Desai died on July 27, 1931 leaving behind him his widow Smt. Akkavva and four sons, Nagesh, Bhimrao, Ganesh and Gopal. Out of them, Bhimaji had gone in adoption to Martand, member of a junior branch. Upon his father's death the plaintiff Nagesh Bisto Desai was recognised to be the watandar. The plaintiff's cousin is Khandoppa.

7. The subjoined genealogical table gives the relationship of the parties belonging to the senior branch descended from Thimappa.

GENEALOGICAL TABLE



8. It appears that after the death of the plaintiff's father in 1931, in the mutation proceedings that followed, the plaintiff first made a claim that the watan being impartible according to the custom of the family, he became the exclusive owner of the entire watan properties. Although his brothers Ganesb Bisto Desai and Gopal Bisto Desai, defendants 2 and 3 had at first consented to mutation of the watan in his name, they later resiled from that position and the strongest opposition came from the plaintiff's uncle Tirmal, father of Khando. In consequence of this, the plaintiff accepted before the revenue authorities that the properties belonged to the joint Hindu family and refrained from making any claim on the footing of the properties being impartible. In 1945, the plaintiff's brother Bhimaji, defendant No. 5 who had gone in adoption to Martand, started asserting a claim to 7 Mars of land and right of residence in the family Wada, and this had the support of the plaintiff's mother Smt. Akkavva. The defendant No. 5 Bhimaji in assertion of his claim brought Special Suit No. 51 of 1949, in the Civil Court at Kundgol on the basis of the properties being impartible. In June, 1946, the plaintiff leased out some home farm lands to defendants 6, 7 and 8, and this gave rise to proceedings under S. 114 of the Code of Criminal Procedure, 1898. The Sub-Divisional Magistrate, Kundgol passed an order restraining defendants 2, 3 and 5 from disturbing the possession of defendants 6, 7 and 8 and this order was kept in force by the former State of Jamkhandi till merger in the former State of Bombay in Aug., 1948. The State Government revoked the order with effect from Dec. 15, 1948, as a result of which the defendants 6, 7 and 8 brought suits for injunction. Due to discord in the family, the plaintiff left the ancestral residential house at Kundgol and started residing in his bungalow. The plaintiff has admittedly been re-granted all the watan land under sub-sec. (1) of S. 4 of Act No. 60 of 1950 and S. 7 of Act No. 22 of 1955 as if it were an unalienated land, being the holder of the watan to which it appertained, and he is deemed to be an occupant thereof within the meaning of the Bombay Land Revenue Code, 1879.

9. The defendants filed separate written statements and repudiated the

plaintiff's claim of impartibility. They denied that the suit properties formed an impartible estate and that succession to the estate was governed by the rule of lineal primogeniture. The defendant No. 1 asserted that there had been at least three partitions in the family. According to him, the allotment of the properties described in Schedules F and G to the two branches of Gundopanth and Lingappa represented allotment of shares on partition. He pleaded that all the properties described in Schedules B, C, D and E were joint family properties and claimed one-half share therein. The defendants Nos. 2 and 3, in their written statement, also asserted that the properties described in Schedules F and G to the two branches of Gundopanth and Lingappa were shares allotted to them on partition. The defendant No. 4 supported the case pleaded by her sons defendants Nos. 2 and 3. The defendant No. 5, however, pleaded that there had never been a partition in the family and that the entire properties, that is to say, the properties described in the plaint Schedules B to G continued to be joint family properties wherein he claimed one-fourth share. The remaining defendants also denied that the suit properties were impartible.

10. The learned trial Judge rejected the plaintiff's claim that he was entitled to remain in full and exclusive possession and enjoyment of the aforementioned properties being the watandar of the Kundgol Deshgat Estate and that other members had no right, title or interest therein except as to maintenance as junior members and held instead that the properties belonged to the joint Hindu family and were, therefore, partible. He further held that the properties described in Schedules F and G in possession of the junior branches of Gundappa and Lingappa were not allotted to them as their share on partition and therefore had to be put into the hotchpot. He accordingly passed a preliminary decree for partition, declaring the plaintiff's share to be one-twentyfourth of the entire estate and to other minor reliefs. On appeal, the High Court upheld the judgment of the trial Judge, holding that the suit properties were not impartible and were therefore liable to partition. but it set aside the direc-

tion with regard to Schedules F and G properties on the finding that the two branches of Gundappa and Lingappa had separated from the joint family. It accordingly modified the decree of the learned trial Judge and held that the plaintiff was entitled to one-sixth share in the properties described in Schedules B to E.

11. Arguments in these appeals have been confined to the question as to whether, as a matter of law, even if it were assumed that the plaintiff had succeeded in proving that the Kundgol Deshgat Estate was an impartible estate, and that succession to it was governed by the rule of lineal primogeniture, the incident of impartibility of the watan as well as the rule of lineal primogeniture stand extinguished by Act No. 60 of 1950 and Act No. 22 of 1955, and it is no longer open to the plaintiff to make any claim on the basis of the alleged custom of impartibility or the rule of lineal primogeniture.

12. The questions that fall for determination in these appeals are, firstly, whether the impartibility of the tenure of a paragana watan appertaining to the office of a Hereditary District (Paragana) Officer, in respect of which a commutation settlement has been effected, regulating succession to the property, by reason of family custom or a local custom, being the incidents of such watan stands abolished by virtue of S. 3 of Act No. 60 of 1950 or S. 4 of Act No. 22 of 1955; and, secondly, whether the watan lands lost the character of being joint family property with the resumption of the watan under S. 3 of Act No. 60 of 1950 or S. 4 of Act No. 22 of 1955, and re-grants thereof were exclusively to the plaintiff under S. 4 of Act No. 22 of 1955, by reason of his status as the watandar and therefore, they belonged to the plaintiff and were not capable of partition. There is no merit in any of these submissions.

13. It is argued that impartibility of the tenure was not an incident of the grant but the watan was impartible by custom and succession to it was governed by the rule of lineal primogeniture. Our attention is drawn to the averment contained in paragraph 3 of the plaint:

"The Kundgol Deshgat Estate, along with the estates of two other District

Hereditary Offices of Nadgir and Deshpande of Kundgol is impartible by custom and succession to it is governed by the rule of lineal primogeniture. This custom is ancient, invariable, definite and reasonable. It is both a family custom and also a local custom prevailing in the families of Paragana Watandars of Kundgol....."

It is urged that in case of an impartible estate, the right to partition and the right of joint enjoyment are from the very nature of the property incapable of existence and therefore, the courts below were in error in dismissing the plaintiff's claim for a declaration that being the present holder of the office of Desai, he was entitled to exclusive possession and enjoyment of the suit properties. It is further urged that even assuming that impartibility of the estate or the rule of primogeniture regulating succession were an incident of the watan, the suit properties lost the character of being joint family property with the resumption of the watan and the re-grant of the suit lands were exclusively to the plaintiff under sub-section (1) of S. 4 of Act No. 60 of 1950 and sub-sec. (1) of S. 7 of Act No. 22 of 1955, by reason of his status as the watandar and, therefore, they exclusively belonged to the plaintiff and they were not capable of being partitioned. There is no merit in the submission.

14. The decision of these appeals must turn on the question whether the impartibility of the estate and the rule of lineal primogeniture by which succession to it was governed makes the suit properties the self acquired or exclusive properties of the plaintiff and, therefore, cannot be partitioned by metes and bounds between the members of the joint family. In *Martand Rao v. Malhar Rao*, 55 Ind App 45 : (AIR 1928 PC 10), the Privy Council ruled as follows :

"If an impartible estate existed as such from before the advent of British Rule, any settlement or regrant thereof by the British Government must, in the absence of evidence of the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom."

It also held in that case :

"When there is a dispute with respect to an estate being impartible or other-

wise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance, according to which custom the estate is to be held by a single member, and as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom."

"Any such special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence."

15. The courts below in their well considered judgments have considered minutely and elaborately the whole of the evidence, both the oral and documentary, led by both the parties on the question of custom and having considered the evidence come to a definitive finding that the evidence is of little or no assistance to establish the alleged custom pleaded by the plaintiff as to the impartibility of the estate or the rule of lineal primogeniture. They have held in favour of the defendants on this basic issue and substantially dismissed the plaintiff's suit claiming full and exclusive title. That part of the judgment has rightly not been assailed before us, and the argument has proceeded on the footing that even if the Kundgol Deshgat Estate were an impartible estate, and that succession to it was governed by the rule of lineal primogeniture the incidents of impartibility of the watan as well as the rule of lineal primogeniture stand extinguished by Act No. 60 of 1950 and Act No. 22 of 1955,

16. It has always been the accepted view that the grant of watan to the eldest member of a family did not make the watan properties the exclusive property of the person who is the watan-dar for the time being. In order to understand the arguments on this point, it is necessary to deal with the incidents of a Deshgat watan. In the Bombay Presidency, it has always been treated to be the joint family property. It may be worthwhile to refer to the decision of the Privy Council in *Adrishappa v. Gurushidappa*, (1880) 7 Ind App 162, the headnote of which is that a

"Deshgat watan or property held as appertaining to the office of Desai is not to be assumed prima facie to be impartible. The burden of proving the impartibility lies upon the Desai. and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies."

In a suit for partition of property forming part of a Deshgat estate brought by the younger brothers against their eldest brother who held the hereditary district office of Desai, partly within the State of Jamkhadi and partly within the territory of British India, the defence was that the watan was held by him as an impartible estate and that he was entitled being the watan-dar to be in full and exclusive possession thereof, subject to a right by custom, that a brother should receive maintenance out of the income derived from it. The Court of first instance having found that there was no invariable rule against the partition of a Deshgat watan, the High Court refused to allow effect to be given to what had not been proved to be "the established governing rule of the family, class or district" sufficient to establish the impartibility of the estate and held that the watan in question was subject to the general Hindu law, including the presumption as to the right to partition belonging to the members of the family to which it had descended. The Judicial Committee upheld the decision of the High Court holding that there was no general presumption in favour of the impartibility of an estate of this kind as to shift the burden of proof; the burden of proof was upon the Desai, who seeks to show that the property devolved upon him alone, in contravention of the ordinary rule of succession according to the Hindu law, and that no sufficient evidence had been given by the watan-dar either of family custom, or of district custom, to prevent the operation of the ordinary rule of law whereby the property would be partible.

17. In *Vinayak Waman Joshi v. Gopal Hari Joshi*, (1903) 30 Ind App 77 (PC), the Court of first instance held that by custom a Deshgat Inam had become impartible and hence dismissed the suit for partition. On appeal, the High Court reversed upon the view that the mere fact that the management remained in

the hands of the eldest branch was not sufficient to establish the plea that the estate was impartible. While affirming the decision of the High Court, the Privy Council followed its earlier decision in Adrishappa's case, (1880) 7 Ind App 162, and agreed with the conclusion arrived at by the High Court that:

"Neither by the terms of the original grant nor of the subsequent orders of the ruling power, nor by family custom, nor by adverse possession (if such there could be in a case like this), the eldest branch of the family acquired a right to perpetual management of the village or in consequence to resist its partition."

18. It is a trite proposition that property though impartible may be the ancestral property of the joint Hindu family. The impartibility of property does not per se destroy its nature as joint family property or render it the separate property of the last holder, so as to destroy the right of survivorship; hence the estate retains its character of joint family property and devolves by the general law upon that person who being in fact and in law joint in respect of the estate is also the senior member in the senior line.

19. As observed by Sir Dinshaw Mulla in his celebrated judgment in Shiba Prasad Singh v. Rani Prayag Kumari Debi, 59 Ind App 331 : (AIR 1932 PC 216) :

"The keynote of the whole position, in their Lordships' view, is to be found in the following passage in the judgment in the Tipperah case, (1367) 12 Moo Ind App 523 (PC) :

'Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom'.

"Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in Sertai Kumari's case. (1888) 15 Ind App

51 (PC) and the first Pittapur case, (1899) 26 Ind App 83 (PC); and so also the third as held in the second Pittapur case, (45 Ind App 148) : (AIR 1918 PC, 81). To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate though ancestral is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in Bajinath's case, 48 Ind App 195 : (AIR 1921 PC 62). To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate."

Since the decision of the Privy Council in Shiba Prasad Singh's case (supra), it is well-settled that (the fact that) an estate is impartible does not make it the separate and exclusive property of the holder: where the property is ancestral and the holder has succeeded to it, it will be part of the joint estate of the undivided family.

20. The incidents of impartible estate laid down by the Privy Council in Shiba Prasad Singh's case, (supra), and the law as there stated, have been reaffirmed in the subsequent decisions of the Privy Council and of this Court : Collector of Gorakhpur v. Ram Sundar Mal, 61 Ind App 286 : (AIR 1934 PC 157); Commr. of Income-tax, Punjab v. Krishna Kishore, 68 Ind App 155 : (AIR 1941 PC 120); Anant Bhikappa v. Shankar Ramchandra, 70 Ind App 232 : (AIR 1943 PC 196). Chinnathavi v. Pandiya

Naicker, 1952 SCR 241 : (AIR 1952 SC 29); Pushpavathi Vijaram Gajapathi Rai v. Shri Pushpavathi Visweswar Gajapathi Rai, (1964) 2 SCR 403 : (AIR 1964 SC 118); Rajah Velugoti Kumara Krishna Yachendra Varu v. Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu, (1970) 3 SCR 88 : (AIR 1970 SC 1795) and Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo, (1982) 1 SCR 417 : (AIR 1981 SC 1937).

21. In *Collector of Gorakhpur v. Ram Sundar Mal's case*, (AIR 1934 PC 157) (supra), it was observed that though the decision of the Board in *Sartaj Kuari's case*, ((1888) 15 Ind App 51) (PC) and the *First Pittapur's case*, (1899) 26 Ind App 83 (PC) appeared to be destructive of the doctrine that an impartible zamindari could be in any sense joint family property, this view apparently implied in these cases was definitely negated by Lord Dunedin when delivering the judgment of the Board in *Bajnath Prasad Singh's case* (AIR 1921 PC 62). In *Commr. of Income-tax, Punjab v. Krishna Kishore's case* (AIR 1941 PC 120) dealing with an impartible estate governed by the Madras Impartible Estates Act, 1904, it was held that the right of junior members of the family for maintenance was governed by custom and was not based on any joint right or interest in the property as co-owners. In *Anant Bhikappa Patil's case* (AIR 1943 PC 196) (supra), it was observed that an impartible estate is not held in coparcenary though it may be joint family property. It may devolve as joint family property or as separate property of the last male holder. In the former case, it goes by survivorship to that individual, among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom e.g. lineal male primogeniture. In the latter case, jointness and survivorship are not as such in point the estate devolves by inheritance by the last male holder in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by the custom.

22. In *Chinnathayi's case* (AIR 1952 SC 29), (supra), it was observed that the dictum of the Privy Council in *Shiba Prasad Singh's case* (AIR 1932 PC 216) (supra), that to establish that an im-

partible estate has ceased to be joint family property for purposes of succession, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and an intention to impress upon the zamindari the character of separate property. In *Mirza Raja Gajapathi's case* (AIR 1964 SC 118) (supra), it was observed that an ancestral impartible estate to which the holder has succeeded by the custom of primogeniture is part of the joint estate of the undivided Hindu family. Though the other rights enjoyed by the members of a joint Hindu family are inconsistent in the case of an impartible estate, the right of survivorship still remains. In *Rajah Velugoti Kumara Krishna's case* (AIR 1970 SC 1795) (supra), it was observed that the only vestige of the incidents of joint family property, which still attaches to the joint family property is the right of survivorship which, of course, is not inconsistent with the custom of impartibility. In *Bhaiya Ramanuj Pratap Deo's case* (AIR 1981 SC 1937) (supra), the principles laid down by the Privy Council in *Shiba Prasad Singh's case* were reiterated.

23. In the course of argument, great reliance was placed on the two decisions of this Court in *Mirza Raja Gajapathi's case* (AIR 1964 SC 118) (supra), and *Rajah Velugoti Kumara Krishna's case* (AIR 1970 SC 1795) (supra), for the proposition that the junior members of a joint family in the case of an ancient impartible joint family estate take no right in the property by birth and therefore have no right of partition having regard to the very character of the estate that it is impartible. To our mind, the contention cannot be accepted. Both the decisions in *Mirza Raja Gajapathi's case* supra, and *Rajah Velugoti Kumara Krishna's case*, supra, turned on the provisions of the Madras Estates (Abolition & Conversion into Ryotwari) Act, 1948 and the Madras Impartible Estates Act, 1904. There are express provisions made in Ss. 45 to 47 of the Abolition Act for the apportion-

ment of compensation to the junior members of zamindari estates and sub-s. (2) of S. 45 thereof provides for payment of the capitalised value of the compensation amount to them on the basis of extinction of the estate. The scheme of the Abolition Act therefore contemplates the continued existence of the rights of the holder of an impartible estate vis-a-vis the junior members of such an estate. The facts involved in those cases were also entirely different.

24. In *Mirza Raja Gajapathi's case* (AIR 1964 SC 118) (supra), it was a suit for partition for Vizianagram Estate, an ancient impartible estate governed by the Madras Impartible Estates Act, 1904. The claim of the junior members regarding buildings which had been incorporated in the impartible estate as also their claim with regard to jewels treated as state regalia and therefore impressed with the family custom of impartibility was negatived. It was held that despite the fact that Vizianagram Estate had been notified to be an estate within the meaning of S. 3 of the Madras Estates (Abolition & Conversion into Ryotwari) Act, 1948, the extinguishment of the proprietary right, title and interest of the zamindar did not affect his right or title to the impartible properties outside the purview of that Act and governed by the Madras Impartible Estates Act, 1904, but as regards other properties falling within the zamindari including lands were held to be partible. With regard to the buildings, it was held that the buildings in question were not partible by virtue of sub-sec. (4) of S. 18 of the Act as the buildings falling within the section vested in "the person who owned them immediately before the vesting". The expression "the person who owned" in sub-sec. (4) of S. 18 of the Act was held to refer to the land-holder and not to any other person. Further, the buildings were outside the limits of the zamindari estate and therefore not covered by S. 3 of the Abolition Act. The claim with regard to jewels failed because they were part of the impartible estate.

25. In *Rajah Velugoti Kumara Krishna's case* (AIR 1970 SC 1795) (supra), it was a suit for partition by the junior members of Vankatgiri Estate; an ancient impartible estate governed by the Madras Impartible Estates Act, 1904. The

suit was principally confined to the claim for a share to the Schedule B properties. The contention was that the impartibility was continued under that Act but ceased when the estate vested in the State Government under S. 3 of the Madras Estates (Abolition & Conversion into Ryotwari) Act, 1948 and this had the effect of changing character of the properties in the B Schedule and making them partible. It was said that the junior members had a present right in the impartible estate and were entitled to share in the properties once it lost its character of impartibility. The Court had to consider the effect of the Abolition Act on the rights and obligations of the members of the family and held that the Abolition Act has no application to properties which are outside the territorial limit of the Venkatgiri Estate. The claim that failed was in relation to properties which did not form part of a 'zamindari estate' within the meaning of S. 1 (16) and therefore did not come within the purview of S. 3 of the Abolition Act but continued to be governed by the Madras Impartible Estates Act, 1904.

26. The contention that the plaintiff holding the District Hereditary Office of Desai and being the watandar of the Kundgol Deshga Estate was entitled to remain in full and exclusive possession and enjoyment thereof to the exclusion of the other members of the joint Hindu family, runs counter to the scheme of the Bombay Hereditary Offices Act, 1874 (for short 'the Watan Act'), and is against settled legal principles. The plaintiff's rights to such watan properties whatever they were, were subject to the rights of the other members of the family.

27. The term 'Watandar' is defined in S. 4 of the Watan Act. It reads:

"Watandar means a person having a hereditary interest in the Watan. It includes a person holding watan property acquired by him before the introduction of British Government into the locality of the watan, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance. It includes a person adopted by an owner of a watan or part of a watan subject to the conditions specified in Ss. 33 to 35".

If the words used in the definition are strictly and literally construed, it would

mean that before a person can be said to be a watandar, he must have a hereditary interest both in the watan property and in the hereditary office, because it is these two that constitute the watan. There is no basis whatever for such a strict construction. The definition is undoubtedly in two parts: the first sets out what "watandar" means and the other states what is included in it and the question arises whether the primary definition i.e. the meaning portion of it, should be regarded as primary and the inclusive part as illustrative or both the parts should be regarded as constituting one whole definition, the inclusive part being supplementary to the former. The controversy arising from the rival constructions placed on the definition of 'watandar' in S. 4 of the Watan Act was set at rest by the Full Bench decision of the Bombay High Court in Vijayasingrao Balasaheb Shinde Desai v. Ganardanrao Narayanrao Shinde Desai, (1949) 51 Bom LR 556 : (AIR 1949 Bom 314). Prior to that decision, two conflicting constructions on the definition had been placed by two Division Benches of the Bombay High Court. In Kadappa v. Krishtappa, (1935) 37 Bom LR 599 : (AIR 1935 Bom 380), an alienation of watan land by a watandar to his bhaubandh for maintenance was challenged and Rangnekar and Divatia, JJ. held that the alienation was valid beyond the lifetime of the watandar inasmuch as it was to a watandar of the same watan; in other words, the alienee who was a bhaubandh to whom a watan land had been transferred for maintenance regarded as a watandar though he had no interest in the hereditary office and the rights and privileges attached to it. It would, therefore, appear that in Kadappa's case, supra, the entire definition of watandar in S. 4 was looked upon as one, the latter part being supplementary and additional to what is contained in the first part. In Smt. Tarabai v. Muracharya, (1939) 41 Bom LR 924 : (AIR 1939 Bom 414), Sir John Beaumont C.J. and Wadia, J. however, struck a discordant note. It was that a person who merely acquired a watan property without acquiring the office and without being under any obligation to perform services attached to the office was not a watandar within the meaning of the

aforesaid definition; in other words, it held that the first part of the definition was exclusive and exhaustive, the latter part being merely illustrative and the illustrations given in the latter part should fall within the ambit of the exclusive definition given in the first part, that is to say, the primary definition of a "watandar" in S. 4 was that he was a person having a hereditary interest in a watan, i.e. the office and a property if any, and the subsequent words were merely explanatory of the primary definition and did not curtail it. In view of this conflict, the specific question referred to the Full Bench in Vijayasingrao's case (AIR 1949 Bom 314) (supra), was "Whether the term 'watandar' as defined in S. 4 of the Watan Act necessarily and always meant a person who had a hereditary interest not only in the watan property but also in the hereditary office". And, on a consideration of the scheme and the relevant sections of the Watan Act and the two earlier decisions, the Full Bench preferred the construction placed on the term 'watandar' in Kadappa's case (AIR 1935 Bom 380) (supra), and concluded that a person who acquired watan property or held hereditary interest in it without acquiring the hereditary office and without being under an obligation to perform the services attached to each (such) office was also a 'watandar' within the meaning of the Watan Act.

28. There can be no doubt that the Watan Act was designed to preserve the pre-existing rights of the members of joint Hindu family. The word 'family' is defined in Section 4 of the Watan Act to include 'each of the branches of the family descended from an original watandar' and the expression 'head of a family' is defined therein to include 'the chief representative of each branch of a family'. 'Representative watandar' defined in S. 4 meant 'a watandar registered by the Collector under S. 25 as having a right to perform the duties of a hereditary office'. Section 5 of the Watan Act prohibited alienations of watan and watan rights. Clause (a) of sub-sec. (1) of S. 5 thereof, referred to a watandar in general and provided that it would not be competent to such a watandar to mortgage, charge, alienate or lease, for a

period beyond the term of his natural life, any watan, or any part thereof, or interest therein, to or for the benefit of any person who is not a watandar of the same watan, without the requisite sanction. The expression 'watandar of the same watan' occurs in many sections of the Act. As already indicated, the term 'watandar' as defined in S. 4 includes the members of a joint Hindu family. It must follow as necessary corollary that the expression 'watandar of the same watan' would include members of the family other than the watandar, who were entitled to remain in possession and enjoyment of the watan property.

29. It is necessary to emphasize that commutation of service had not the effect of changing the nature of the tenure. The effect of the Gordon Settlement came up for consideration in *Collector of South Satara v. Laxman Mahadev Deshpande*, (1964) 2 SCR 48 : (AIR 1964 SC 326) when the Court referred to the decision in *Appaji Bapuji v. Keshav Shamrav* (1890) ILR 15 Bom 13 and quoted the following passage from the judgment of Sargent, C. J., with approval (at p. 329 of AIR 1964 SC):

"What is termed a Gordon Settlement was an arrangement — entered into in 1864 by a Committee, of which Mr. Gordon, as Collector, was chairman, acting on behalf of Government — with the vatandars in the Southern Maratha Country, by which the Government relieved certain vatandars in perpetuity from liability to perform the services attached to their offices in consideration of a 'judi' or quit-rent charged upon the vatan land's xx xx xx the reports of Mr. Gordon's Committee of the Statra and Poona Districts and their correspondence with Government can we think, leave no doubt that the settlements made by that committee, unless it was otherwise, specially provided by any particular settlement, were not intended by either party to these settlements, to convert the watan lands into the private property of the vatandars with the necessary incident of alienability, but to leave them attached to the hereditary offices, which although freed from the performance of service remained intact."

The Court continued:

"But the commutation settlement does not confer an indefeasible title to

the grantee, for the right affirmed by the settlement under S. 15 (2) of the Watan Act is liable to be determined by lapse, confiscation or resumption (S. 22 of the Watan Act). The State having created the watan, is entitled to put an end to the watan i. e., to cancel the watan and to resume the grant: *Bacharam Datta Patil v. Vishwanath Pundalik Patil*, 1956 SCR 675 : (AIR 1957 SC 34). Therefore if there be mere commutation of service, the watan office ordinarily survives without liability to perform service, and on that account the character of watan property still remains attached to the grant. But the State Government may abolish the office and release the property from its character as watan property."

30. The Court then dealt with the relevant provisions of Act No. 60 of 1950 and observed that in the light of these features of the watan and the property granted for remuneration of the watandar that the relevant feature of Act No. 60 of 1950 were considered with respect to the right of the watandar to a regrant of the watan lands. It was observed that on a combined operation of sub-section (3) of S. 3 and S. 4 of the Act, the holder of the watan land is entitled to regrant of the land in occupancy rights as an unalienated land. As to the effect of the legislation, it was observed that S. 3 in terms provides for abolition of the watan, extinction of the office and modification of the right in which the land is held. The abolition, extinction and modification arise by operation of S. 3 of the Act, and not from the exercise of the executive power of confiscation or resumption by the State, and it was then said:

"Undoubtedly the power of resumption of watan may be exercised under S. 22 of the Watan Act and such a resumption may destroy the right of the holder both to the office and the watan land, and in the absence of any provision in that behalf no right to compensation may arise. But where the abolition of the watan is not by executive action, but by legislative decree, its consequences must be sought in the statute which effectuates that abolition".

31. As to the effect of the resumption of the watan lands under sub-sec. (3) of S. 3 and their regrant under sub-sec. (1) of S. 4 of the Act it was observed :

"It must be remembered that the power which the State Government always possessed by the clearest implication of S. 22 of the Bombay Hereditary Offices Act, 1874, of resumption is statutorily enforced by S. 3 in respect of the Paragana and Kulkarni Watans. The State Government having the power to abolish a watan office, and to resume land granted as remuneration for performance of the duties attached to the office was not obliged to compensate the watandar for extinction of his rights. But the Legislature has, as a matter of grace, presumably because of settlements between the holders and the Government under the Gordon Settlement, provided by S. 6 that cash compensation be awarded for loss of the right to cash allowance or remission of land revenue and has by S. 4 conferred upon the holder of the watan land, for loss of his right, a right to regrant of the land as occupant and free from the obligation imposed by its original tenure as watan land. xx xx xx By the operation S. 3 all Paraganas and Kulkarni watans falling within the Act are abolished, the right to hold office is extinguished and the land granted as remuneration for performance of service is resumed. The holder of the land is thereafter liable to pay land revenue, and is entitled, on payment of the occupancy price at the prescribed rate, to be regranted occupancy rights as if it is unalienated land. The right so conferred is, though not a right to cash compensation, a valuable right of occupancy in the land. By the resumption of watan land and regrant thereof in occupancy right, all the restrictions placed upon the holder of watan land are by the provisions of the watan Act. and the terms of the grant, statutorily abolished. But the right of occupancy granted by Section 4 adequately compensates the holder for loss of the precarious interests of a watandar, because the land regranted after abolition of the watan, is held subject only to the restrictions imposed by sub-section (2) of S. 4, and is freed from the incidents of watan tenure, such as restriction on alienation beyond the lifetime of the holder, devolution according to the special rule of succession, and the liability to confiscation or resumption."

32. It must therefore be observed that the commutation of service under sub-section (3) of S. 15 of the Watan lands by which the watandars were relieved in perpetuity from liability to perform the services attached to their offices in consideration of 'judi' or quit-rent charged upon the watan land, unless where it was otherwise provided for, had not the effect of converting watan land into the private property of the watandars with the necessary incident of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of services, remained intact. Despite commutation of service, the office of watandars ordinarily survived without liability to perform service, and on that account the character of the watan lands still remained attached to the grant. By the end of the first half of the 19th century, the watandars had lost much of their *raison d'être*. The British thought it expedient to dispense with their services, and the watandars were given an offer to convert their watans into private property by the annual payment of a Nazrana but they were opposed to this. At their own request, the Government agreed to continue their watans as unalienable after service commutation settlements, subject to payment of 'judi' or quit-rent. After the service commutation settlements and the appointment of Mamlatdars the watandars had practically no function to perform but the watans were not discontinued till the Government decided upon their abolition.

33. It is said that although co-ownership of the joint family may exist in impartible property, a distinction must be drawn between present rights and future rights of the members of a family. This is because of the peculiar character of the property. Thus, while the junior members have future or contingent rights such as a right of survivorship, they have, apart from custom or relationship, no present rights, as for instance, a right to restrain alienation or to claim maintenance. It is upon this basis that the submission is that the Courts below manifestly erred in passing a decree for partition of the watan property described in Schedules B and C appended to the plaint. We are afraid, these submissions based upon the

alleged impartiality of the watan properties or the applicability of the rule of lineal primogeniture regulating succession to the estate cannot prevail, as these being nothing more than incidents of the watan, stand abrogated by sub-sec. (4) of Section 3 of Act No. 60 of 1950 and S. 4 of Act No. 22 of 1955.

34. It seems plain to us that the effect of Act No. 60 of 1950 and Act number 22 of 1955 was to bring out a change in the tenure or character of holding as watan land but they did not affect the other legal incidents of the property under personal law. It will be convenient to deal first with the provisions of Act No. 60 of 1950. Section 3 of the Act lays down that, with effect from, and on, the appointed day, notwithstanding anything contained in any law, usage, settlement, grant, sanad or order, all watans shall be deemed to have been abolished and all rights to hold office and any liability to render service appertaining to the said watans shall stand extinguished. It further lays down that subject to the provisions of Sec. 4, "all watan land is hereby resumed" and "shall be deemed to be subject to the payment of land revenue under the provisions of the Code and the rules made thereunder as if it were an unalienated land". The term 'Code' as defined in S. 2 (b) means "the Bombay Land Revenue Code, 1879". All incidents pertaining to the said watans stand extinguished from the appointed day.

35. Sub-sec. (1) of Section 4 of the Act, insofar as material, provides :

"4 (1). A watan land resumed under the provisions of this Act shall be regranted to the holder of the watan to which it appertained, on payment of the occupancy price..... and the holder shall be deemed to be an occupant within the meaning of the Code in respect of such land and shall primarily be liable to pay land revenue to the State Government in accordance with the provisions of the Code and the rules made thereunder, all the provisions of the Code and rules relating to unalienated land shall, subject to the provisions of this Act, apply to the said land."

Clause (1) of Explanation to S. 4 reads:

"Explanation — For the purposes of this section the expression "holder" shall include:—

(i) all persons who on the appointed day are the watandars of the same watan to which the land appertained, and

xx xx xx xx"

36. The provisions of Act No. 22 of 1955 are more or less similar. Likewise, S. 4 of the Act provides that, notwithstanding anything contained in any usage, settlement grant etc., with effect from the appointed day, all alienations shall be deemed to have been abolished and all rights legally subsisting on the said date in respect of such alienations and all other incidents of such alienation shall be deemed to have been extinguished. Section 7 of the Act provides that "all land held under a watan is hereby resumed" and "shall be regranted to the holder in accordance with the provisions contained in cls. (1) to (3) therein". Clause (1) of Explanation to S. 7 reads :

"Explanation— For the purpose of this section, the expression "holder" shall include:—

(1) an alienee holding land under a watan, and

(2) xx xx xx xx"

37. Upon a plain reading of sub-sec. (1) of Sec. 4 of Act No. 60 of 1950 and of S. 7 of Act No. 22 of 1955, it is clear that watan lands resumed under the provisions thereof, have to be regranted to the holder of the watan, and he shall be deemed to be an occupant within the meaning of the Code in respect of such land. The expression 'holder' as defined in Cl. (1) Explanation to S. 4 of the former Act includes "all persons who, on the appointed day, are the watandars of the same watan" and Cl. (1) of Explanation to S. 7 of the latter Act defines it to include "an alienee holding land under a watan". The term "an alienee" is defined in S. 2 (i) (iii) to mean "the holder of an alienation and includes his co-sharer".

38. The Watan Act contemplated two classes of persons. One is a larger class of persons belonging to the watan families having a hereditary interest in the watan property as such and the other a smaller class of persons who were appointed as representative watandars and who were liable for the performance of duties connected with the office of such watandars. As already indicated, it would not be correct to limit

the word "watandar" only to this narrow class of persons who could claim to have a hereditary interest both in the watan property and in the hereditary office. Watan property had always been treated as property belonging to the family and all persons belonging to the watan family who had a hereditary interest in such watan property were entitled to be called "watan-dars of the same watan" within the Watan Act. That being so, the members of a joint Hindu family must be regarded as holders of the watan land along with the watandar for the time being, and therefore the regrant of the lands to the watandar under sub-section (1) of S. 4 of Act No. 60 of 1950 and under S. 3 of Act No. 22 of 1955 must enure to the benefit of the entire joint Hindu family.

39. It appears that the same view has been taken in a Full Bench decision of the Bombay High Court in *Laxmibai Sadashiv Date v. Ganesh Shankar Date*, (1977) 79 Bom LR 234 : (AIR 1977 Bom 50).

40. A controversy had arisen as to the purport and effect of the non obstante clause contained in S. 4 of the Bombay Inferior Village Watans Abolition Act, 1959. *Malvankar, J. in Dhondi Vithoba v. Mahadeo Dagdu* (1972) 75 Bom LR 290 : (AIR 1973 Bom 323) held that the effect of sub-section (3) of Section 4 read with S. 5 of the Act was to bring about a change in the tenure or character of holding as watan land, but it did not affect the other legal incidents of the property under personal law. The learned Judge therefore held that even though the watan was abolished and the incidents thereof were extinguished and the land resumed under S. 4, the Act maintained the continuity of the interest in the lands of the persons before and after the coming into force of the Act provided of course, the holder pays occupancy price in respect of the land. In other words, the property continues to be the joint family property or the property held by the tenants-in-common, as the case may be. In *Kalgonda Babgonda v. Balgonda Kalgonda*, (1976) 78 Bom LR 720, a Division Bench of the High Court took a view to the contrary and observed :

"The words "all incidents appertaining to the said watans shall be and are

hereby extinguished", must include every kind of incident, including the so-called incident of a right to partition as claimed by the plaintiff in this case, even if such right existed. Further, the lands were resumed by the Government on that date in law and vested in the Government till the lands were re-granted under S. 5 or 6, or 9 of that Act."

xx xx xx xx
"It is not possible for us to consider it reasonable to hold that although the lands were resumed by the Government and the holder himself had lost all his rights till the lands were re-granted to him except the right of asking for regrant, the incidents of the property under personal law appertaining to, impartible property would survive the extinguishment of the tenure and resumption of the land by the State."

It was obviously wrong in reaching the conclusion that it did.

41. In *Laxmibai Sadashiv Date's case*, (AIR 1977 Bom 350) (supra), the Full Bench reversed the decision of the Division Bench and upheld the view taken by *Malvankar, J.* in *Dhondi Vithoba's case* (AIR 1973 Bom 323) (supra), observed (at p. 354) :

"It is undoubtedly true that S. 4 starts with a non obstante clause, but it is a well recognised canon of construction to give effect to a non obstante clause having regard to the object with which it is enacted in a statute. The non obstante clause is contained at the inception of S. 4 and the sole object of S. 4 is to abolish alienation and rights and incidents in respect thereof. The right of a member of joint Hindu family to ask for partition of a joint family property cannot be regarded as a right relating to grant of land as service inam or as an incident in respect thereof.

xx xx xx xx
The object of S. 4 was not to affect in any manner rights created under the personal law relating to the parties and if the property belonged to joint Hindu family, then the normal rights of the members of the family to ask for partition were not in any way affected by reason of the non obstante clause contained in S. 4."

42. Those observations, in our opinion, are clearly in consonance with the true

meaning and effect of the nor. obstante clause,

43. It still remains to ascertain the impact of sub-sec. (2) of S. 4 of Act No. 60 of 1950 and sub-sec. (3) of S. 7 of Act No. 22 of 1955, and the question is whether the occupancy of the land re-granted under sub-sec. (1) of S. 4 of the former Act and sub-sec. (2) of S. 7 of the latter Act is still impressed with the character of being impartible property. All that these provisions lay down is that the occupancy of the land re-granted under sub-section (1) of Section 4 of the former Act shall not be transferable or partible by metes and bounds without the previous sanction of the Collector and except on payment of such amount as the State Government may, by general or special order, determine. It is quite plain upon the terms of these provisions that they impose restrictions in the matter of making alienations. On re-grant of the land, the holder is deemed to be an occupant and therefore the holding changes its intrinsic character and becomes Ryotwari and is like any other property which is capable of being transferred or partitioned by metes and bounds subject, of course, to the sanction of the Collector and on payment of the requisite amount,

44. It is the policy of the law to prevent the land-working classes being driven into the state of landless proletariates so far as may be, and accordingly it is provided by these provisions that alienations of such holdings or partition thereof shall be ineffective unless the sanction of the Collector has first been obtained. It is of the utmost importance that this important safeguard should be maintained in full force and effect so that the parties must exactly know what they have bargained for. The condition for the grant of sanction by the Collector as a pre-requisite for a valid transfer of a holding or the making of a partition by metes and bounds, is to ensure that the actual tiller of the soil is not deprived of his land except for valid consideration, or that the partition effected between the members of a family is not unfair or unequal. These provisions therefore do not create a statutory bar to a transfer or a partition once the conditions mentioned therein are fulfilled.

45. In the result, the appeals must fail and are dismissed. There shall however be no order as to costs.

Appeals dismissed.

AIR 1982 SUPREME COURT 902

D. A. DESAI AND

A. VARADARAJAN, JJ.

Writ Petns. Nos. 6443-44 of 1980 and 8829-30, 9123-24, 370-87, 777-96, 658-62, 732-63, 824-31, 847-62, 1080-1102, 9347-48 and 9352-67 of 1981, D/- 3-3-1982.

M/s. Sukhnandan Saran Dinesh Kumar and another etc. etc., Petitioners v. Union of India and another etc. etc., Respondents.

(A) Sugarcane (Control) Order (1966), Cls. 4A (introduced by Notification G.S.R. 197 (E) Ess. Com./Sugarcane dated 20-3-1978) and 4 — Relative scope — Both provisions are independent — Power under Cl. 4A to prescribed rate of rebate in respect of binding material of sugarcane bundles — Exercise of — Fixing minimum price of sugarcane is not a pre-condition. (Essential Commodities Act (1955), S. 3).

Clause 4A stands on an independent footing and it is independent of cl. 4. Cl. 4A is neither inter-dependent nor-inter-related to Cl. 4. Cl. 4A visualises a situation in which either the minimum price of sugarcane is fixed under Cl. 4 or where no such price is fixed, the price agreed to between the sugarcane grower and the producer who purchased sugarcane and even in this latter situation the power to prescribe rate of rebate only in respect of binding material is conferred on the Central Government or the authorities set out in the third proviso to Cl. 4A. Therefore, fixing of the minimum price may be a pre-condition to the exercise of power under the third proviso of Cl. 4, as far as Cl. 4A is concerned, even where the price to be paid by the producer to the sugarcane grower is the one negotiated between the two, the producer or his agent will have to allow that much rebate and no more for binding material if notified in exercise of the power conferred by the third proviso. (Para 9)

It cannot be said that because the purchaser and seller of sugarcane are free to negotiate price no useful purpose would be served by prescribing the rate of rebate statutorily. By the very nature of the product, it being perishable and

transport over a distance being uneconomic, the grower of sugarcane has limited choice in selecting the producer to whom it could be sold. Between the producer of khandsari and the grower of sugarcane, the first one is primarily in a position to dominate and dictate and they do not operate on the level of equality. Unquestionably, therefore, the grower of sugarcane in relation to the producer of the khandsari sugar would be weaker and it is he who requires to be protected. Now, if the protection of fixing of minimum price is not resorted to because the authorities under the Control Order may have information before them that looking to the supply and demand and the market economy, the grower of sugarcane would be able to obtain a reasonably fair price for his labour, the only thing which is required to be protected against is inequitous, unauthorised and impermissible deductions. Therefore, while retaining the power to fix minimum price or price to be paid and also in a given situation leaving it to the purchaser of sugarcane and grower of sugarcane to negotiate the price in order to eschew any exploitation of the weaker section between the two, the power to prescribe the rate of rebate was acquired and can be rightly enforced. Therefore, it cannot be said that unless the power to fix the price or minimum price is exercised there is no power to prescribe the rate of rebate. (Para 10)

(B) Sugarcane (Control) Order (1966), Cl. 4A (introduced by Notification G.S.R. 197 (E) Ess. Com./Sugarcane, dt. 20-3-1978) — Rate of rebate in respect of binding material of sugarcane bundles — Fixation at 0.625 Kg. per quintal of sugarcane — Not arbitrary or unrelated to trade and practice — It is based on information collected and is in vogue for last 25 years — Government is free to examine the question of upward revision. (Constitution of India, Art. 14).

(Paras 13, 14, 16)

(C) Sugarcane (Control) Order (1966), Cl. 4A (introduced by Notfn. G.S.R. 197 (E) Ess. Com./Sugarcane dt. 20-3-1978) — Cl. 4A is not violative of Art. 19 (1) (g). (Constitution of India, Art. 19 (1) (g)).

Whenever it is contended that a regulatory measure imposes restriction upon the freedom of trade guaranteed by Article 19 (1) (g), it must be shown that the restriction so imposed directly and proximately interferes in praesenti with the exercise of freedom of trade. If the alleg-

ed restriction does not directly or proximately interfere with the exercise of freedom of trade, the freedom guaranteed by Art. 19 (1) (g) is not violated.

(Para 18)

Clause 4A of the Control Order does not directly and proximately interfere with the exercise of freedom of trade and therefore Art. 19 (1) (g) is not attracted. The rebate for binding material is to be allowed only when sugarcane is brought to the khandsari sugar producing unit bound in bundles. It is always open to the purchaser of sugarcane to insist upon the grower bringing the sugarcane not bound in bundles and he is free to negotiate the price when price or minimum price of sugarcane is not fixed and Cl. 4A will not even remotely impinge upon his freedom to carry on his trade. (Para 18)

(D) Sugarcane (Control) Order (1966), Cl. 4A (introduced by Notfn. G.S.R. 197 (E) Ess. Com./Sugarcane dt. 20-3-1978) — Rate of rebate in respect of binding material of sugarcane bundles — Restriction imposed under Cl. 4A is reasonable and is in public interest. (Constitution of India, Art. 19 (1) (g) and (6)).

Once it is assumed that the impugned law imposes a restriction on the freedom of trade, the burden is on those who support it, to show that the restriction imposed by the impugned law is reasonable and is imposed in the interest of general public. In other words, the burden is on those who seek the protection of cl. (6) of Art. 19 and not on the citizen who says that the restrictive enactment is invalid. (Para 19)

The statutory prescription of quantum of rebate for binding material has been prescribed under Cl. 4A for the benefit of sugarcane growers. Producers of sugar and khandsari sugar constitute a powerful trade lobby, the fact of which one can take judicial notice. The farmers having small holdings need protection for selling at fair price their meagre agricultural produce. The State can impose a restriction in the interest of general public on the right of a party to contract where in the opinion of the Government the contracting parties are unable to negotiate on the footing of equality. Sugarcane growers who are farmers cannot negotiate on the footing of the equality with the producers of sugar and khandsari sugar. The State action for the protection of the weaker sections is not only iustifi-

ed but absolutely necessary unless the restriction imposed is excessive.

(Paras 21, 22)

Further, a restriction under Cl. 4A serves two-fold purpose: (i) it ensures price of sugarcane avoiding impermissible deductions; (ii) it circumvents possible fraud by making such deductions as would render illusory even the negotiated price, if not fixed price. If the rebate is not statutorily prescribed the cane growers will be at the mercy of the producers of sugar and khandsari sugar. The price or minimum price of sugarcane can be fixed by the State and this very power comprehends the power to provide such incidental and ancillary regulations which will ensure the price. Price fixation measure is for protection of the farmer from the exactions of producers against which he cannot protect himself. The restriction imposed under Cl. 4A ensures price either fixed or negotiated and, therefore, it is a restriction which is undoubtedly reasonable and is imposed in the interest of general public and the guarantee of freedom of trade is not violated. Case law discussed.

(Para 23)

Cases Referred: Chronological Paras

AIR 1970 SC 129: (1970) 1 SCR 400	19
AIR 1964 SC 925: (1964) 5 SCR 975	19
AIR 1960 SC 415: (1960) 2 SCR 408	23
AIR 1956 SC 676: 1956 SCR 393	22
AIR 1954 SC 728: (1955) 1 SCR 707: 1955 All LJ 38	19
(1933) 78 Law ed 940: 291 US 502, Leo Nebbia v. People of the State of New York	23

DESAI, J.:— Even an innocuous marginally regulatory measure affecting the sugar trade at fringes is sufficient for this powerful industry to invade the courts with petitions galore almost proclaiming that there should be hands off policy in respect of this trade. The flimsy albeit untenable grievance made in this group of petitions would underscore the truth of what is just stated.

2. In exercise of the power conferred by cl. (4) third proviso of the Sugarcane (Control) Order, 1966, ('Control Order' for short), the 2nd respondent—State of Uttar Pradesh, with the permission of the 1st respondent Union of India, issued Notification dated Sept. 3, 1980, which is impugned in these petitions. The impugned Notification reads as under:

"Sr. No. 398A (Ka) 13-38-16, 56
Government Gazette. U. P.

Extraordinary
Legislative Supplement
Part 4, Section (b) (kha)

.....Order

Lucknow, Wednesday, 3rd Sept., 1980.

Notification

P. Aa. — 306

In exercise of the powers conferred by clause 4 proviso 3 of the Sugarcane Control Order, 1966, the Governor, with the permission of the Central Government, allows in Uttar Pradesh in respect of Khandsari units, producing Gur, rab or Khandsari sugar, where sugarcane is brought in bundles and is weighed as such, a rebate in regard to the binding material at 0.650 Kilograms per quintal.

By order,
R. Basudev,
Secretary."

It was stated that there was a printing error in mentioning the figure '0.650 kg.' and a corrigendum has been issued to correct it to '0.625 kg.' per quintal in the Notification.

3. The allegations in all the petitions are identical and, therefore, we would state a few representative facts from the writ petition filed by M/s. Sukhnandan Saran Dinesh Kumar and another. The petitioner are producers of sugar by open pan process, the product being described as khandsari sugar. This term is to be understood in contradistinction to the marketable commodity called 'sugar' which is produced by vacuum pan process. The raw material for manufacturing sugar or khandsari sugar is sugarcane. The petitioners have set up a factory for manufacturing khandsari sugar by open pan process. The petitioners buy sugarcane from the sugarcane growers. In order to extend protection to the farmers who have undertaken raising of sugarcane crop, the Central Government issued the Control Order in exercise of the power conferred by S. 3 of the Essential Commodities Act, 1955. By Cl. 3 of this Order, power was conferred on the Central Government to fix minimum price of sugarcane to be paid by producers of sugar for sugarcane purchased by them. Cl. 4 confers similar power to fix the minimum price to be paid by the producers of khandsari sugar for sugarcane purchased by them. Other clauses of the Order for the present purpose are not relevant. Cl. 3A was introduced by G.S.R. 815 (E)/ESS. COM./Sugarcane dated September 24, 1976, which, inter alia, con-

ferred power on the Central Government and various other authorities mentioned therein to allow a suitable rebate in regard to the weight of the binding material not exceeding 0.625 kg. per quintal of sugarcane, when sugarcane was purchased by the producer of sugar. Subsequently, by Notification GSR 197 (E)/Ess. Com./Sugarcane dated March 20, 1978 Cl. 4A with the marginal note "Rebate that can be deducted from the price paid for sugarcane by producers of khandsari sugar" was introduced. Cls. 4 and 4A are material for the present discussion and they may be extracted:

"4. Minimum price of sugarcane payable by producers of khandsari sugar:—

The Central Government or a State Government, with the concurrence of the Central Government, may, by notification in the Official Gazette, from time to time, fix the minimum price or the price of sugarcane to be paid by producers of khandsari sugar or their agents for the sugarcane purchased by them:

Provided also that the Central Government or, with the approval of the Central Government, the State Government, may in such circumstances and subject to such conditions as it may specify allow a suitable rebate in the price so fixed."

*"4A, Rebate that can be deducted from the price paid for sugarcane by producers of khandsari sugar:—

A producer of khandsari sugar or his agent shall pay, for the sugarcane purchased by him, to the sugarcane grower or the sugarcane growers' co-operative society, either the minimum price of sugarcane fixed under clause 4, or the price agreed to between the producer or his agent and the sugarcane grower or the sugarcane growers' co-operative society, as the case may be (hereinafter referred to as the agreed price.)

Provided that:

(iii) Where the sugarcane is brought bound in bundles and weighed as such, the Central Government or, with the approval of the Central Government, the State Government or the Director of Agriculture or the Cane Commissioner or the District Magistrate within their respective jurisdiction, may allow a suitable rebate in regard to the weight of the

binding material not exceeding 0.625 kilogram per quintal of sugarcane, and

4. Clause 4 conferred power on the Central Government or a State Government with the concurrence of the Central Government to fix the minimum price or the price of sugarcane to be paid by producers of khandsari sugar or their agents for the sugarcane purchased by them. The second and third proviso to cl. 4 were simultaneously introduced with cl. 4A. By the third proviso to cl. 4, power was conferred on the Central Government or with the approval of the Central Government on the State Government to allow a suitable rebate in the price fixed in exercise of the power conferred by clause 4. The purpose underlying the proviso is manifest. If the minimum price or price of sugarcane to be paid by producers of khandsari sugar is fixed, it is incumbent upon the producers of khandsari sugar to pay that price and nothing less than that price on the pain of criminal prosecution. The authorities clearly envisaged a situation where sugarcane may be brought in bundles to the unit manufacturing khandsari sugar and if the sugarcane is weighed with the binding material used, the minimum price or price fixed by the Government to be paid per quintal of sugarcane would ipso facto include the weight of the binding material and if the power to grant rebate is not conferred the producer of khandsari sugar will be under an obligation to pay the same price even if the part of the payment was for something other than sugarcane, namely, binding material. The *raison d'être* behind conferring this power is thus clearly discernible.

5. Clause 4A made it obligatory to pay the minimum price of sugarcane if so fixed under cl. 4 or in the absence of price fixation, the negotiated price. Proviso (iii) to clause 4A confers power to allow rebate not exceeding 0.625 kg. per quintal of sugarcane where sugarcane is brought in bundles and is weighed as such, i.e. with the binding material. Armed with this power, the 2nd respondent after obtaining approval of the Central Government, as per letter dated September 6, 1979, issued the impugned notification directing that where sugarcane is brought in bundles and is weighed as such a rebate in regard to the binding material at 0.625 kg. per quintal be allowed.

6. Before advertent to the contentions raised in this group of petitions it may be made distinctly clear that though

*Inserted vide Notification No. GSR 197 (E)/Ess. Com./Sugarcane dated 20-3-1978.

clause 3A was inserted in the Control Order in 1976 conferring similar power on the Central Government or with the approval of the Central Government, on the State Government to allow rebate at 0.625 kg. per quintal of sugarcane purchased by manufacturers of sugar, such rebate was being prescribed by the Central Government since 1968. The Gazettes of India setting out the Notifications for the years 1968, 1971, 1972 and 1975 were shown to us. The notifications were issued in exercise of the power conferred by clause 3 of the Sugarcane Control Order, 1966. By the notifications hereinabove referred to minimum price of sugarcane per quintal payable by each sugar mill enumerated in the Schedule to the Notification was fixed. While fixing this minimum price the Central Government authorised itself as also conferred power on the State Governments or the Commissioner or Director of Agriculture within their jurisdiction to allow a suitable rebate in regard to the weight of binding material not exceeding 0.625 kg. per quintal of sugarcane. It thus clearly transpires that the power to fix the minimum price of sugarcane comprehended the power to fix rebate to be allowed for binding material where sugarcane is brought to the factory or the producing centre bound in bundles. However, to avoid any quibbling about the power to fix such rates of rebate, clause 3A was added in 1976 and an identical clause 4A was added in 1978 acquiring power to prescribe rebate to be allowed for binding material where sugarcane is brought to the khandsari sugar producing units bound in bundles and weighed as such. This would at least show that since 1968 rebate at 0.625 kg. per quintal of sugarcane purchased by producers of sugar is being allowed. Sugarcane is a raw material both for sugar and khandsari sugar, the distinction between them being that when vacuum pan process is employed the end product is called sugar and when open pan process is employed the end product is called khandsari sugar. In case of either of them, the grower of sugarcane has hardly anything to do with the end product. After the grower sells his sugarcane, as far as he is concerned, it is immaterial whether the producer produces sugar or khandsari sugar or rab or jaggery or shakkar. Therefore, cl. 4A was introduced to avoid discrimination between producers of sugar and khandsari sugar in the matter of rebate to be allowed when the grower of sugarcane

brings the same bound in bundles to be delivered to the producer. The producers of sugar have without a murmur accepted this position but once the producers of khandsari sugar are brought within the purview of an identical provision, they have filed the present petitions.

7. Mr. C. M. Lodha who led on behalf of the petitioners contended that the power to prescribe rate of rebate under third proviso to clause 4 is conditional upon the fixing of minimum price or price of sugarcane, and as the pre-condition to exercise of power is not satisfied, the authorities cannot exercise power to prescribe rate of rebate. The submission is that where minimum price or price of sugarcane is fixed by the Government, in order to ensure that that price is paid for sugarcane and simultaneously to avoid any unauthorised deduction, the Central Government or the State Government may prescribe the rate of rebate to be allowed beyond which no deduction under the camouflage of rebate for binding material can be resorted to by the purchaser; but if the power to fix minimum price or price of sugarcane is not exercised, there does not arise a situation in which the power to prescribe rebate to be allowed for binding material can be exercised. It was urged that the power to fix price or minimum price of sugarcane and to prescribe rate of rebate are not independent but they are interdependent and one cannot be exercised without exercising the other.

8. Clause 4 confers power on the Central Government or a State Government with the concurrence of the Central Government to fix the minimum price or the price of sugarcane to be paid by producers of khandsari sugar for sugarcane purchased by them. Third proviso to clause 4 provides that the Central Government or with the approval of the Central Government, the State Government may in such circumstances and subject to such conditions as it may specify, allow a suitable rebate in the price so fixed. If the provision were to end with clause 4, a serious contention would arise whether the power to determine rate of rebate can be exercised dehors the power to fix minimum price or price of sugarcane or can be unilaterally exercised. Undoubtedly, if the power was exercised under clause 4 probably the pre-condition to exercise of power of prescribing suitable rebate viz. fixing of minimum price or price of sugarcane if not satisfied, the power to prescribe rate

of rebate could not have been exercised because the latter power for its exercise is dependent upon the power to fix price or minimum price. Both the powers are interrelated as would be evident from the language of third proviso: ".....as it may specify, allow a suitable rebate in the price so fixed." The rebate is thus correlated to price fixed. Therefore prima facie it appears that the power to fix rate of rebate under the third proviso to clause 4 cannot be exercised without exercising the power to fix price or minimum price. It being a conditional power, the satisfaction of condition giving rise to the occasion to exercise of power is a must. Therefore, before the rate of rebate is prescribed the price or the minimum price of sugarcane as provided in the substantive part of clause 4 will have to be fixed. From the price so fixed a rebate has to be allowed and, therefore, the power was conferred by the third proviso to prescribe the rate of rebate. The rebate contemplated by the third proviso to clause 4 is not necessarily confined to rate of rebate for binding material only but permissible rate of rebate from the price or minimum price fixed under the substantive provision of clause 4 can be prescribed.

9. Clause 4A stands on an independent footing and it is independent of clause 4. Cl. 4A is neither inter-dependent nor interrelated to cl. 4. Cl. 4A provides that the producer of khandsari sugar or his agent shall pay for the sugarcane purchased by him to the sugarcane grower or the sugarcane growers' co-operative society either the minimum price of sugarcane fixed under clause 4 or the price agreed to between the producer or his agent and the sugarcane grower or the sugarcane growers' co-operative society as the case may be. Cl. 4A thus visualises a situation in which either the minimum price of sugarcane is fixed u/cl. 4 or where no such price is fixed, the price agreed to between the sugarcane grower and the producer who purchased sugarcane and even in this latter situation the power to prescribe rate of rebate only in respect of binding material was conferred on the Central Government or the authorities set out in the third proviso to cl. 4A. Therefore, fixing of the minimum price may be a precondition to the exercise of power under the third proviso of cl. 4, as far as cl. 4A is concerned, even where the price to be paid by the producer to the sugarcane grower is the one negotiated between

the two, the producer or his agent will have to allow that much rebate and no more for binding material if notified in exercise of the power conferred by the third proviso. This literal construction accords with the intendment of the provision as would be presently pointed out.

10. Mr. Lodha urged that if the purchaser and seller of sugarcane are free agents to negotiate the price, what useful purpose would be served by prescribing the rate of rebate statutorily? Says Mr. Lodha, that if higher rebate is to be allowed, the producer of khandsari sugar and the grower of sugarcane would work out the price accordingly and if less rebate is allowed, it will have a direct impact on the negotiated price. This submission proceeds on the unwarranted assumption that a producer of khandsari sugar and the grower of sugarcane are capable of negotiating the price as free agents and stand on a footing of equality. Sugarcane is a perishable commodity. The grower of the sugarcane is at the mercy of producers of sugar or khandsari sugar. It would be uneconomic for him to transport sugarcane to a long distance. By the very nature of the product, it being perishable and transport over a distance being uneconomic, the grower of sugarcane has limited choice in selecting the producer to whom it could be sold. Between the producer of khandsari and the grower of sugarcane, the first one is primarily in a position to dominate and dictate and they do not operate on the level of equality. Unquestionably, therefore, the grower of sugarcane in relation to the producer of the khandsari sugar would be weaker and it is he who requires to be protected. Now, if the protection of fixing of minimum price is not resorted to because the authorities under the Control Order may have information before them that looking to the supply and demand and the market economy, the grower of sugarcane would be able to obtain a reasonably fair price for his labour, the only thing which is required to be protected against is inequitous, unauthorised and impermissible deductions. It appears that in the State of Uttar Pradesh and Bihar the weight of the binding material when sugarcane is brought in bundles to the producer has been a fruitful source for the producers of khandsari sugar to make deductions from the weight of sugarcane delivered to them in such an exorbitant quantity as to deny in real money worth the negotiated price. This can be demonstrably established by

the claim made in these petitions that the weight of binding material is 2.5 kg. per quintal of sugarcane while the authorities have prescribed only 0.625 kg. per quintal of sugarcane and the national average as worked out by National Sugar Institute, Kanpur is 0.741 kg. per quintal of sugarcane. If the price of sugarcane is fixed per quintal and the deduction is made as contended herein, it does not require imagination or mathematician's intellect to work out the invisible loss inflicted by the subtle method on the growers of sugarcane. Therefore, while retaining the power to fix minimum price or price to be paid and also in a given situation leaving it to the purchaser of sugarcane and grower of sugarcane to negotiate the price, in order to eschew any exploitation of the weaker section between the two, the power to prescribe the rate of rebate was acquired and can be rightly enforced. Therefore, viewed from either angle, there is no merit in the submission that unless the power to fix the price or minimum price is exercised there is no power to prescribe the rate of rebate. Language of cl. 4A on a literal or grammatical construction negatives the submission and it must as well be rejected looking to the intentment underlying this provision.

11. Mr. Shanti Bhushan, learned counsel appearing for the petitioners in Writ Petitions Nos. 732 to 763 urged that assuming that power to prescribe rate of rebate under cl. 4A read with the third proviso could also be exercised where price of sugarcane may be left to be negotiated between the growers of sugarcane and producers of khandsari sugar, yet the quantum as determined must at least have reasonable relation to the reality of market situation as well as prevalent trade practice. He urged that viewed from this angle fixation of rate of rebate at 0.625 kg. per quintal of sugarcane is unjust and unfair and therefore the Court should strike down the impugned notification on the ground that the determination is arbitrary and utterly unrelated to trade and practice. Simultaneously he contended that assuming that national average of weight of binding material works out at 0.741 kg. per quintal as submitted by the respondents on the strength of the report of National Sugar Institute, Kanpur, there was absolutely no justification for reducing the same to 0.625 kg. per quintal and therefore the prescribed rate of rebate apart from

being arbitrary is unrelated to trade and practice and deserves to be quashed. In this connection, he referred to Paragraph 6 of the counter-affidavit filed by Shri H. A. M. L. Vaz, Deputy Secretary, Ministry of Agriculture, Department of Food in which it is stated as under:

"The limit of 625 grams per quintal was adopted, as it was allowed by the States of U. P. and Bihar before the Central Government took over the control over the price of sugarcane, and has continued since then. Representations were received from the Associations of the vacuum pan sugar mills etc. against that limit. A survey was carried out by the National Sugar Institute, Kanpur, and the average weight of the binding material worked out to 0.741 kg. per quintal for the winter season of the selected factories spread over the whole country. Subsequently, on receipt of a representation from the Madras State Federation of Co-operative Sugar Factories, views of the State Governments in the matter were also called for, with the specific request that they might also ascertain the views of the cane growers. The major sugar producing State Governments of U. P., Punjab, Rajasthan, Maharashtra, Karnataka, Andhra Pradesh, Pondicherry, West Bengal, Orissa, Madhya Pradesh, Kerala and Gujarat, recommended that the limit already prescribed was adequate and that there was no need to revise it. The Bihar Government had already indicated the same view. Hence fixation of that limit cannot be said to be unreal and arbitrary or contrary to actualities of trade and practice."

12. Petitioners countered it by the affidavit in rejoinder of Shri Prem Parkash Aggarwal; the relevant portion of para 4 reads as under:

"With reference to Para 6 of the counter-affidavit I say that to the best of my information no survey was carried out at any time after 1976. It is to the best of my information that National Sugar Institute, Kanpur, conducted some kind of survey in 1964 or earlier."

This half-hearted lack of knowledge would not be sufficient to reject what Mr. Vaz stated in his counter-affidavit. However, to put this factual averment beyond the pale of controversy Mr. Girish Chandra, learned advocate who appeared for the Union Government produced a file of the Department of Food, Sugar Policy Desk, in which claim for upward revision of allowance for binding material

presently allowed under Sugar (Control) Order, 1966 in the light of the suggestions received from Indian Sugar Mills Association as per its letter dated July 14, 1977 has been meticulously examined. It appears that Indian Sugar Mills Association approached the Central Government requesting it for upward revision of the rebate for binding material till then granted under the Control Order. Indian Sugar Mills Association appears to be the spokesman of the sugar industry. Probably a grievance was voiced that while producers of sugar are under a statutory obligation to grant the prescribed rate of rebate, the producers of khandsari sugar are under no such obligation even though they purchase sugarcane from the same market. Accordingly while examining the question whether any upward revision in the rate of rebate should be allowed to the producers of sugar who purchase sugarcane, it was decided to simultaneously introduce an identical provision in respect of purchase of sugarcane by producers of khandsari sugar. That is the genesis of the introduction of cl. 4A in the Control Order. The file meticulously examines the suggestion for upward revision of the rate of rebate. It clearly transpires from the file that a circular letter was sent to all the governments of sugar producing States requesting them to intimate their view on the desirability or otherwise of any upward revision in the existing quantum of rebate of 0.625 kg. per quintal in respect of the weight of the binding material where sugarcane is brought bound in bundles and weighed as such. It may be briefly mentioned that Punjab, Gujarat, Karnataka and U. P., did not consider it necessary to grant any upward revision. On the other hand, Tamil Nadu, Kerala, West Bengal, Pondicherry, Haryana, Rajasthan and Orissa were of the opinion that there is some justification for an upward revision not exceeding 1 kg. per quintal. The State of Bihar took a neutral stand stating that in Bihar, sugarcane is not supplied bound in bundles and therefore the question of giving any rebate in respect of binding material does not arise. After ascertaining the views of the different State Governments, the department was of the view that since the views of the State Governments are sharply divided a request may be made to Director, National Sugar Institute, Kanpur to carry out an independent study in regard to the quantum of rebate that should be given for

binding material, to enable the Government to take a final decision, on the request of the industry for upward revision of the existing rebate of 0.625 kg. per quintal. This is the genesis of the report of the Director, National Sugar Institute referred to in Para 6 of the counter-affidavit. The summary of the report of the Director, National Sugar Institute, Kanpur was examined and it was observed that the percentage of the binding materials varies from State to State and ranges between 0.64 to 1.5% except in Orissa where it is found to be 3.00%. When the matter was still under consideration of the Department, the present writ petitions were filed. It was observed that the present rate of rebate is in force for the last over 20 years, so far as the vacuum-pan sugar manufacturers are concerned and the same can be applied to the khandsari sugar manufacturers also. Probably further examination of the request for upward revision came to be stalled in view of the fact that the present writ petitions were filed.

13. In the light of the fact situation hereinabove set-out, it is difficult to accept the submission that the fixation of rate of rebate for binding material at 0.625 kg. for the whole country is either arbitrary or unreal or unrelated to trade and practice. The rate of rebate seems to have been determined by the law of averages after collecting information from all over the country. Coupled with this is the fact that the present rate of rebate is in vogue for over a quarter of a century. It in itself is sufficient to negative the contention that the rate of rebate is fixed arbitrarily or is unrelated to trade and practice.

14. The next submission is that assuming that the Central Government was influenced by the report made by the Director of the National Sugar Institute, Kanpur, the report suggests that the average works out at 0.741 kg. per quintal, being approximately the mean between 0.64 and 1.5%. Therefore, it was vehemently urged that there was no justification for further reducing it to 0.625 kg. When the determination has to be made on law of averages and applicable to the whole country, the final figure cannot be mathematically determined. If the existing rate of rebate, determined on the national average is marginally higher or lower than the average worked out by a later study team, it cannot be said that the existing prescription is arbitrary or

unrelated to trade or practice. No doubt, if the range is wide, and the gap is unexplained, realistic redetermination may be directed. According to the average worked out by the Director of the National Sugar Institute, all India average rate of rebate would work out at 0.741 kg. per quintal while the Government has been fixing for over a quarter of a century the rate of rebate at 0.625 kg. per quintal. Thus the differential between what is prescribed and what is calculated by the study is not so wide as to render the prescribed rate arbitrary or unrealistic. The differentials being within a narrow range, the one which is in vogue for over a quarter of a century cannot be rejected as arbitrary or unrelated to trade and practice. Nor is the Court competent to work out the exact permissible rebate with mathematical accuracy.

15. A reference at this stage to a piece of evidence furnished by the petitioners would suffice to repel the contention of the petitioners that the average weight of binding material is 2.5 kg. per quintal and, therefore, the prescribed rate is not merely marginally low but wholly unrealistic. Annexure I to the rejoinder affidavit filed by Shri Prem Prakash Aggarwal, Secretary of Gur Khandsari Utpadak Sangh, Roorkee, dated December 24, 1981, purports to be a report of the Assistant Sugarcane Commissioner on his visit to M/s. Anandprakash Atulkumar, a Khandsari sugar producing unit on January 25, 1978. He was accompanied by Shri Ravi Shankar Shukla, Khandsari Officer, Sarvashri S. D. Verma, R. C. Kureel, Deoband and Navin Chandra, Khandsari Inspectors. In order to ascertain the average weight of binding material a truck loaded to its full capacity with sugarcane was weighed. The gross weight was 37 quintals and 36 kgs. Shri Shobha Ram, the owner of the sugarcane was directed to remove the joon (binding material) of sugarcane. The weight of M. Trolley was found to be 21 quintals and 40 kgs. Subtracting the weight of trolley from the gross weight, the weight of sugarcane with binding materials worked out at 15 quintals and 96 kgs. Then followed the calculation which may be extracted:

"The above farmer (kastkar) also reported that the sugarcane was being purchased at Rs. 9.10 p. per quintal. Approximately about 1800 quintals cane was lying at site. The weight of the joon (bind-

ing material) after it had been removed came to 32 kgs."

If the actual weight of the binding material in respect of 1800 quintals of sugarcane turned out to be 32 kg., obviously per each quintal it would be much less than 0.625 kg. Mr. Shanti Bhushan, however, attempted to urge that the last sentence in the report is disjointed and misplaced and he wanted us to read the Report as meaning that the weight of sugarcane in the trolley was 15.96 kg. and that the weight of the binding material in respect of the same was 32 quintals and, therefore, on an average it would work out at 2 kg. per quintal. It is not possible to read the Report in the manner indicated by Mr. Shanti Bhushan. In fact, the Report was produced on behalf of the petitioners and not a word has been stated in the affidavit to which it is annexed as to how the Report is to be read. It would thus appear that the rate of rebate set out in the impugned Notification bears resemblance to the sample testing of actual weight of binding material used in binding sugarcane when brought in bundles to the khandsari factory.

16. Our rejection of the submission should not be interpreted to imply that no case is made out for upward revision of the rate of rebate for binding material. There is by the law of averages as recently worked out in 1980-81, an examinable case for revision up to at least 0.741 kg. per quintal. We do not purport to indicate the figure as a judicial pronouncement but we believe that the Central Government would continue its examination of the request made by Indian Sugar Mills Association, shelved because of these petitions, for upward revision and realistically examine the same as early as possible and before the next crushing season commences. With this we reject the submission that the fixation of rate of rebate at 0.625 kg. per quintal in the impugned notification is arbitrary or unrelated to trade and practice.

17. Mr. Kacker, learned counsel who appeared in Writ Petitions 777-796 and 1131-52/81 urged that the impugned notification places a restriction on the freedom of trade guaranteed to the petitioners under Art. 19 (1) (g) and as it is neither shown to be reasonable nor imposed in public interest, it is violative of the freedom of trade and is, therefore, void.

18. Whenever it is contended that a regulatory measure imposes restriction upon the freedom of trade guaranteed by Art. 19 (1) (g), it must be shown that the

restriction so imposed directly and proximately interferes in praesenti with the exercise of freedom of trade. If the alleged restriction does not directly or proximately interfere with the exercise of freedom of trade, the freedom guaranteed by Art. 19 (1) (g) is not violated. Petitioners contend that they have a right to carry on trade of manufacturing khandsari sugar and for facilitating the carrying on of this trade they have to buy the raw material called sugarcane. When they buy sugarcane in the absence of fixing of minimum price for sugarcane the sugarcane grower and the producer of khandsari sugar are free to negotiate the price. The negotiated price would take care of the condition in which sugarcane should be supplied. It would be open to the producer of khandsari sugar to buy sugarcane from the grower who may be asked to bring sugarcane not bound in bundles. The rebate for binding material is to be allowed only when sugarcane is brought to the khandsari sugar producing unit bound in bundles. It is always open to the purchaser of sugarcane to insist upon the grower bringing the sugarcane not bound in bundles and he is free to negotiate the price when price or minimum price of sugarcane is not fixed and the impugned notification will not even remotely impinge upon his freedom to carry on his trade. Therefore, the short answer is that the restriction complained of does not directly and proximately interfere with the exercise of freedom of trade and Art. 19 (1) (g) is not attracted.

19. Assuming that the impugned notification making it obligatory to grant rebate for binding material when sugarcane is brought bound in bundles to the extent prescribed in the impugned notification does impose a restriction on the freedom to carry on trade, the next question is, whether the restriction is reasonable and imposed in the interest of general public. Once it is assumed that the impugned notification imposes a restriction on the freedom of trade, the burden is on those who support it, to show that the restriction imposed by the impugned law is reasonable and is imposed in the interest of general public. In other words, the burden is on those who seek the protection of cl. (6) of Art. 19 and not on the citizen who says that the restrictive enactment is invalid (see *Saghir Ahmad v. State of U. P.*, (1955) 1 SCR 707: (AIR 1954 SC 728), *Khyerbari Tea Co. Ltd. v. State of Assam*, (1964) 5 SCR 975: (AIR

1964 SC 925) and *Vrajlal Manilal & Co. v. State of Madhya Pradesh*, (1970) 1 SCR 400: (AIR 1970 SC 129)). It is of course not necessary to recall the dissent of Sarkar, J. in *Khyerbari Tea Co. Ltd. case*. The learned Judge was of the view that the whole theory of burden of proof rests on the assumption that clause (6) of Article 19 carves out an exception and that the burden to prove that the case is covered by the exception is on him who pleads the same, but it was observed that this way of reading the Constitution is not proper and one may legitimately say that there is no exception because the real fundamental right is what is left after the restriction has been imposed. Consistently with the majority view, the burden will be on the authority who claims the protection of cl. (6) of Art. 19 to show that the restriction is a reasonable one and that it is imposed in the interest of general public.

20. Having settled the question of burden, the passing submission made by Mr. Kackar may be dealt with. It was urged that in the batch of petitions in which he appears neither the Union Government nor the State of Uttar Pradesh has filed counter-affidavit and, therefore, one can say that no attempt has been made to justify the restriction. We are not disposed to accept this submission because the Union Government has filed counter-affidavit in Writ Petitions Nos. 6443-6444 of 1980 and all the petitions in this batch raised identical contentions and were directed to be heard with Writ Petitions Nos. 6443-6444 of 1980. Undeserved respect for processual justice may have persuaded us to direct the Union Government to file a copy of the counter-affidavit in each petition which we consider superfluous. At any rate, the petitioners in the petitions in which Mr. Kackar appears, were supplied a copy of the counter-affidavit and therefore this passing submission must be negatived.

21. If freedom of trade postulates, inter alia, freedom to negotiate price for purchase and sale both the raw material and the finished product, the Control Order confers power to fix price of sugarcane and to that extent there is a restriction on freedom of trade. But the restriction is not under examination here. Even when he is left free to negotiate the price where either the Central Government or with the approval of the Central Government, the State Government does not fix minimum price or price of sugarcane

there is a further restriction on his freedom of negotiating the price because he is statutorily bound to give rebate for the binding material as prescribed in the impugned notification. To this extent one may give credence to the contention that there is a marginal restriction on the freedom of trade.

22. The statutory prescription of quantum of rebate for binding material has been prescribed for the benefit of sugarcane growers. Producers of sugar and khandsari sugar constitute a powerful trade lobby, the fact of which one can take judicial notice. Sugar being an essential commodity occasionally kept in short supply and being a commodity needed for consumption by almost the entire population, the powerful industry magnates in this field are in a position to dominate both the growers of sugarcane as also the consumers of the essential commodity. Number of regulations have been enacted almost since the dawn of independence to regulate this powerful combination of manufacturers of sugar and khandsari sugar all over the country for the ultimate benefit of consumers on the one hand and on the other hand the farmers and the growers of sugarcane with their small holdings and raising a perishable food crop. The marginal farmers, are unable to stand up against the organised industry. It does not require long argument in this predominantly agricultural society that the farmers having small holdings need protection for selling at fair price their meagre agricultural produce. As far back as 1953, the U. P. Legislature enacted U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953, for rational distribution of sugarcane to factories, for its development on the organised scientific line, to protect the interest of cane growers and of the industry, etc. Constitutionality of this Act was challenged on various grounds including one under Art. 19 (1) (g). In *Ch. Tika Ramji v. The State of U. P.*, 1956 SCR 393: (AIR 1956 SC 676), this Court repelled the challenge under Art. 19 (1) (g) holding that the restriction which is imposed upon the canegrowers in regard to sales of their sugarcane to the occupiers of factories in areas where the membership of the Canegrowers Co-operative Society is not less than 75 per cent of the total canegrowers within the area, is a reasonable restriction in the public interest designed for safeguarding the interest of the large majority of growers of sugarcane

in the area and works for the greatest good of the greatest number. The proposition is now beyond the pale of controversy that the State can impose a restriction in the interest of general public on the right of a party to contract where in the opinion of the Government the contracting parties are unable to negotiate on the footing of equality. Constitutional validity of statutes prescribing minimum wages has been founded on this proposition. The principle can be effectively extended to the powerful sugar industry and the cane growers because the cane growers admittedly are at a comparative disadvantage to the producers of sugar and khandsari sugar who were described in the course of arguments as sugar barons. It does not require an elaborate discussion to reach an affirmative conclusion that sugarcane growers who are farmers cannot negotiate on the footing of equality with the producers of sugar and khandsari sugar. The State action for the protection of the weaker sections is not only justified but absolutely necessary unless the restriction imposed is excessive.

23. Viewed from another angle, the impugned restriction is entirely reasonable. If price or minimum price of sugarcane is fixed, the producers of sugar would try to circumvent the price or minimum price by unrealistic and impermissible deductions. The rebate for the weight of binding material seems to be a source for indulging in this nefarious, if not wholly fraudulent conduct. It is equally well settled that the State can impose reasonable restrictions under cl. (6) of Art. 19 to prevent fraud or where advantage of a fraudulent conduct is sought to be taken (see *Fedco (P.) Ltd. v. S. N. Bilgrami*, (1960) 2 SCR 408: (AIR 1960 SC 415)). The impugned restriction serves twofold purposes: (i) it ensures price of sugarcane avoiding impermissible deductions; (ii) it circumvents possible fraud by making such deductions as would render illusory even the negotiated price, if not fixed price. And it is indisputable that if the rebate is not statutorily prescribed the cane growers will be at the mercy of the producers of sugar and khandsari sugar. If price or minimum price of sugarcane can be fixed by the State, because this power was never questioned before us, this very power comprehends the power to provide such incidental and ancillary regulations which will ensure the price. Price fixation measure is for protection of the farmer from

the exactions of producers against which he cannot protect himself. (See *Lee Nebbia v. People of the State of New York*, (1933) 78 Law ed 940 at p. 960). The impugned measure ensures price either fixed or negotiated and, therefore, it is a restriction which is undoubtedly reasonable and is imposed in the interest of general public and the guarantee of freedom of trade is not violated.

24. The last submission is that in order that the restriction may be reasonable it must have reasonable relation to the object which the statute seeks to achieve and must not be in excess of the object. It was urged that the Sugarcane Control Order was issued in exercise of power conferred by S. 3 of the Essential Commodities Act. One of the objects sought to be achieved by the Essential Commodities Act, 1955, is to ensure availability at fair price the essential commodity to the consumers. It was further urged that one can visualise that the power to fix minimum price or price of sugarcane may have a rational nexus to the object sought to be achieved, namely, availability of sugar to the consumers at fair price. But it was urged that prescribing the rate of rebate for binding material has no relation with the aforementioned object. This submission does not commend to us for the obvious reason that the restriction is imposed in the interest of the cane growers and the State while ensuring that sugar, a commodity of daily consumption by almost every one in this country, is available to everyone at a fair price simultaneously wanted to ensure that the grower of sugarcane, another weaker section of the society is not left to the vagaries of trade or the powerful sugar industry. To strike the balance between the conflicting interests not only State acquired power to fix minimum price of sugar and khandsari sugar but that this wholesome effort may not work to the disadvantage of the sugarcane growers another weaker section of the society, the power to prescribe rate of rebate was acquired. And the power to fix price or minimum price comprehends the power to so regulate supply as to ensure the price so fixed and to ensure that in the name of unauthorised and unwarranted deduction the price fixed or negotiated is not rendered illusory.

25. Views from either angle the restriction is both reasonable and it is imposed in the interest of general public,

and has a rational relation to the object sought to be achieved by the Control Order.

26. These were all the contentions in this batch of petitions and as none has merit in it, the petitions fail and are dismissed with costs; hearing fee is one set,

Petitions dismissed.

AIR 1982 SUPREME COURT 913

(From : (1976) 2 APLJ (HC) 254)

A. D. KOSHAL, V. BALAKRISHNA
ERADI AND R. B. MISRA, JJ.

Civil Appeal No. 1346 of 1976, D/- 5-3-1982.

State of Andhra Pradesh, Appellant v. Mohd. Ashrafuddin, Respondent.

Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), S. 3 (i) — 'Holding', interpretation of — Expression 'held' in definition of 'holding' connotes both ownership as well as possession — Land transferred under unregistered sale deed pursuant to agreement for sale — Transferor is holding as owner, although he is not in possession. (1976) 2 APLJ (HC) 254 : 1976 Andh LT 500, Reversed. (Interpretation of Statutes; Words and Phrases— 'Held').

The word 'held' is not defined in the Act. 'Held' connotes both ownership as well as possession. And in the context of the definition it is not possible to interpret the term 'held' only in the sense of possession. For example, if a land is held by an owner and also by a tenant or by a person in possession pursuant to a contract for sale, the holding will be taken to be the holding of all such persons. It obviously means that an owner who is not in actual possession will also be taken to be a holder of the land. If there was any doubt in this behalf, the same has been dispelled by the explanation attached to the definition of the term 'holding'. The explanation clearly contemplates that the same land can be the holding of two different persons holding the land in two different capacities. Therefore the respondent, who has transferred some lands to another person under unregistered sale deeds pursuant to an agreement for sale, in view of the definition certainly is holding as an owner, although he is not in possession. (Para 8)

CZ/CZ/B62/82/LGC

It is by now well settled that a person in possession pursuant to a contract for sale does not get title to the land unless there is a valid document of title in his favour. In the instant case the transferee came into possession in pursuance of an agreement for sale but no valid deed of title was executed in his favour. Therefore, the ownership remained with the transferor. But even in the absence of a valid deed of title the possession pursuant to an agreement of transfer cannot be said to be illegal and the transferee is entitled to remain in possession. If perchance he is dispossessed by the transferor, he can recover possession. The transferor cannot file any suit for getting back possession but all the same he will continue to be the owner of the land agreed to be transferred. The respondent, satisfies the conditions contemplated by the definition of the term 'holding' and the land transferred by him under a defective title deed will form part of his holding. Therefore the land in possession of the transferee can be taken to be a part of the holding of the transferor-respondent. (1976) 2 APLJ (HC) 254: 1976 Andh LT 500, Reversed. (Para 9)

There may be cases in which some prejudice might be caused to some tenure holders but that cannot be helped. If the definition of the term 'holding' is couched in clear and unambiguous language the court has to accept it as it stands, and if it is so construed, there is not the slightest doubt that the same land can be a part of the holding of various persons holding it in different capacities. When the terms of the definition are clear and unambiguous there is no question of taking extraneous aid for construing it.

(Para 13)

Mr. L. N. Sinha, Attorney General, Mr. P. P. Rao, Sr. Advocate and Mr. B. Paratasarthy, Advocate with them, for Appellant; Mr. P. Govindan Nair, Mr. S. K. Mehta, P. N. Puri and M. K. Dua, Advocates, for Respondent.

MISRA, J.:— The present appeal by special leave is directed against the judgment and order of the High Court of Andhra Pradesh dated the 17th of September, 1976 allowing a civil revision arising out of proceedings under the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973, hereinafter referred to as 'the Act'.

2. The holding of the respondent consisted of survey Nos. 36, 37, 41, 42 and 92, all dry, admeasuring acres 88.46 cents in village Ghotkuri in district Adilabad.

It appears that he had transferred 17 acres from survey No. 36 and 11 acres and 48 cents from survey No. 41 to another person under unregistered sale deeds pursuant to an agreement for sale, and had gifted away survey Nos. 37, 42 and 92 to his own son Naimuddin by a document written on a plain paper.

3. Pursuant to a notice under Sec. 8 of the Act the respondent filed a declaration in respect of his holding. In his declaration, however, he did not include in his holding the area transferred by him under two unregistered sale deeds and the aforesaid gift deed.

4. The Land Reforms Tribunal ignoring the aforesaid transfers computed his holding at 1.7692 standard holding. Under the Act he was entitled to possess one standard holding only. He was, therefore, asked to surrender land equivalent to 0.7692 standard holding.

5. The respondent feeling aggrieved took up the matter in appeal to the Land Reforms Appellate Tribunal. He, however, confined his appeal to the land covered by the two sale deeds in respect of survey Nos. 36 and 41 and submitted to the finding of the Land Reforms Tribunal regarding the gift of survey Nos. 37, 42 and 92. The Appellate Tribunal confirmed the order of the Land Reforms Tribunal and ignored the sale deeds executed by the respondent in respect of survey Nos. 36 and 41. The respondent challenged the order of the Appellate Tribunal by preferring a revision to the High Court. The High Court in its turn allowed the revision holding that the land transferred under the two sale deeds could not be included in the holding of the respondent for ascertaining the ceiling area. The High Court has given the benefit of Section 53A of the Transfer of Property Act to the person in possession of the plots pursuant to the contract for sale and treated the land as a part of his holding. The State of Andhra Pradesh has come up in appeal to this Court.

6. The Attorney General appearing for the State has raised only one contention. According to him, on a correct interpretation of the definition of 'holding' as given in cl. (i) of S. 3 of the Act, the land transferred by the respondent will still continue to be a part of his holding. In order to appreciate the contention we have to read the definition of 'holding' along with the explanation attached to it.

"3 (i) 'holding' means the entire land held by a person,—

- (i) as an owner;
- (ii) as a limited owner;
- (iii) as a usufructuary mortgagee;
- (iv) as a tenant;

(v) who is in possession by virtue of a mortgage by conditional sale or through part performance of a contract for the sale of land or otherwise, or in one or more of such capacities; and the expression 'to hold land' shall be construed accordingly.

Explanation.— Where the same land is held by one person in one capacity and by another person in any other capacity, such land shall be included in the holding of both such persons."

The term 'holding' takes in its fold land held by various persons in various capacities viz., as an owner, as a limited owner, as a usufructuary mortgagee as a tenant or as a person in possession by virtue of a mortgage by conditional sale or through part performance of a contract for the sale of land or otherwise, or in one or more of such capacities. The Explanation appended to the definition clearly contemplates that if the same land is held by one person in one capacity and by another person in another capacity such land shall be included in the holding of both such persons. Obviously, therefore, the same land can be taken to be a part of the holding of more persons than one provided they hold it in different capacities.

7. Shri P. Govindan Nair appearing for the respondent on the other hand has contended that the expression 'held' in the definition of 'holding' contemplates ownership with possession and that if this be so the transferee who is in possession will be taken to be the holder of the land transferred, and not the respondent who was the transferor and who was not in possession. He has also contended that the interpretation sought to be put by the Attorney General on the definition would create an anomalous situation.

8. The word 'held' is not defined in the Act. We have, therefore, to go by the dictionary meaning of the term. According to Oxford Dictionary 'held' means: to possess; to be the owner or holder or tenant of; keep possession of; occupy. Thus, 'held' connotes both ownership as well as possession. And in the context of the definition it is not possible to interpret the term 'held' only in the

land is held by an owner and also by a tenant or by a person in possession pursuant to a contract for sale, the holding will be taken to be the holding of all such persons. It obviously means that an owner who is not in actual possession will also be taken to be a holder of the land. If there was any doubt in this behalf, the same has been dispelled by the explanation attached to the definition of the term 'holding'. The explanation clearly contemplates that the same land can be the holding of two different persons holding the land in two different capacities. The respondent in view of the definition certainly is holding as an owner, although he is not in possession.

9. It is by now well settled that a person in possession pursuant to a contract for sale does not get title to the land unless there is a valid document of title in his favour. In the instant case it has already been pointed out that the transferee came into possession in pursuance of an agreement for sale but no valid deed of title was executed in his favour. Therefore, the ownership remained with the respondent-transferor. But even in the absence of a valid deed of title the possession pursuant to an agreement of transfer cannot be said to be illegal and the transferee is entitled to remain in possession. If perchance he is dispossessed by the transferor, he can recover possession. The transferor cannot file any suit for getting back possession but all the same he will continue to be the owner of the land agreed to be transferred. The respondent, in our considered opinion, satisfies the conditions contemplated by the definition of the term 'holding' and the land transferred by him under a defective title deed will form part of his holding. The High Court, therefore, erred in holding that the land in possession of the transferee cannot be taken to be a part of the holding of the transferor-respondent.

10. This takes us to the other contention raised by Shri P. Govindan Nair that the interpretation sought to be put by the Attorney General on the definition would create an anomalous position inasmuch as the same land according to the definition may form part of the holding of the transferor as well as of the transferee or of the owner as well as of the tenant.

11. At the first flush it may appear to be paradoxical to say that the same land could form part of the holding of

dition of 'holding' but on a closer scrutiny of the relevant provisions of the Act the proposition presents no difficulty.

12. A reference may be made to Sections 10 and 12 of the Act. In so far as they are material for the purpose of this case they read:

"10. (1) If the extent of the holding of a person is in excess of the ceiling area, the person shall be liable to surrender the land held in excess.

(2) The Tribunal shall serve on every person, who is liable to surrender the land held in excess of the ceiling area under sub-section (1), a notice specifying therein the extent of land which such person has to surrender and requiring him to file a statement within such period not being less than fifteen days, as it may fix, indicating therein, full particulars of the lands which such person proposes to surrender.

(3) & (4)

(5) (a) Notwithstanding anything in this section it shall be open to the Tribunal to refuse to accept the surrender of any land—

(i) which has been converted into non-agricultural land and has been rendered incapable of being used for purposes of agriculture;

(ii) the surrender of which is not acceptable on account of a dispute as to the title to the land or an encumbrance on the land or on account of the land being in the possession of any person mentioned in item (ii) or item (v) of clause (i) of Section 3 or on account of the land proposed to be surrendered becoming inaccessible by reason of its severance from the remaining part of the holding; and

the Tribunal shall, in every such case, serve a notice on the person concerned requiring him to surrender any other land in lieu thereof; and thereupon the provisions of sub-sections (3) and (4) shall, mutatis mutandis apply to such surrender:

Provided that where land proposed to be surrendered under this section is burdened with a mortgage, the Tribunal may, on an application made by the mortgagor with the consent of the mortgagee, by order, transfer such mortgage from the land so proposed to be surrendered to the residuary holding of the mortgagor or to any part thereof.

(b) Where the land so surrendered under clause (a) is also not acceptable

giving an opportunity to the person concerned of being heard, select any other land in lieu thereof, and thereupon, the said land shall be deemed to have been surrendered by such person."

"12. (1) Where any land is surrendered or is deemed to have been surrendered under this Act by any usufructuary mortgagee or tenant, the possession of such land shall subject to such rules as may be prescribed revert to the owner.

(2)-(3)

(4) Where any land is surrendered or is deemed to have been surrendered under this Act by any limited owner or by any person in possession by virtue of a mortgage by conditional sale or through a part performance of contract for sale or otherwise, the possession of such land shall, subject to such rules as may be prescribed, revert to the owner."

It may be argued on the strength of Section 10 that if the same land is included in the holding of two persons in different capacities both of them may be asked to surrender the excess area and in that case serious prejudice might be caused to one or to both of them. For example, A is the owner of certain plots and he delivers possession of a part of his land to B pursuant to an agreement for sale. According to the definition of 'holding' the land in possession of B will be taken to be a part of the holding of A and B both. If the land forming part of the holding of A and B is in excess of the ceiling area, both may be obliged to surrender the excess area. The legislature, however, has made a provision to safeguard the interest of the owner in such a case. Section 12 (4) provides: "where any land is surrendered or is deemed to have been surrendered under this Act by any limited owner or by any person in possession by virtue of a mortgage by conditional sale or through a part performance of contract for sale or otherwise, the possession of such land shall, subject to such rules as may be prescribed, revert to the owner. Sub-section (5) also safeguards the interest of the mortgagee in possession or a person in possession in pursuance of a contract for sale and provides: "the owner to whom the possession of the land reverts under sub-section (4) shall be liable to discharge the claim enforceable against the land by the limited owner or person in possession; and the land surrendered shall, if held as a security, continue to be the security."

13. Even so, there may be cases in which some prejudice might be caused to

some tenure holders but that cannot be helped. If the definition of the term 'holding' is couched in clear and unambiguous language the court has to accept it as it stands, and if it is so construed, there is not the slightest doubt that the same land can be a part of the holding of various persons holding it in different capacities. When the terms of the definition are clear and unambiguous there is no question of taking extraneous aid for construing it.

14. Lastly, Shri P. Govinda Nair referred to Form No. I in the rules framed under the Act. He relies on item 8 of that Form in support of his contention. It reads:

"8. Have all details of all lands owned by others but held by the declarant and where the declaration is by a family unit, by all members of the family unit as limited owner, usufructuary mortgagee, tenant, or in possession by virtue of a mortgage by conditional sale or through part performance of a contract for the sale of land or otherwise on the specified date, been furnished in Enclosure II?"

We are afraid, item No. 8 of Form I of the rules does not help the respondent at all. Rather it goes counter to his contention. It envisages that the same land can be part of the holding of various persons in different capacities.

15. For the foregoing discussion the appeal must succeed. We, accordingly, allow the same and set aside the order of the High Court and restore that of the Land Reforms Tribunal. In the circumstances of the case, there will be no order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 917

Y. V. CHANDRACHUD C. J.,
S. M. FAZAL ALI AND
A. D. KOSHAL, JJ.

Writ Petitions Nos. 4158-4182 of 1978
D/- 5-3-1982.

V. T. Khanzode and others, Petitioners
v. Reserve Bank of India and another,
Respondents.

(A) Reserve Bank of India Act (2 of 1934), S. 58 (2) (i)—Scope—Section refers to Staff funds and superannuation funds — Does not confer power to frame service conditions. 1980 (2) Serv LR 167 (Cal) Approved. (Para 14)

(B) Reserve Bank of India Act (2 of 1934), Sec. 58 (1) and (2) — Scope —

JZ/CZ/B29/82/DVT

Power under sub-sec. (1) — Not limited by specific power under sub-sec. (2) — Central Board of Directors of the Reserve Bank of India is competent under sub-sec. (1) to frame service regulation for Bank's employees.

The Central Board has the power to make service regulations for the employees of the Reserve Bank under Section 58 (1) of the Act. (Para 21)

Section 58 (1) confers power on the Central Board of Directors of the Reserve Bank to make regulations in order to provide for all matters for which provision is necessary or convenient for the purpose of giving effect to the provisions of the Act. It is not only convenient but manifestly necessary to provide for the service conditions of the Bank's staff in order to give effect to the provisions of the Act. The power to provide for the service conditions of the staff is at least incidental to the obligation to carry out the purposes for which the Reserve Bank was constituted. The provisions of sub-s. (2) of Sec. 58 cannot be taken to be exhaustive of the power of the Central Board to make regulations. The specific power is only illustrative and cannot restrict the width of the general power. Therefore, the ambit of the general power conferred by sub-sec. (1) cannot be attenuated by limiting it to matters specified in sub-sec. (2) of Sec. 58. AIR 1945 PC 156, AIR 1971 SC 771, 1939 (1) Ch D 422 and (1880) 5 AC 473 Rel. on. (Paras 15, 16)

(C) Reserve Bank of India Act (2 of 1934), Sec. 58 (1) — Regulation of service conditions of Bank employees — Power under Sec. 58 (1) is not exclusive — Regulations not framed under Section 58 (1) — Central Board of Directors can issue administrative directions or circulars for regulating service conditions. (Administrative law; Statutory Corporations — Ambit of powers).

So long as staff regulations are not framed under Sec. 58 (1), it is open to the Central Board to issue administrative circulars regulating the service conditions of the staff, in the exercise of power conferred by Sec. 7 (2) of the Act. The power to frame rules or regulations does not necessarily imply that no action can be taken administratively in regard to a subject-matter on which a rule or regulation can be framed, until it is so framed. (Para 21)

There is no doubt that a statutory corporation can do only such acts as

are authorised by the statute creating it and that the powers of such a corporation cannot extend beyond what the statute provides expressly or by necessary implication. If an act is neither expressly or impliedly authorised by the statute which creates the corporation, it must be taken to be prohibited. This does not, however, mean that the Central Board of Directors of the Reserve Bank is not competent to issue administrative directions or circulars regulating the conditions of service of the Bank's staff and that the Central Board must frame staff regulations under Section 58 (1) only. Sec. 58 (1) is in the nature of an enabling provision under which the Central Board 'may' make regulations in order to provide for all matters for which it is necessary or convenient to make provision for the purpose of giving effect to the provisions of the Act. This provision does not justify the argument that staff regulations must be framed under it or not at all. The substance of the matter is that the Central Board has the power to frame regulations relating to the conditions of service of the Bank's staff and it may exercise it either in accordance with Section 58 (1) or by acting appropriately in the exercise of its general power of administration and superintendence. Section 7 (2) confers upon the Central Board the power of general superintendence over the affairs and business of the Bank. The Central Board, therefore, is authorised by the statute to regulate the service conditions of the Bank staff by issuing administrative circulars. The provisions of Sec. 58 (1) does not prohibit the exercise of such power under Section 7 (1). Case law discussed.

(Paras 18, 19, 20)

(D) Reserve Bank of India Act (2 of 1934), S. 58 (1) — Regulations under — Cannot be amended or altered by administrative circular. (Para 23)

(E) Reserve Bank of India (Staff) Regulations (1948), Pre. — Regulations are not statutory — Are not framed under Sec. 58 of the Reserve Bank of India Act (2 of 1934) — Being of administrative nature can be altered, or amended by administrative circulars. (Reserve Bank of India Act (1934), Sec. 58). 1980 (2) Serv LR 167 (Cal) and Misc. Petn. 206 of 1969, D/- 6-8-1969 (Bom) and AIR 1981 NOC 46: 1981 Lab IC 175 (Delhi) (FB) Approved (Paras 22, 24, 25)

(F) Constitution of India Arts. 14, 16 — Reserve Bank of India Administrative Circular No. 8 dated 7-1-1978 and Office Order No. 679 dated 27-4-1978 — Introduction of common seniority and inter-group mobility amongst different grades of Bank Officers of Groups I, II and III — Not violative of Arts. 14 and 16 — Giving retrospective effect to combined seniority list and choosing 22-5-1974 as relevant date held proper.

The system of grouping had many drawbacks bearing on the promotional opportunities of Officers in the various Groups. To mention but a few, the drawbacks were: (i) Unequal size of one Group as compared to another, (ii) Uneven expansion in one Group as compared to another, and (iii) Earlier confirmations of Officers in one Group as compared to those in another. Various Departments of the Reserve Bank were grouped and regrouped from time to time. Such adjustments in the administrative affair of the Bank are a necessary sequel to the growing demands of new situations which are bound to arise in any developing economy. The group system has never been a closed or static chapter and it is wrong to think that the officers of the various groups were kept, as it were, in quarantine. The group system has been a continuous process of trial and error and the scheme of inter-group mobility has emerged as the best solution out of the experience of the past. Combined seniority has been recommended by two special committees, whose reports reflect the expertise and objectivity which was brought to bear on their sensitive task. It is clear that inter-group mobility and common seniority are a safe and sound solution to the conflicting demands of officers belonging to Group I on one hand and those of Groups II and III on the other. Private interest of employees of public undertakings cannot override public interest and an effort has to be made to harmonize the two considerations. No scheme governing service matters can be fool-proof and some section or the other of employees is bound to feel aggrieved on the score of its expectations being falsified or remaining to be fulfilled. But the fact that the scheme does not satisfy the expectations of every employee does not render it arbitrary, irrational, perverse or mala fide. Combined seniority

ority has emerged as the most acceptable solution as a matter of administrative, historical and functional necessity.

(Paras 32, 40)

As regards the retrospective operation given to the Scheme with effect from May 22, 1974, the Board has struck a via media between two extreme contentions advanced by officers belonging to Group I and those belonging to Groups II and III. In order to rectify the imbalances and anomalies caused by the compartmentalised and group-wise seniority, it was necessary to give retrospective effect to the Combined Seniority List. The Central Board struck a balance by choosing the date May 22, 1974, and that seems to be the best solution in the peculiar circumstances of the case. (Para 42)

Cases Referred: Chronological Paras

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682	21
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Mr. F. S. Nariman, Sr. Advocate, M/s. B. R. Agarwala and P. G. Gokhale, Advocates with him for Petitioners; Mr. B. Sen, Sr. Advocate, M/s. I. N. Shroff and H. S. Parihar, Advocates with him (for Nos. 1 & 2) and Mr. R. K. Garg, Sr. Advocate, Mr. S. Balakrishnan and Mr. M. K. D. Namboodiry, Advocates (for No. 3) for Respondents. Mr. P. R. Mridul, Sr. Advocate, Mrs. Shobha Dikshit for Mrs. Urmila Kapoor, Advocate with him for the Intervener.

CHANDRACHUD, C. J.:— These are 25 petitions under Art. 32 of the Constitution of India challenging the decision of the Reserve Bank of India as regards the introduction of common seniority and inter-group mobility amongst different grades of officers belonging to

Group I (Section A), Group II and Group III, with retrospective effect from May 22, 1974. That decision or order is contained in Administration Circular No. 8 dated January 7, 1978 as also in office Order No. 679 dated April 27, 1978 and has been acted upon in the draft combined seniority list of officers in Grade 'B' (appointed as such prior to Jan. 1, 1970) and in Grades 'C' 'D', 'E' and 'F.' The contention of the petitioners is that the aforesaid circular, office order and combined seniority list are violative of their fundamental rights under Arts. 14 and 16 of the Constitution, and are also ultra vires the power, jurisdiction and competence of the Reserve Bank of India, being without the authority of law and in contravention of the provisions of the Reserve Bank of India Act, 1934.

2. The facts leading up to the impugned decision dated Jan. 7, 1978, the office order dated April 27, 1978 and the draft combined seniority list are as follows: The Reserve Bank of India (Respondent No. 1) was established under the Reserve Bank of India Act, 1934, hereinafter referred to as "the Act." Under the Reserve Bank of India (Staff) Regulations, 1948 framed under Sec. 58 of the Act, the terms and conditions of service of the staff (including officers) of the respondent Bank were revised and regulated. These Regulations were amended from time to time. Provisions regarding record of service, seniority and promotion are contained in Regulations 27 to 30 (Chapter III), which read thus:—

"27. Record of Service: A record of service shall be maintained by the Bank in respect of each employee at such place or places and shall be kept in such form and shall contain such information as may be specified from time to time by the Chief Manager.

28. Seniority: An employee confirmed in the Bank's service shall ordinarily rank for seniority in his grade according to his date of confirmation in the grade and an employee on probation shall ordinarily rank for seniority among the employees selected along with him in the same batch according to the ranking assigned to him at the time of selection.

29. Promotion: All appointments and promotions shall be made at the discretion of the Bank and notwithstanding his seniority in a grade, no employee shall have a right to be appointed or

promoted to any particular post or grade.

30. (1) An employee transferred from one appointment to another or confirmed in a grade or appointment higher than his substantive grade or appointment, shall be liable to be reverted without notice at any time within one year of such transfer or confirmation.

(2) An employee who has been appointed to officiate in a higher grade or appointment, or whose confirmation in a higher grade or appointment is subject to his undergoing probation for any specified period or otherwise shall be liable to be reverted without notice at any time when he is so officiating or undergoing probation.

(3) Nothing in sub-regulations (1) and (2) shall affect the provisions of Regulation 47."

3. Ever since the date of the Staff Regulations of 1948 and even prior thereto, there were "groups" constituted for the different departments of the Reserve Bank, and officers were required to exercise irrevocable options for service in any particular Group. Those who had opted for a service in a particular Group were to be normally eligible for promotion in that Group only. The grouping was revised with effect from April, 1951 when employees were asked to exercise their option with regard to the Group of their choice. In 1951, the various departments of the Bank were re-classified into three Groups, Group I, Group II and Group III. This system of grouping continued until 1955, in which year the Bank found it necessary to reorganise the Agricultural Credit Department. Accordingly, the staff attached to the various departments were regrouped into Groups I, II, III and IV, with effect from April 1, 1957. In each of these Groups, there are six grades of officers based on pay scales, namely, Grades A, B, C, D, E and F, the lowest being Grade A and the highest being Grade F. Each Group had its own seniority List, that is to say, there were four separate seniority lists, one for each group. The latest of such lists, prior to the impugned combined seniority lists, is dated July 1, 1976.

4. The Reserve Bank had constituted a Cadre Review Committee in 1970, comprising Shri Justice J. L. Nain, then a sitting Judge of the Bombay High Court, and two other members, one of whom

and Prof. N. S. Ramaswamy, a Management Expert. The Committee submitted a report in October 1972, on the basis of which the Bank issued Administration Circular No. 15, dated May 22, 1974, specifying the decisions taken by it in the light of the recommendations made by the Committee. One such decision which the Bank took was to prepare a common seniority list for and to provide for inter-group mobility at the lowest level of officers in each group, namely, Grade A officers, including those who were promoted to Grade B on or after January 1, 1970. With regard to higher grades (including officers in Grade B promoted prior to January 1, 1970), the Bank decided to retain the "groupwise seniority as at present." The inter-group mobility in Grades C and D was to be introduced only to a limited extent, namely, "on a swap basis": It was first to be introduced in Grade C and thereafter to be extended "in due course" to the officers in Grade D. The two higher Grades viz. Grades E and F were left untouched and no intention was expressed in the above circular to introduce either combined seniority or any scheme for inter-mobility in these grades. In accordance with the decisions expressed in the aforesaid circular dated May 22, 1974, the Bank published separate seniority lists of officers in Grade B and above for the years 1974, 1975 and 1976. The petitioners, all of whom are officers in Group I, were given their due seniority as of July 1, 1973.

5. By the impugned Administration Circular No. 8, dated Jan. 7, 1978, the Bank stated that it had decided to combine the seniority of all officers on the basis of their total length of service (including officiating service) in Group I (Section A), Group II and Group III. The seniority of all officers in each of the three Groups was to be combined with effect from May 22, 1974 on the basis of their total length of service, including officiating service, in the grade in which they were then posted on a regular basis. The Circular introduced combined seniority with retrospective effect from May 22, 1974 (the date of Administration Circular No. 15) as it was "fair and equitable to the officers as a class".

6. Briefly stated, the effect of this decision is that the group-wise system of seniority which was in existence for more than 25 years stands substituted

by a combined seniority for officers in Group I (Grade A) and in Groups II and III with retrospective effect. That has adversely affected the existing seniority of officers, particularly of those in Group I, who are now placed many places below their existing position of seniority, some by several hundred places.

7. According to the petitioners, the Reserve Bank has no power, competency or jurisdiction to introduce the impugned scheme which discriminates against officers in higher posts, adversely affecting their vested and existing rights of seniority. The scheme, according to them, is without any rationale and far from furthering the efficient functioning of the Bank, it will affect it adversely by compelling officers to leave positions in which they had acquired long and valuable experience and work in posts for which they possess no expertise. For example, for the Department of Banking Operations and Development (in Group II), the emphasis was laid on the commercial banking experience of officers whereas, for recruitment and selection in the Agricultural Credit Department (in Group III), the emphasis was on experience in co-operation and agricultural finance. That is why the Bank had laid the pre-condition that the selected officer should give a specific and irrevocable undertaking to serve in the Group for which he was selected. Another grievance of the petitioners is that although the Bank has stated in paragraph 9.2.1 of the impugned Circular that the seniority of officers will be combined on the basis of their total length of service, the seniority list has, in fact, been prepared in a very arbitrary and inequitable manner. In a large number of cases, it is alleged, the actual service rendered by the officers concerned has been arbitrarily reduced and adjusted in the length of service of other officers, and the latter have been notionally treated as officiating in higher grades from dates much prior to their actual promotions to those grades. In some cases, on the other hand, officiation in higher posts has been wholly ignored. This has generally resulted in accelerated and discriminatory benefit being conferred upon officers mostly belonging to Groups II and III vis-a-vis the petitioners and the other officers in Group I. The petitioners apprehend that a large number of officers who have

been promoted since January 1, 1976 against normal vacancies in their own departments on the basis of their experience and expertise of the relative work, are likely to be reverted and replaced by officers from other groups, mostly from Group III, who were selected for the specific job requirements of that group and who have no experience of the work done in the Group I departments. The petitioners also challenge the retrospective effect given to the impugned circular from May 22, 1974 as irrational and arbitrary. Further, according to them the said circular dated January 7, 1978, the Office order dated April 27, 1978 and the combined seniority list are violative of the Reserve Bank (Staff) Regulations 1948.

8. In reply to the writ petition, a counter-affidavit has been filed on behalf of the Reserve Bank by Shri S. L. Jathar, Deputy Manager in the Department of Administration and Personnel, Central Office, Bombay. The case of the Bank, as disclosed in that affidavit is as follows: The Reserve Bank of India (Staff) Regulations, 1948, are not statutory in character, not having been framed under Section 58 of the Reserve Bank of India Act, 1934. The said Staff Regulations did not provide for the division of the staff of the Bank into different groups but only categorised them as Officers, Personal Assistants, etc. In view of the growing need for specialisation in departments handling research work and developmental activities, a functional segregation of departments into four groups, with group-wise seniority for Officers, was introduced in the year 1951. Appendix XII to the Report of the 'Reserve Bank of India Cadre Review Committee', which refers to the grouping of the departments from time to time, shows that the groupings were not static and fixed but were changed as and when necessary. Group I was composed of General Departments dealing with the day-to-day operational functions of the Bank, including accounts and organisational matters, Group II of Departments dealing with regulatory and inspection functions over the money market; Group III of Departments dealing with the Co-operatives and agricultural Credit institutions; and Group IV of Research Departments. Each Department had a separate line of seniority and although the Bank had the right under the Staff Regulations to post any em-

ployee to any group, each group operated as an independent seniority unit and the employees were eligible for promotion within their group only. It was, however, noticed that the group system had resulted in glaring inequalities in promotional opportunities in the various Departments, because of the accelerated pace of expansion of Departments in some of the Groups, wherein relatively junior employees were able to secure earlier promotions and confirmations. So far as the non-officer staff was concerned, the Bank took several steps from time to time to equalise their chances of promotion. Finally, in pursuance of an agreement with the All-India Reserve Bank Employees' Association, which is a representative Association of Class III employees of the Bank, the Bank introduced a combined seniority scheme for clerical staff in May 1972 under which, the separate seniority lists of clerical employees in Class III were merged into one list with effect from 7th May, 1972, irrespective of their respective groups. The validity of that Scheme was challenged in several High Courts and the matter came up on appeal to this Court from a decision of the Delhi High Court which has struck down the Scheme. This Court, in *Reserve Bank of India v. N. C. Paliwal*, (1977) 1 SCR 377: (AIR 1976 SC 2345) upheld the Scheme. The Cadre Review Committee' whose report was received by the Bank on October 11, 1972 recommended, broadly, the gradual introduction of inter-mobility of officers in different groups and the framing of a common seniority list, except for officers in specialised groups like Economists, Statisticians, Lawyers and Engineers. According to the Committee, the most rational basis for drawing up a common seniority list was to go by the date of entry of each officer in a grade in a continuous officiating capacity. The Bank announced its decision as regards the Committee's recommendations, by the Administrative Circular dated May 22, 1974. In December 1975, the Bank appointed a Departmental Committee under Shri C. L. Thareja, the then Chief Manager of the Bank, to work out the modalities of integration of the group-wise seniority lists of officers in the higher grades which had not yet been integrated. That Committee submitted its report on December 15, 1976. It unanimously recommended simultaneous introduction of

combined seniority for all grades but, its members could not agree on the date to be adopted for integration of the group-wise seniority lists. The Chairman and one member favoured January 1, 1976 as the date of integration while the remaining two members favoured January 1, 1970. A Committee of the Central Board of the Bank decided to appoint May 22, 1974 as the date for integration as a *via media* and also because, it was on that date that the Bank had announced to its officers its decision on combined seniority, mobility and interchangeability. Fixation of January 1, 1970 as the date for integration would have adversely affected the interests of Group I officers while the other date, January 1, 1976, would have adversely affected the interests of officers in other groups.

9. That is the answer made by the Reserve Bank to the petition. Originally, the writ petition was filed against two respondents only: (1) The Reserve Bank of India and (2) the Chief Manager, Reserve Bank of India, Department of Administration & Personnel, Central Office, Bombay. The petitioners did not implead to the petition any of the officers belonging to the other groups who are likely to be affected if the relief sought by the petitioners is granted. Later, by an order dated July 24, 1978, respondents 3 and 4 were allowed to join in the petition on their own application. Respondent 3, Shri M. P. Saxena, was then the Deputy Chief Officer, Department of Banking Operations and Development, New Delhi, while respondent 4, Shri S. Acharya, was Deputy Chief Officer, Agricultural Credit Department, Chandigarh.

10. Respondent 3, whose counter-affidavit has been adopted by respondent 4, has raised a preliminary objection to the maintainability of the writ petition on the ground that hundreds of officers similarly situated who are all specifically identifiable and who would be prejudicially affected if the prayers in the writ petitions are granted, have not been impleaded as respondents. According to him, this is a case of a few privileged persons trying to retain their undue privileges at the cost of a scheme introduced to improve the operational efficiency of the Institution and for the common good of the officers as a class. Respondent 3 has also raised the objection

that no writ petition can lie under article 32 to enforce or challenge service conditions which are purely contractual.

11. The contentions raised by respondent 3 in his counter-affidavit may be summed up thus: Groupings and regroupings of departments have been undertaken by the Reserve Bank as and when the need arose in the context of changing requirements, and all such groupings and regroupings have been done as a result of administrative decisions and given effect to through appropriate Administration Circulars. While the expedient of group-wise promotions based on group-wise seniority lists served the immediate convenience over a period of time, this artificial segregation resulted in compartmentalised approach to questions of policy, impairing thereby the overall efficiency of the institution as a whole. Further, it also led to other anomalies and imbalances, more particularly in promotional opportunities of the staff attached to different groups. In some groups, expansion was quicker and greater than in others. It is in order to meet this situation that several measures were initiated by the Bank and by the Associations of employees of various categories. Since these measures did not meet the situation adequately, the Bank initiated a dialogue with the respective Associations for introducing a combined seniority for the various grades in different groups. For officers at the base level, namely, 'A' Grade (direct recruits), the Bank had maintained a common list of seniority in place of groupwise lists since 1968. Thereafter, groupings and regroupings have been a continuous process to meet the needs of the changing situations, and the present scheme of combined seniority which is one such, has come about as a matter of administrative, historical and functional necessity. The implementation of the scheme of inter-group mobility is being stalled by the Bank's internal administration, which was controlled solely by a small section of officers drawn from Group-I, which all along had unfair advantage of accelerated promotions as compared with officers in Groups II and III. Thus, the petitioners' plea is an attempt to perpetuate the unfair and unequal privileges which they had enjoyed over the years without any justification and with detriment to Bank's interests — a fact which has been recognised by an impartial tribunal like

the Cadre Review Committee. The Staff Regulations of 1948 are in the nature of standardised contractual conditions of service. They were not framed under Section 58 of the Act and, therefore, it is competent to the Bank to alter them by administrative circulars.

12. On these pleadings, the three main questions which arise for our consideration are, firstly, whether the Reserve Bank of India (Staff) Regulations, 1948 are statutory in character; secondly, whether it is competent to the Bank to provide for conditions of service of its Staff by administrative circulars; and, thirdly, whether the impugned circular and seniority list offend against the provisions of articles 14 and 16 of the Constitution. The contention of the petitioners is that the Regulations were framed under Section 58 of the Reserve Bank of India Act, 1934; that they cannot be altered by administrative circulars; that conditions of service cannot be framed by administrative circulars but must be framed by Regulations made under Sections 58 of the Act; and that, the impugned circular and seniority list violate their right to equal treatment in the matter of their service conditions and career. The Reserve Bank and the contesting respondents have joined issue with the petitioners on all of these questions.

13. Turning to the first question, S. 58 (1) of the Reserve Bank of India Act, 1934 provides that:

"The Central Board may, with the previous sanction of the Central Government, make regulations consistent with this Act to provide for all matters for which provision is necessary or convenient for the purpose of giving effect to the provisions of this Act."

Sub-section (2) of S. 58 provides that in particular and without prejudice to the generality of the foregoing provision, such regulations may provide for all or any of the matters mentioned in the various clauses of that sub-section. Cl. (j) refers to "the constitution and management of staff and superannuation funds for the officers and servants of the Bank", while cl. (r) refers to the subject: "generally, for the efficient conduct of the business of the Bank". Subs. (3) and (4) were inserted in Section 58 by Act 51 of 1974. By sub-s. (3), any regulation made under Section 58 shall have effect from such earlier or later

date as may be specified in it. Sub-s. (4), requires that every Regulation shall, as soon as may be after it is made by the Central Board, be forwarded to the Central Government which, in turn, shall cause a copy of the same to be laid before each House of Parliament. Thereafter, the Regulation takes effect in accordance with the modifications, if any, made by the Parliament.

14. A side argument may be disposed of briefly. It was suggested on behalf of the petitioners, though faintly, that the power to frame service conditions is derived from clause (j) of Section 58 (2) of the Act. It is impossible to accept this contention. That clause cannot be split up to read: "the constitution and management of staff; and superannuation funds for the officers and servants of the Bank". It hardly makes any sense that way. What the clause means is: "the constitution and management of staff funds and superannuation funds for the officers and servants of the Banks." An important subject like the service conditions of the staff could not have been provided for in such a dubious and indirect manner. Nor indeed, could it have been described as "constitution and management of staff". A rule of seniority cannot properly fall under such a head. We endorse the view taken by the Calcutta High Court in *Reserve Bank Employees Association v. Union of India** that S. 58 (2) (j) refers to staff funds and superannuation funds and that it cannot comprise service conditions.

15. But, the provisions of sub-s. (2) of S. 58 cannot be taken to be exhaustive of the power of the Central Board to make regulations. It is well-settled that where a specific power is conferred without prejudice to the generality of a power already conferred, the specific power is only illustrative and cannot restrict the width of the general power. (See *Emperor v. Shibnath Banerjee*, 72 Ind App 241: (AIR 1945 PC 156)), *Om Parkash v. Union of India*, (AIR 1971 SC 771). Therefore, the ambit of the general power conferred by sub-section (1) cannot be attenuated by limiting it to matters specified in sub-s. (2) of S. 58.

16. Section 58 (1) of the Act confers powers on the Central Board of Directors of the Bank to make regulations in order to provide for all matters for which provision is necessary or con-

venient for the purpose of giving effect to the provisions of the Act. It seems to us clear that it is not only convenient but manifestly necessary to provide for the service conditions of the Bank's staff in order to give effect to the provisions of the Act. The Act was passed in order to constitute a Bank for achieving economic purposes of the highest national importance; regulating the issue of Bank notes, keeping reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage. It is, in our view, not open to any question either on the basis of reason or authority that the power to provide for service conditions of the staff is at least incidental to the obligation to carry out the purposes for which the Bank was constituted. As observed in *Armour v. Liverpool Corporation*, 1939 (1) Ch D 422 "To assist in removing from the minds of its employees the fear of an unprotected old age, to foster their happiness and contentment, and to procure their good and efficient service, these are objects which even if economic considerations alone count, are incidental, if not vital, to the proper carrying on of any undertaking as well by a municipal as any other corporation." The doctrine of ultra vires in relation to the powers of a statutory corporation has to be understood reasonably and so understood, "whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires". (See *Attorney-General v. Great Eastern Ry. Co.*, (1980) 5 AC 473). The Central Board has, therefore, the power to make service regulations under Section 58 (1) of the Act.

17. Shri Nariman pleads for such a power but his purpose in doing so is to urge that S. 58 (1) is the sole repository of the power of the Central Board to provide for the conditions of service of the Bank's staff. He contends that statutory corporations like the Reserve Bank of India have no inherent or residuary powers and that they must seek and find their powers and obligations in the Charter of their creation. Therefore, the argument proceeds, it is imperative that regulations governing terms and conditions of service of the Bank's staff must be framed under S. 58 (1) only and

cannot be framed by administrative circulars issued in the exercise of any non-statutory power or authority.

18. In support of this submission, reliance is placed by the learned counsel on the statement of law contained in paragraphs 1326 and 1333 (pages 775 and 779) of Halsbury's Laws of England, Fourth edition. In paragraph 1326 it is stated that:

"Corporations may be either statutory or non-statutory, and a fundamental distinction exists between the powers and liabilities of the two classes. Statutory corporations have such rights and can do such acts only as are authorised directly or indirectly by the statutes creating them; non-statutory corporations, speaking generally, can do everything that an ordinary individual can do unless restricted directly or indirectly by statute".

Paragraph 1333 says that:

"The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited".

There is no doubt that a statutory corporation can do only such acts as are authorised by the statute creating it and that, the powers of such a corporation cannot extend beyond what the statute provides expressly or by necessary implication. If an act is neither expressly or impliedly authorised by the statute which creates the corporation, it must be taken to be prohibited. This cannot, however, produce the result for which Shri Nariman contends. His contention is not that the Central Board has no power to frame staff regulations but that it must do so under S. 58 (1) only. On that argument, it is material to note that S. 58 (1) is in the nature of an enabling provision under which the Central Board "may" make regulations in order to provide for all matters for which it is necessary or convenient to make provision for the purpose of giving effect to the provisions of the Act. This provision does not justify the argument that staff regulations must be framed under it or

not at all. The substance of the matter is that the Central Board has the power to frame regulations relating to the conditions of service of the Bank's staff. If it has that power, it may exercise it either in accordance with S. 58 (1) or by acting appropriately in the exercise of its general power of administration and superintendence.

19. The statement of law in Halsbury puts emphasis on the limitation on powers of statutory corporations in the light of the provisions of statutes under which they are constituted. From that point of view, the provisions of S. 7 (2) of the Act are important. By that section, the general superintendence and direction of the affairs and business of the Bank are entrusted to the Central Board of Directors, which is empowered to exercise all powers and do all acts and things which may be exercised or done by the Bank. Matters relating to the service conditions of the staff are, pre-eminently, matters which relate to the affairs of the Bank. It would therefore be wrong to deny to the Central Board the power to issue administrative directions or circulars regulating the conditions of service of the Bank's staff. To read into the provisions of S. 58 (1) a prohibition against the issuance of such administrative directions or circulars is patently to ignore the scope of wholesome powers conferred upon the Central Board of Directors by S. 7 (2) of the Act. Indeed, this section brings the impugned circular and seniority list within the rule mentioned in Halsbury: they have the authority of the statute.

20. In this behalf, reliance is also placed by Shri Nariman on a decision of a Constitution Bench of this Court in Sukhdev Singh v. Bhagatram, (1975) 3 SCR 619: AIR 1975 SC 1331. Ray, C. J., who spoke for three members of the Bench, observes in his judgment that the powers of statutory bodies are derived, controlled and restricted by the statutes which create them and that any action of such bodies in excess of their power or in violation of the restrictions placed on their powers is ultra vires. The concurring judgment of Mathew, J. also contains observations to the same effect (see pages 628, 630 and 659 of the Report). This enunciation of law is to the same effect as in Halsbury and our answer is the same. While issuing the administrative circular governing the staff's conditions of service, the Central

Board of Directors has neither violated any statutory injunction nor indeed has it exercised a power which is not conferred upon it by the statute. The circular is strictly within the confines of S. 7 (2).

21. So long as staff regulations are not framed under S. 58 (1), it is open to the Central Board to issue administrative circulars regulating the service conditions of the staff, in the exercise of power conferred by S. 7 (2) of the Act. In *T. Cajee v. U. Jormanik Siem*, (1961) 1 SCR 750: (AIR 1961 SC 276) a District Council was constituted under the Sixth Schedule to the Constitution, for the United Khasi and Jaintia Hills District in the Tribal Areas of Assam. The rules in the Sixth Schedule empowered the District Council to make laws with respect to various matters regarding the administration of the District, including the appointment or succession of Chiefs and Headmen. No law was however made regulating such appointments. Even so, it was held by this Court that the District Council had the power to appoint or remove administrative personnel under the general power of administration vested in it by the Sixth Schedule. Delivering the leading judgment of the Bench, Wanchoo, J., said that where executive power impinges upon the rights of citizens, it will have to be backed by an appropriate law; but where executive power is concerned only with the personnel of the administration, it is not necessary that there must be laws, rules or regulations governing the appointment of those who could carry on the administration under the control of the District Council. The District Council had therefore the power to appoint officers by virtue of the fact that the administration was vested in it. In *B. N. Nagarajan v. State of Mysore*, (1966) 3 SCR 682: (AIR 1966 SC 1942) Rule 3 of the Mysore State Civil Services (General Recruitment) Rules, 1957 provided that recruitment to the State Civil Services shall be made by a competitive examination or by promotion and that the method of recruitment and qualifications shall be as set forth in the Rules specially made in that behalf. It was urged before this Court that no recruitment could be made to any service until the rules were made. That argument was rejected on the ground that it is not obligatory under the proviso to

Art. 309 to make rules of recruitment before a service can be constituted and that it was not necessary that there must be a law in existence before the executive is enabled to function. It is true that reliance was placed in that case on the provisions of Art. 162, by which the executive power of a State extends to the matters with respect to which the legislature of the State has power to make laws. But the decision is useful for illustrating that the power to frame rules or regulations does not necessarily imply that no action can be taken administratively in regard to a subject-matter on which a rule or regulation can be framed, until it is so framed. The only precaution to observe in the cases of statutory corporations is that they must act within the framework of their charter. Its express provisions and necessary implications must at all events be observed scrupulously.

22. It may bear mentioning that any action taken by the Central Board of Directors under S. 7 (2) is subject to the directions given by the Central Government under S. 7 (1), just as any regulation framed by it under S. 58 is subject to the previous sanction of the Central Government. In either case, the Central Board has to abide by the decision or directions of the Central Government. There can therefore, be no apprehension that, by taking action under S. 7 (2), the Central Board may circumvent the condition on which the power conferred by S. 58 can be exercised by it. The overall authority of the Central Government acts as a restraining influence on any action taken by the Central Board, whether it acts under one or the other provision of the Act.

23. Having seen that the Central Board has the power to provide for service conditions of the staff by issuing administrative circulars, the next question for consideration is whether the Staff Regulations of 1943 were issued under S. 58 of the Act. The importance of this question lies in the fact that, quite clearly, if the 1943 Regulations are statutory, they cannot be altered by administrative circulars and in that event the impugned circular will not have the effect of superseding them. Having considered the entire materials on this subject, including the correspondence that has transpired between the Reserve Bank and the Central Government, we find it difficult to take the view that the Staff

Regulations of 1948 were framed in the exercise of power conferred by S. 58. One fact which stands out in this regard is that whereas S. 58 (1) envisages the making of regulations "with the previous sanction of the Central Government", the Regulations of 1948 do not purport to have been made with such sanction. Indeed, in so far as the *ex facie* aspect of the matter is concerned, the Regulations of 1948 do not purport to have been made under S. 58 at all. It is true that this by itself is not conclusive because, failure to mention the source of power cannot invalidate the exercise of power, if the power is possessed by the authority which exercises it. But, the common course of the manner in which the Central Board exercises its power when it purports to do so under S. 58 is not without relevance and has an important bearing on the question under consideration. The Employees' Provident Fund Regulations of 1935, the Note Issue Regulations of 1935, the General Regulations of 1949, the Scheduled Banks Regulations of 1951 and the Guarantee Fund Regulations, which were all framed under S. 58, contain a preamble reciting that they were framed under that section and that they were framed with the previous sanction of the Central Government. By way of illustration, we may cite the preamble of the Reserve Bank of India General Regulations, 1949, which runs thus:

"In exercise of the powers conferred by Section 58 of the Reserve Bank of India Act, 1934 (II of 1934) and in supersession of the Reserve Bank of India General Regulations, 1935, the Central Board of the Reserve Bank of India, with the previous sanction of the Central Government, is pleased to make the following Regulations....."

It is significant that such a recital is conspicuously absent in the Regulations of 1948. That renders it safe and reasonable to accept the statement contained in the counter affidavit filed on behalf of the Reserve Bank by Shri Shamrao Laxman Jathar, Deputy Manager in the Department of Administration and Personnel, to the effect that the Staff Regulations of 1948 are not statutory in character, not having been made under S. 58 of the Act of 1934. The rejoinder affidavit dated July 16, 1979 filed on behalf of the petitioners by Shri Jamnadas Gupta reiterates the contention that the Regulations of 1948 were

framed under S. 58 (1) with the sanction of the Central Government. Support is sought to that contention from the correspondence annexed to the affidavit filed in support of the writ petition and the correspondence annexed to the rejoinder. Of particular importance is the statement contained in the 'Memorandum to the Central Board' dated Jan. 21, 1949, submitted by the then Governor of Reserve Bank, Shri C. D. Deshmukh, on the subject of "Reserve Bank of India Regulations". That Memorandum contains a list of regulations which were made by the Central Board "with the approval of the Central Government". The very first item in the list is "Reserve Bank of India (Staff) Regulations". Having considered the correspondence bearing on the subject and particularly the aforesaid Memorandum, we see no reason to doubt the contention of the Bank that the Regulations of 1948 were not framed under S. 58 and that they were not made with the previous sanction of the Central Government. The then Governor of the Reserve Bank of India, Shri C. D. Deshmukh, a distinguished Economist and Civilian, was perhaps justified in assuming from the correspondence that the Central Government had no objection to the proposed regulations, which explains his statement, that they were made with the "approval" of the Central Government. But, it is one thing to infer that the Regulations had the approval of the Central Government since no objection was raised by it to the making of the regulations and quite another that they were made with its previous sanction. The supplementary affidavit dated March, 1980 which was filed on behalf of the Reserve Bank by Shri Pradeep Madhav Joshi, Deputy Manager in the Department of Administration and Personnel, has dealt fully with the correspondence on the subject of previous sanction of the Central Government to the Regulations of 1948. We are inclined to accept the statement contained in paragraph 9 of the said affidavit that the Memorandum of January 21, 1949 contains a "factual mistake" to the effect that the Staff Regulations, (which would include the Regulations of 1948) were made with the approval of the Central Government. We therefore conclude that the Reserve Bank of India (Staff) Regulations of 1948 were not made under S. 58 of the Act and that, in fact, the Central Board had not ob-

tained the sanction of the Central Government to the making of those Regulations.

24. The High Courts of Bombay Misc. Petn. No. 206 of 1967 (Bimal Kumar Shome v. P. C. Bhattacharya) D/- 6-8-1969, Calcutta (1980-2 Serv LR 167) and Delhi Civil Writ No. 876 of 1974 (R. M. Joshi v. The Reserve Bank of India) decided on March 19, 1980 by a Full Bench: (AIR 1981 NOC 46): (1981 Lab IC 175) have all taken the view that the Staff Regulations of 1948 are not statutory, not having been framed under S. 58 of the Act. We endorse the correctness of that view:

25. Since the Staff Regulations of 1948 are in the nature of administrative directions, it was competent to the Central Board to alter or amend them by an administrative circular. No lack of statutory powers is involved in that process. Under S. 7 (2), the Central Board has the power to provide for service conditions of the Bank's staff by administration circulars, so long as they do not impinge upon any Regulations made under S. 58 of the Act.

26. It now remains to be considered whether the impugned Administration Circular, No. 8, dated January 7, 1978; Office Order No. 679, dated April 27, 1978; and the draft Combined Seniority List of officers prepared pursuant thereto, are violative of the petitioners' right to equality in the matter of their service conditions. The salient features of the impugned Administration Circular may be summarized thus:

(a) A common seniority and inter-group mobility is introduced simultaneously in all Grades of officers attached to Group I (Section A) and Groups II and III.

(b) The seniority of all officers is combined as on May 22, 1974, on the basis of their total length of service (including officiating service), in the grade to which they were then posted on a regular basis. In doing so, the existing inter se seniority of the officers in the respective groups is maintained and the subsequent supersessions for promotion or confirmation in the respective groups are suitably reflected. The date of confirmation is not taken into account for this purpose.

(c) The Circular covers all officers in Group I (Section A) and Groups II and III who were appointed to Grade 'B' prior to January 1, 1970 as well as offi-

cers in the higher grades 'C', 'D', 'E' and 'F'. The Circular does not cover officers in Sections B to L of Group I, technical officers in Group III and officers attached to Group IV.

(d) All promotions to Grade 'C' and above which were made on a provisional basis after January 1, 1976 are to be reviewed individually in order to ascertain as to which of the officers may be allowed to continue in the higher grade on the basis of their seniority and suitability. Consequential adjustments are to be made in a phased and gradual manner in order to ensure that the operational efficiency of the various departments and the Bank's requirements of a specialised staff of officers are not adversely affected.

(e) officers promoted to higher grades prior to January 1, 1976 are to be allowed to retain their existing grades, though not necessarily the same post, and their seniority is to be adjusted under a common seniority scheme.

(f) Officers appointed to officiate in the higher grade on a provisional basis on or after January 1, 1976 and who are allowed to continue in such grade on the basis of their seniority and suitability, are to be considered for confirmation in the normal course.

(g) Officers who are in a lower grade but who rank higher in seniority in the common seniority list than those who are already officiating or confirmed in the higher grade, are to be considered for promotion on the basis of their suitability.

(h) All future promotions to Grade 'C' and to the higher grades are to be made on the basis of the common seniority list, subject to selectivity.

(i) Wherever possible, the transfer of officers from one department or group to another in the same grade has to be encouraged in order to enable a broader diffusion of experience and to prepare a wider base for deployment of officers in different departments.

(j) All promotions from Grade 'B' to 'C' are to be made on the basis of seniority-cum-suitability, with greater emphasis on suitability. The selections for this purpose are to be made by the Reserve Bank of India Services Board.

(k) Selections for promotions to Grade 'D' and above are to be made by a Committee of the Deputy Governors, who are

to give greater consideration to merit, apart from the aptitude and experience of the officers concerned.

27. Office order No. 679 dated Apr. 27, 1978 was issued in pursuance of the aforesaid Circular. The Bank announced by it that the tentative Combined Seniority List of Officers in Grade 'B' (appointed prior to Jan. 1, 1970) and Grades 'C', 'D', 'E' and 'F' would be available for inspection up to May 12, 1978. Officers aggrieved by the tentative Seniority List were asked to submit their representations within fifteen days. The tentative Combined Seniority List shows the proposed position occupied seniority-wise by 644 officers belonging to Group I (Sec. A) and Groups II and III.

28. These writ petitions were filed by the petitioners on June 10, 1978 in order to challenge the Administrative Circular the Office order and the Combined Seniority List referred to above. The 25 petitioners are all officers in Group I.

29. The case of the petitioners is that the Administrative Circular and the draft Combined Seniority list are violative of their rights under Arts. 14 and 16 of the Constitution because: (a) The combined fixation of seniority has the effect of treating unequals as equals in so far as officers belonging to different groups are concerned, whose appointment, recruitment, promotion and seniority had all along been fixed, accepted and acted upon on a group-wise basis, and (b) Recruitment, selection and promotion of officers having been made on a group-wise basis from time to time and their seniority having been fixed accordingly, the seniority is now fixed retrospectively from an arbitrary date, viz., May 22, 1974.

30. These contentions, particularly the first, have to be answered in the light of historical data governing the constitution and management of services, under the Reserve Bank, from time to time. Without an awareness of the history leading to the events which the petitioners have challenged as unconstitutional, it will not be possible either to appreciate their contention or to provide an answer to it.

31. The Reserve Bank of India was constituted on April 1, 1935 under the Reserve Bank of India Act, 1934. The main purpose of constituting the Bank, as stated in the Preamble of the Act was "To regulate the issue of bank notes and

the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage." In course of time, new functions came to be added as a result of new measures so as to meet the growing needs of an expanding economy. During the first decade after the inception of the Bank in 1935, these functions were carried out through three departments: The Banking Department, the Issue Department and the Agricultural Credit Department. The Agricultural Credit Department was trifurcated into three branches with effect from August 1, 1945: (i) the Agricultural Credit Department, (ii) the Department of Research and Statistics and (iii) the Department of Banking Operations. The first two branches, which were of a specialised nature, were grouped together for the purposes of promotions of officers while the third branch was grouped for that purpose with the banking group on the General Side. All promotions were made from two separate common seniority lists, one for the specialised or technical group and the other for the banking group. The departments were regrouped again into three Groups, with effect from April 1, 1951. Group I consisted of Staff attached to the Department of Research and Statistics, Group II of the Staff attached to the Department of Banking Operations, the Department of Banking Development and the Agricultural Credit Department and Group III of the Staff attached to the other Departments on the General Side. The Staff attached to the Agricultural Credit Department was reconstituted into a new Group, namely, Group IV with effect from April 1, 1955. The Industrial Finance Department and the Department of Non-Banking Companies were added to Group II in September 1957 and Mar. 1966, respectively. Group V was created for the staff of the Industrial Development Bank of India with effect from April 1, 1965. The composition of the five Groups was readjusted on that date to ensure greater administrative efficiency.

32. This system of grouping had many drawbacks bearing on the promotional opportunities of officers in the various Groups. To mention but a few, the drawbacks were: (i) Unequal size of one Group as compared to another,

(ii) Uneven expansion in one Group as compared to another, and (iii) Earlier confirmations of Officers in one Group as compared to those in another.

33. In 1955, Group I was the largest of all the three Groups on the basis of the total number of officers in Grades 'B' and above in each of the three Groups. The subsequent expansion in staff strength has been greater in Groups II and III than in Group I with the result that by the end of 1975, the total strength of Officers in Grade 'B' and above was the smallest in Group I as compared to the other Groups. The number of officers in Grade 'A', however, continues to be the largest in Group I on account of the operational nature of its functions. While the increase in the total number of officers in Grades 'B' and above in Group I over a period of twenty years was 280%, the corresponding increase in Groups II and III was 451% and 1100% respectively. However, the large expansion in Groups II and III was mainly at the junior officers' level, particularly in Grade 'B'. As regards senior officers i.e. officers in Grades, 'D', 'E' and 'F', while the expansion in Groups I and II could be regarded as more or less equal, the expansion in Group III, particularly in Grade 'D' was marked. In spite of this, the total number of posts of senior officers and the percentage of such posts as compared with those of junior officers continued to be smaller in Groups II and III. Officers in Groups II and III also took a longer time generally for confirmation as the posts against which they were promoted were either initially sanctioned on a temporary basis and continued as such for quite some time before they were made permanent or the vacancies were caused by deputation of regular officers to commercial banks, state co-operative banks, etc. for which no permanent vacancies were created. On the other hand, Group I had more or less its normal growth during these years and there was a smooth flow of normal vacancies. The officers recruited in the early years of the Bank had also gradually started reaching the age of superannuation and there was a regular flow of retirement vacancies. The Officers in Group I had, therefore, their confirmation quickly and thereby derived distinct benefits.

34. Under the Bank's rules the seniority of an Officer in a particular grade

was ordinarily dependent on the date of his confirmation in that grade and although for the purpose of promotion, the seniority of an officer was given weightage only within the same group for a notional comparison of seniority of officers in different Groups, an officer who was confirmed earlier in one Group as compared with another who was confirmed later in another Group had an edge over the latter in matters of service benefits. Such comparisons arising from promotional imbalances in the various groups caused resentment among the affected officers. This state of affairs had long agitated the minds of the officers in Groups II and III and they brought this state of affairs to the management's notice by various representations beginning from 1968.

35. The Management of the Bank took several steps from time to time to correct the promotional imbalances but these steps did not touch even the fringe of the problem, especially since the ad hoc schemes and proposals were mainly aimed at correcting imbalances at the lower level. Ultimately, in face of growing discontentment amongst officers belonging to Groups II and III, the Management decided to refer the question to the Cadre Review Committee (CRC), which was appointed by the Bank in May, 1970. The Committee was, among other things, required to examine and make recommendations for the changes desirable in the existing constitution of the cadres of officers, having due regard to the need to provide reasonable prospects of increments and promotion and to ensure such degree of interchangeability as administrative efficiency and exigencies of the Bank's services demanded. The Committee, under the Chairmanship of Shri J. L. Nain, a sitting Judge of the Bombay High Court, submitted its report in October 1972.

36. The Cadre Review Committee expressed the view that there was irrationality in the way the groupings had been done and the way in which seniority was being maintained group-wise and that Group I had an unfair advantage in matters of promotion over Groups II and III. The Committee further held that as certain departments were inordinately large as compared to others, this by itself, in the context of absence of inter-group mobility brought about imbalances in promotional opportunities. The Committee also recog-

nised that mobility from one group to another would not only facilitate removing the imbalances in promotional opportunities but that it would also lead to "better operational efficiency." The Committee stressed the need for a common seniority list for each grade of officers throughout the Bank, except in respect of the Economic and Statistics Departments and among lawyers, engineers and other technical sections of officers. It recommended a system of promotion from a lower grade to higher grade which would ensure, among other things, to the largest extent possible, equality of opportunity of promotion among all officers in the same grade and effective operation of mobility of officers between different departments and groups. In regard to the operation of the combined seniority scheme, the Committee recommended its immediate introduction for 'A' and 'B' grades and within a period of two years for the 'C' grade. In regard to the rest of the grades, namely, 'D', 'E' and 'F', the Committee recommended the application of this principle *mutatis mutandis* and left it to the discretion of the Bank to introduce it as and when it chose, taking into consideration the exigencies of the situation. The Committee was also of the view that it was necessary that mobility and interchangeability as between groups among all grades of officers should be introduced in the shortest time, possible.

37. Following the recommendations of the Cadre Review Committee, the Bank introduced through an administrative circular (No. 15, dated 22-5-1974), a combined seniority for 'A' and part of 'B' grades, with retrospective effect. In regard to 'C' and 'D' Grades, the circular provided for mobility and interchangeability on a swap basis, but the Officers' Association protested against it and demanded immediate and simultaneous introduction of combined seniority and interchangeability for the rest of the grades also.

38. Following the persistent demand made by the majority of the officers, the Bank appointed a Committee comprising Shri C. L. Thareja, the then Chief Manager, as Chairman, Shri K. Madhava Das, Chief Officer, Agricultural Credit Department, Shri P. N. Khanna, Chief Officer, Department of Banking Operations and Development, and Shri T. D. Katara, Manager, Bombay Office, to work out the

modalities of the implementation of the combined seniority scheme for grades 'C' to 'F' and to determine the operative date for combining the seniority. The Bank decided that pending the submission of the report by this Committee, all future promotions, namely, those effected from 1-1-1976, will be purely ad hoc and provisional.

39. The Thareja Committee, like the Cadre Review Committee, unanimously recommended the introduction of combined seniority simultaneously for all grades of officers. However, on the question of the operative date, it was divided in its views. Whereas Shri Thareja and Shri Katara, both Group I officers, recommended that the scheme be given retrospective effect from January 1, 1976, the other two members representing Groups II and III, were of the view that it should be given effect from Jan. 1, 1970. The Bank, by the impugned circular, accepted May 22, 1974 as the date from which the combined seniority list was to have effect.

40. It is clear from this narration of historical events that the various Departments of the Reserve Bank were grouped and regrouped from time to time. Such adjustments in the administrative affairs of the Bank are a necessary sequel to the growing demands of new situations which are bound to arise in any developing economy. The group system has never been a closed or static chapter and it is wrong to think that the officers of the various groups were kept, as it were, in quarantine. The group system has been a continuous process of trial and error and the impugned scheme of inter-group mobility has emerged as the best solution out of the experience of the past. Combined seniority has been recommended by two special committees, whose reports reflect the expertise and objectivity which was brought to bear on their sensitive task. It is clear that inter-group mobility and common seniority are a safe and sound solution to the conflicting demands of officers belonging to Group I on one hand and those of Groups II and III on the other. Private interest of employees of public undertakings cannot override public interest and an effort has to be made to harmonize the two considerations. No scheme governing service matters can be fool-proof and some section or the other of employees is bound to feel aggrieved.

on the score of its expectations being falsified or remaining to be fulfilled. Arbitrariness, irrationality, perversity and mala fides will of course render any scheme unconstitutional but the fact that the scheme does not satisfy the expectations of every employee is not evidence of these. Vested interests are prone to hold on to their acquisitions and we understand the feelings of Group I officers who have to surrender a part of the benefits which had accrued to them in a water-tight system of grouping. Combined seniority is indispensable for the smooth functioning of the Bank and no organisation can function smoothly if one section of its officers has an unfair advantage over others in matters of promotional opportunities. The reports of the Cadre Review Committee and the Thareja Committee show that combined seniority has emerged as the most acceptable solution as a matter of administrative, historical and functional necessity. We see no justification for undoing what these committees have achieved after an objective and integral examination of the whole issue. We may mention that the conclusion to which these committees came were considered by the Bank when Shri M. Narasimhan, later India's Executive Director in the World Bank, was the Governor and it was after Dr. I. G. Patel, formerly Secretary, Economic Affairs, Govt. of India and Deputy Administrator, United Nations Development Programme, took over as Governor in December 1977 that the final decision was taken by the Central Board to introduce inter-group mobility and combined seniority.

41. In Reserve Bank of India v. N. C. Paliwal, AIR 1976 SC 2345 a Combined Seniority Scheme was introduced by the Reserve Bank of India, consisting of two parts, one part provided for the integration of the clerical staff of the General Departments with the clerical staff of the Specialised Departments, while the other provided for the switchover and integration of the non-clerical staff with the clerical staff in all the Departments of the Bank. The Delhi High Court set aside the Scheme on the ground that it violated Arts. 14 and 16 of the Constitution. While setting aside the judgment of the High Court, this Court held that the integration of different cadres into one cadre did not involve violation of the equality clause and that neither Art. 14 nor Art. 16 forbids creation of

different cadres in Government service. Whether there should be a combined seniority in different cadres or groups was, according to the Court, a matter of policy which did not attract the applicability of the equality clause. The integration of non-clerical with clerical services which was effectuated by the Combined Seniority Scheme was, in the circumstances, held to be not violative of the guarantee contained in Arts. 14 and 16.

42. As regards the retrospective operation given to the Scheme with effect from May 22, 1974, it does appear that the Board has struck a via media between two extreme contentions advanced by officers belonging to Group I and those belonging to Groups II and III. But that was inevitable and we consider it as the best solution in the peculiar circumstances of the case. In order to rectify the imbalances and anomalies caused by the compartmentalised and group-wise seniority, it was necessary to give retrospective effect to the Combined Seniority List. Officers belonging to Group I urged that the Scheme should be brought into effect from January 1, 1976, while those belonging to Groups II and III wanted the Scheme to be brought into effect from January 1, 1970. The Central Board struck a balance by choosing the date May 22, 1974, because that was the date on which the decision in regard to combining the seniority retrospectively with effect from January 1, 1970 in regard to Grade 'A' and part of Grade 'B' officers was announced. It was, again, on that date that the Bank had announced that a similar decision in regard to the remaining grades of officers was under its consideration. Thus, at least on May 22, 1974 it was known to officers of all grades that a combined seniority list was due to be brought into force. If a certain section of officers succeeded in obtaining promotional benefits thereafter, the imbalance introduced thereby in the services of the Bank and the consequent dissatisfaction had to be rectified. That could only be done by not recognising the accelerated promotions obtained in the intervening period by a certain class of officers. Shri Nariman has drawn our attention to various individual cases of officers in Group I whose old seniority has gone down by several steps in the new Scheme. As we have stated earlier, any scheme of seniority is bound to produce isolated aber-

rations. That cannot justify the argument that the entire scheme is for that reason violative of the guarantee of equality.

43. We are, therefore, of the opinion that the impugned Administration Circular, the Officer Order and the Combined Seniority List are not violative of the rights of the petitioners under Arts. 14 and 16 of the Constitution.

44. For these reasons, the writ petitions are dismissed, but there will be no order as to costs.

Petitions dismissed.

AIR 1982 SUPREME COURT 933

(From: 1974 Raj L. W. 543)

A. D. KOSHAL, V. BALAKRISHNA ERADI AND R. B. MISHRA, JJ.

Civil Appeal No. 303 of 1976, D/- 5-3-1982.

Dr. B. L. Asawa, Appellant v. State of Rajasthan and others, Respondents.

Rajasthan Medical Service (Collegiate Branch) Rules (1962), R. 12 — Lecturer in Forensic Medicine in Govt. Medical Colleges — Eligibility for the post — Candidate possessing M. D. Degree of Bihar University in Forensic Medicine cannot be refused to be considered on ground that said M. D. degree is not recognised by Rajasthan University. 1974 Raj LW 543: 1974 WLN 882 Reversed. (i) University of Rajasthan Act (29 of 1949), S. 23-A — (ii) Rajasthan University Ordinance No. 65, Cl. (vii) — (iii) Education — Recognition of University degrees — (iv) Medical Council Act (1956), S. 11 and Sch. I).

A candidate had applied for the post of Lecturer in Forensic Medicine in Government Medical Colleges in Rajasthan. He had obtained M. B. B. S. Degree from the Rajasthan University and M. D. Degree in Forensic Medicine from the University of Bihar. The State Public Service Commission informed him that he was ineligible for the post as the Post-graduate degree in Forensic Medicine possessed by him was not one awarded by the University of Rajasthan and the said Degree has also not been recognised by the University of Rajasthan as an equivalent qualification.

Held that the candidate was fully qualified for being considered for appointment

to the posts of Lecturers in Forensic Medicine advertised by the Commission and that the Commission acted illegally in treating the candidate as not being possessed of the requisite academic qualification and excluding him from consideration on the said ground. 1974 Raj LW 543: 1974 WLN 882, Reversed.

(Para 13)

A Post-graduate Medical Degree granted by a University duly established by statute in India and which has also been recognised by the Indian Medical Council by inclusion to the Schedule of the Medical Council Act has ipso facto to be regarded, accepted and treated as valid throughout our country. In the absence of any express provision to the contrary, such a degree does not require to be specifically recognised by other Universities in any State in India before it can be accepted as a valid qualification for the purpose of appointment to any post in such a State. The declaration of "equivalence" referred to in S. 23-A of the Rajasthan University Act as well as in Cl. (vii) of Ordinance No. 65 of the Rajasthan University Ordinances can only be in respect of qualifications other than basic or Post-graduate degrees awarded by other statutory Indian Universities in the concerned subjects. In the case of a Post-graduate degree in the concerned subject awarded by a statutory Indian University, no recognition or declaration of equivalence by any other University is called for. This is all the more so in the case of a medical degree — basic as well as Post-graduate — that is awarded by a statutory Indian University and which has been specifically recognised by the Indian Medical Council.

(Para 11)

Dr. Y. S. Chitale, Sr. Advocate, Mrs. Sadhana Ramachandran and Parveen Kumar Advocates with him for Appellant; Mr. Badri Das Sharma, Advocate, for Respondents Nos. 1 and 2.

BALAKRISHNA ERADI, J.:— This appeal by special leave arises out of a writ petition filed by the appellant herein in the High Court of Rajasthan, challenging the legality of the action of the Rajasthan Public Service Commission in issuing to the appellant the Communication — Annexure IV — dated July 21, 1973, stating that the appellant was not eligible for being considered for recruitment to the post of Lecturer in Forensic Medicine in the Government Medical Col-

leges in the State since he lacked the necessary academic qualifications specified in the advertisement and that consequently, the application of the appellant stood rejected. There were also other incidental prayers in the writ petition for the issuance of an appropriate writ or direction to the Public Service Commission to refrain from finalising the selection without considering the case of the appellant, and for a direction being issued to the State Government of Rajasthan not to accept the recommendations of the Public Service Commission in making appointments to the post of Lecturer in Forensic Medicine to Medical Colleges in Rajasthan in case the appellant was not called for interview along with the other candidates.

2. A learned single Judge of the High Court allowed the writ petition holding that the Public Service Commission had acted illegally in treating the appellant as not possessing the requisite academic qualifications and in rejecting his candidature for the post of Lecturer in Forensic Medicine on the said ground. The State of Rajasthan and the Rajasthan Public Service Commission carried the matter in appeal before a Division Bench of the High Court. That appeal was allowed by a Division Bench by its judgment dated October 30, 1974, whereby the order passed by the learned single Judge was set aside and the writ petition filed by the appellant was dismissed. Aggrieved by the said decision, the appellant has preferred this appeal after obtaining special leave from this Court.

3. The appellant secured the M.B.B.S. Degree from the University of Rajasthan in the year 1954 and after undergoing housemanship for one year, he was substantively appointed as Civil Assistant Surgeon in the Rajasthan State Medical Service with effect from May 26, 1956. In 1962, the Rajasthan Medical Service was bifurcated into two branches, namely, (1) The Rajasthan Medical Service and (2) The Rajasthan Medical Service (Collegiate Branch). Separate service rules known as the Rajasthan Medical Service (Collegiate Branch) Rules, 1962 (hereinafter called the Rules) were framed for the Collegiate branch and all appointments of teaching staff in the Government Medical Colleges in Rajasthan were thereafter governed by the said Rules. Under the provisions of the Rules, the post of Lecturer is to be

filled up only by direct recruitment. It is laid down in Chapt. IV of the Rules which prescribes the procedure for direct recruitment that the appointments are to be made on the basis of selection by the State Public Service Commission. R. 12 lays down that "the candidate for direct recruitment to the post specified in Parts A, B and C of the Schedule shall possess such academic and technical qualifications and experience as is laid down, from time to time, by the Rajasthan University for the teaching staff in Medical Colleges." The post of Lecturers is included in part C of the Schedule to the Rules. Hence, for ascertaining the qualifications required for the post of Lecturer under the Rules one has to refer to the Rules relating to technical qualifications and experience laid down by the Rajasthan University for the teaching staff in Medical Colleges.

4. Clause (vii) of Ordinance No. 65 occurring in Chapter XX of the Handbook of the University of Rajasthan, Part II, Vol. 1, is the relevant provision wherein the University of Rajasthan has prescribed the academic and technical qualifications and experience required for eligibility for appointment as teachers in Medical Colleges. That clause is in the following terms:

"1. All teachers must possess a basic University or equivalent qualification entered in Schedules to the Indian Medical Council Act 1956, except in the non-clinical departments of Anatomy, Physiology, Biochemistry, Pharmacology, Microbiology, where non-medical teachers, to the extent of 30% of the total posts of the department may be appointed to posts other than that of the Director or Head of the Department, who must necessarily hold a recognised medical qualification.

2. Medical men must be registered under the State Central Medical Registration Act and non-medical persons must be recognised as teachers with the University before appointments are made permanent.

3. All the teachers in Medical Colleges except Registrars and Demonstrators must possess the requisite post-graduate qualification in their respective subjects.

4. 50% of the time spent in recognised research under the Indian Council of Medical Research or a University or a Medical College, after obtaining the re-

quisite Post-graduate qualification be counted towards teaching experience for the post of Lecturer in the same or in allied subject provided that 50% of the teaching experience shall be the regular teaching experience.

5. Equivalent qualification referred to above and in the recommendations below shall be determined by the University of Rajasthan.

6. In case of specialities under Medicine and Surgery the qualifications and experience should also be as scheduled below but in case the post has been advertised and suitable candidates are not available the qualifications can be relaxed."

This is followed by a tabular statement headed 'Requirements of Special Academic Qualifications and Teaching Experience.' Column 1 of this table deals with the posts, Column 2 lays down the academic qualifications and Column 3 is about Teaching Experience. The table has a number of sub-headings according to the various specialities. The speciality of Forensic Medicine is given at p. 168 of the Handbook (1971 Edition). The relevant provision regarding "Lecturer in Forensic Medicine" is as follows:

"(d) Assistant Professor/ Lecturer,	M. D. (Path.), M. D. (Forensic Medicine), Speciality Board of Pathology (U. S. A.), M. D. / M. R. C. P. / F. R. C. P. (with Diploma D. F. M.), M. R. C. P. (with Forensic Medicine as Special Subject) or equivalent qualification or Post-graduate degree or equivalent qualification in Medicine or Surgery."	Two Years of Medico- Legal Work.
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5. On March 3, 1972, the Rajasthan Public Service Commission (for short, the Commission) issued advertisements inviting applications for the recruitment of two Lecturers in Forensic Medicine for Medical Colleges, Medical & Public Health Department in accordance with the rules.

6. The appellant had, by then, obtained the M. D. Degree in Forensic Medicine from the University of Bihar, Muzaffarpur in 1970 and had been functioning as Lecturer in Forensic Medicine in one of the Government Medical Colleges in Rajasthan on a temporary and ad hoc basis from Dec. 31, 1970 onwards.

7. In response to the aforesaid advertisement published by the Commission, the appellant applied for appointment to one of the two posts. However, by the impugned letter (Annexure IV) dated July 21, 1973, issued by the Secretary of the Commission, the appellant was informed that his application for the post of Lecturer in Forensic Medicine was rejected since he did not possess the necessary academic qualification. A representation made by the appellant to the Public Service Commission for reconsideration of the matter did not meet with any favourable response and hence the appellant approached the High Court by filing the writ petition under Art. 226 of the Constitution out of which this appeal has arisen. During the pendency of the writ petition, the Commission conducted the interview of the remaining candidates and selected respondents Nos. 3 and 4 for appointment to the two posts and on the basis of the said selection the State Government appointed respondents 3 and 4 as lecturers. The appellant thereupon amended the writ petition by incorporating a further prayer that the High Court should issue an appropriate writ or direction cancelling the interview and selection conducted by the Commission as well as the consequential appointments given by the State Government to respondents 3 and 4 as Lecturers in Forensic Medicine.

8. The short point to be considered is whether the Commission was right in law in excluding the appellant from consideration on the ground that he did not possess the academic qualification prescribed by cl. (vii) of Ordinance No. 65 of the Rajasthan University Ordinances for the post of Lecturer in Forensic Medicine.

9. The qualifications prescribed for the said post by cl. (vii) of Ordinance No. 65 are:—

(1) A basic University (Degree?) or equivalent qualification entered in Schedules to the Indian Medical Council Act, 1956.

(2) Registration under the State/Central Medical Registration Act.

(3) Post-graduate qualification in the concerned subject.

(4) Two years' experience of Medico-legal work.

10. The appellant is admittedly the holder of the basic Degree of M. B. B. S. from the Rajasthan University, which

is a qualification entered in the First Schedule to the Indian Medical Council Act. It is also not in dispute that he is duly registered under the Medical Registration Act. The sole ground on which the appellant was treated by the Commission as ineligible for consideration was that the post-graduate degree in Forensic Medicine possessed by the appellant is not one awarded by the University of Rajasthan and the said Degree has also not been recognised by the University of Rajasthan as an equivalent qualification.

11. The University of Bihar at Muzaffarpur is one duly established by statute and it is fully competent to conduct examinations and award degrees. The Degree of Doctor of Medicine (Forensic Medicine) M. D. (Forensic Medicine) of the University of Bihar is included in the Schedule to the Indian Medical Council Act, 1956 as a degree fully recognised by the Indian Medical Council which is the paramount professional body set up by statute with authority to recognise the medical qualifications granted by any University or Medical Institution in India. A Post-graduate Medical Degree granted by a University duly established by statute in this country and which has also been recognised by the Indian Medical Council by inclusion to the Schedule of the Medical Council Act has ipso facto to be regarded, accepted and treated as valid throughout our country. In the absence of any express provision to the contrary, such a degree does not require to be specifically recognised by other Universities in any State in India before it can be accepted as a valid qualification for the purpose of appointment to any post in such a state. The Division Bench of the High Court was, in our opinion, manifestly in error in thinking that since the Post-graduate degree possessed by the appellant was not one obtained from the University of Rajasthan, it could not be treated as a valid qualification for the purpose of recruitment in question in the absence of any specific order by the University of Rajasthan recognising the said degree or declaring it as an equivalent qualification. It is common ground before us that the University of Rajasthan does not conduct Post-graduate examinations in the subject of Forensic Medicine and it does not award the degree of M. D. (Forensic Medicine). In

order that there should be scope for declaration of 'equivalence' of a qualification obtained from another body, there can be declaration of equivalence only as between a qualification obtained from a body different from the one awarded by the concerned University. When the University of Rajasthan does not conduct any examination for the award of the degree of M. D. (Forensic Medicine), there cannot be any question of declaration of 'equivalence' in respect of such a degree awarded by any University. Unfortunately, the State Public Service Commission as well as the Division Bench of the High Court failed to notice this crucial aspect. We may also point out that the declaration of 'equivalence' referred to in S. 23A of the Rajasthan University Act as well as in clause (vii) of Ordinance No. 65 of the Rajasthan University Ordinances can only be in respect of qualifications other than basic or Post-graduate degrees awarded by other statutory Indian Universities in the concerned subjects. In the case of a Post-graduate degree in the concerned subject awarded by a statutory Indian University, no recognition or declaration of equivalence by any other University is called for. This is all the more so in the case of a medical degree basic as well as Post-graduate that is awarded by a statutory Indian University and which has been specifically recognised by the Indian Medical Council.

12. Though a contention was taken by the respondents in the High Court as well as before us that the appellant did not also satisfy the requirement regarding "two years of Medico-legal work," we do not find any force in the said plea. The certificates from the Principal and Heads of Departments of Forensic Medicine in the concerned Medical Colleges produced by the appellant in the High Court as annexures to his affidavit dated July 27, 1973 which are at pages 31 and 33 of the printed Paper Book, establish beyond doubt that the appellant had put in more than two years of Medico-legal work in Dr. S. N. Medical College and in the Dharbhanga Medical College, prior to the last date fixed by the Commission for receipt of the applications.

13. The conclusion that emerges from the aforesaid discussion is that the appellant was fully qualified for being considered for appointment to the two

posts of Lecturers in Forensic Medicine advertised by the Commission on November 16, 1972, and that the Commission acted illegally in treating the appellant as not being possessed of the requisite academic qualification and excluding him from consideration on the said ground.

14. Accordingly, we allow this appeal, set aside the judgment of the Division Bench of the High Court and restore the judgment of the learned single Judge, subject to the modification that in carrying out the directions contained in the judgment of the learned single Judge, the Commission should treat the appellant as a fully qualified candidate in the light of the finding recorded by us that at the relevant time the appellant possessed not merely the prescribed academic qualification but also the requisite experience of two years' Medico-legal work. The appellant will get his costs throughout from respondents 1 and 2 in equal shares,

Appeal allowed.

AIR 1982 SUPREME COURT 937

(From : Allahabad)*

V. D. TULZAPURKAR AND
AMARENDRA NATH SEN, JJ.

Civil Appeal No. 1603 of 1970, D/- 13-1-1982.

State of Uttar Pradesh, Appellant v. Mohd. Sharif (dead) through L. Rs., Respondent.

Police Act (5 of 1861), S. 7 — Departmental inquiry against Head Constable — Charge-sheet not furnishing necessary particulars — Statements of witnesses recorded during preliminary inquiry also not furnished — Held, delinquent was denied reasonable opportunity to defend himself at disciplinary inquiry — Dismissal order illegal. (Constitution of India, Arts. 226, 311).

Where in a departmental inquiry against Head Constable of police for his alleged misconduct of hunting a bull in Government forest by taking advantage of his office and rank, the charge-sheet served on the delinquent did not mention the date and time of his alleged misconduct, even the location

of the incident in the vast forest was not indicated with sufficient particularity, the copies of statements of witnesses recorded during preliminary inquiry were also not furnished to the delinquent at the time of disciplinary inquiry it was held that in the absence of these particulars and statements of witnesses the delinquent was prejudiced in the matter of his defence and was thus denied reasonable opportunity to defend himself at the disciplinary inquiry. The order of his dismissal was, therefore, illegal. (Para 3)

JUDGMENT:— There is no substance in this appeal which has been preferred by the State of U. P. against the judgment and decree dated 25th Nov., 1969 of the High Court of Allahabad in Second Appeal No. 2226 of 1969.

2. The plaintiff Mohd. Sharif (since deceased) was working as a Head Constable of the Daksiti Guard at P. S. Kakwan District Kanpur. On 22nd Jan., 1955 he was served with a charge-sheet under S. 7 of the Police Act calling upon him to submit his explanation thereto; he submitted the explanation on the following day. After holding the department disciplinary inquiry against him the inquiry officer submitted his report which was accepted and ultimately he was dismissed from service by an order dated 3rd June, 1955. After departmental appeal and revision to higher authorities failed, the plaintiff filed a suit challenging his dismissal on the ground that the said order was illegal and void as no proper inquiry was held against him and no reasonable opportunity was given to him to defend himself against the charges framed against him and for recovery of arrears of salary. The trial Court dismissed the suit. In Civil Appeal No. 478 of 1962 preferred by him the learned Second Addl. Civil Judge, Kanpur, reversed the trial Court's findings and decreed his suit holding that the charge-sheet framed against him was vague, that the plaintiff was prejudiced in his defence and was not given a reasonable opportunity to defend himself during the inquiry. The appeal Court set aside the dismissal by declaring the same to be illegal and void but the matter was remanded back in respect of the relief pertaining to salary etc. The State preferred a second appeal and the High Court has confirmed the decree passed by the appeal Court and dismissed the second appeal. The State of U. P. has come up in appeal to this Court.

3. After hearing counsel appearing for the State, we are satisfied that both the appeal

* Second Appeal No. 2226 of 1969, D/- 25-11-1969 (All).

Court and the High Court were right in holding that the plaintiff had no reasonable opportunity of defending himself against the charges levelled against him and he was prejudiced in the matter of his defence. Only two aspects need be mentioned in this connection. Admittedly, in the charge-sheet that was framed and served upon the plaintiff no particulars with regard to the date and time of his alleged misconduct of having entered Government Forest situated in P. C. Thatia District Farrukhabad and hunting a bull in that forest and thereby having injured the feeling of one community by taking advantage of his service and rank, were not mentioned. Not only were these particulars with regard to date and time of the incident not given but even the location of the incident in the vast forest was not indicated with sufficient particularity. In the absence of these plaintiff was obviously prejudiced in the matter of his defence at the inquiry. Secondly, it was not disputed before us that a preliminary inquiry had preceded the disciplinary inquiry and during the preliminary inquiry statements of witnesses were recorded but copies of these statements were not furnished to him at the time of the disciplinary inquiry. Even the request of the plaintiff to inspect the file pertaining to preliminary inquiry was also rejected. In the face of these facts which are not disputed it seems to us very clear that both the first appeal Court and the High Court were right in coming to the conclusion that the plaintiff was denied reasonable opportunity to defend himself at the disciplinary inquiry; it cannot be gainsaid that in the absence of necessary particulars and statements of witnesses he was prejudiced in the matter of his defence. Having regard to the aforesaid admitted position it is difficult to accept the contention urged by the counsel for the appellant that the view taken by the trial Court should be accepted by us. We are satisfied that the dismissal order has been rightly held to be illegal, void and inoperative. Since the plaintiff has died during the pendency of the proceedings the only relief that would be available to the legal heirs of the deceased is the payment of arrears of salary and other emoluments payable to the deceased.

4. The appeal is dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 938

P. N. BHAGWATI AND

E. S. VENKATARAMIAH, JJ.

Criminal Appeal No. 7 of 1982, D/- 4-1-1982.

Madhu Bala, Appellant v. Narender Kumar and others, Respondents.

Constitution of India, Arts. 226, 136 — Penal Code (1860), S. 340 — Habeas corpus — Petition by husband for production and release of his wife — High Court allowing petition — Appeal by special leave by wife — Appellant not detained against her will and without her consent by her parents — Appellant completing 21 years of age during pendency of appeal before Supreme Court — Petition for writ of habeas corpus, not maintainable. Decision of High Court, Reversed. (Para 2)

BHAGWATI, J.:— Special leave granted.

2. The appellant appeared before us in chamber and we questioned her in order to find out whether she is being detained by her parents against her wish and she is being prevented from going to the first respondent. The appellant stated clearly and unequivocally before us that she is not being detained by her parents against her will and she does not want to go to the first respondent. We asked the appellant her age and she stated that she has just completed 21 years in the month of Mar. 1981. She also appears to be of 21 years age. We have satisfied ourselves that the appellant is not being detained against her will and without her consent. The application for a writ of habeas corpus for her production and release must therefore fail. Neither the dismissal of this application for a writ of habeas corpus nor anything we have said in this order will stand in the way of the first respondent agitating, if he so wishes, the factum of marriage or any other civil or matrimonial rights which he may have against the appellant and it will be for the appropriate Court in which such question is raised to decide it on the evidence which may be led before it. Appeal is disposed of in the light of the above observations.

Order accordingly.

BZ/CZ/A830/82/VNP/DVF-H

AIR 1982 SUPREME COURT 939

(From : Andhra Pradesh)

**V. D. TULZAPURKAR AND
AMARENDRA NATH SEN, JJ.**Civil Appeal Nos. 1306 and 1305 of 1970,
D/- 12-1-1982.Indubhai Ambalal Patel and others, Ap-
pellants v. State of Andhra Pradesh, Re-
spondent.

And

Raja Dhanraj Giriji, Appellant v. State
of Andhra Pradesh, Respondent.

(A) Land Acquisition Act (1894), S. 23
— Acquisition of two parcels of land form-
ing part of one plot — Each parcel belong-
ing to separate claimant — Compensation
— Solatium in consideration of injurious
severance of small land allowed only to one
claimant — Held, other claimant was also
entitled to solatium. Decision of Andhra
Pradesh High Court, Partly Reversed.

(Para 3)

**(B) Hyderabad Land Acquisition Act (9 of
1309 F), S. 23** — Interest on compensation
— Land Acquisition Officer granting no
interest to claimants on compensation fixed
by him — Enhancement of compensation
by High Court — High Court granting 4%
interest, only on enhanced amount — Held,
claimants were entitled to interest at 6%
and on the entire amount of compensation.
Decision of Andhra Pradesh High Court,
Partly Reversed. (Land Acquisition Act
(1894), S. 34).

(Para 3)

JUDGMENT:— In these appeals two
parcels of land forming part of one plot
were acquired by a notification issued in
April, 1959 and the question raised pertains
to the market value of these parcels of land
on the relevant date. In C. A. No. 1305
the claimant, Raja Dhanraj Giriji, had
claimed compensation for his parcel of land
admeasuring 4628.26 sq. yds. at the rate of
Rs. 100/- per sq. yd. before the Land Acqui-
sition Officer but he awarded compensation
at the rate of Rs. 35/- per sq. yd. He got
a reference made to the City Civil Court
which granted him compensation at the rate
of Rs. 80/- per sq. yd. exclusive of solatium
at 15% and this rate was fixed after taking
into consideration the injurious affection
suffered by the claimant on account of
severance of a small portion measuring
415 sq. yds. — an unaccessible portion
which was left with him and which was of
no use to him. The matter was carried in
appeal to the High Court both by the

claimant as well as by the State Govern-
ment and the High Court dismissed appeals
of both confirming the compensation award-
ed by the City Civil Court. In the other case
the claimants, Indubhai Ambalal Patel &
Ors. had claimed compensation in respect
of their parcel of land admeasuring 4513 sq.
yds. (sold to them by Dhanraj Giriji at
Rs. 40/- per sq. yd.) at the rate of Rs. 125/-
per sq. yd. but the Land Acquisition Officer
granted compensation at the rate of Rs. 35/-
per sq. yd. and in the reference made to the
City Civil Court, that Court granted com-
pensation at the rate of Rs. 65/- per sq. yd.
The claimants preferred an appeal to the
High Court and obviously in view of com-
pensation awarded to Raja Dhanraj Giriji
at the rate of Rs. 80/- per sq. yd. these
claimants could not be discriminated and
were granted compensation at the same rate,
but inclusive of solatium, especially when
the two parcels of land formed the part of
the same plot originally owned by Raja
Dhanraj Giriji. To both the claimants the
High Court awarded interest at the rate of
4% per annum. Both the claimants have
come up in appeal to this Court.

2. After hearing counsel on either side
and having considered the sale deeds and
the other documents which were considered
by the Courts below we are clearly of the
view that no question of breach of any
principle is involved in these appeals and the
question of quantum of compensation solely
rests on the appreciation of the material
placed before the lower Courts and in our
view the High Courts appreciation of the
entire material seem to be proper and it was
right in conforming the trial Courts rate of
Rs. 80/- per sq. yd. as representing the fair
market value on the relevant date. In re-
gard to two aspects only that were pressed
before us some interference seems to be
called for.

3. In C. A. 1306 of 1970 the claimants
were not granted any interest at all on the
compensation amount awarded by the Land
Acquisition Officer and when the enhanced
compensation was awarded interest has been
awarded at the rate of 4% only on the en-
hanced amount. It has been urged before
us that the claimants would be entitled not
only to interest on the entire amount of
compensation but also at a higher rate,
namely 6% per annum which has been pre-
scribed under S. 23 of the Hyderabad Land
Acquisition Act. There is force in this
contention. Interest at the rate of 4% per

annum seems to have been granted under some apprehension. It has been further urged by counsel for these claimants that solatium at the rate of 15% was also wrongly denied to them. We inquired from counsel for the State as to the basis on which such a solatium was denied and the only basis on which he was able to justify the denial of solatium was that a higher rate, namely Rs. 80/- per sq. yd. was fixed in the case of these claimants and therefore compensation at that rate was decreed as inclusive of solatium. He suggested that the rate of compensation which was in the mind of the Court was Rs. 70/- per sq. yd. but assuming that the Court wanted to give compensation at Rs. 70/- per sq. yd. on mathematical calculation the counsel for the State fairly conceded that if solatium had to be denied on this basis the compensation awarded would have been fixed at Rs. 73/- per sq. yd. and not Rs. 70/- per sq. yd. In view of this position we are of the view that additional compensation at the rate of Rs. 3/- per sq. yd. should be paid to the claimants and further, interest at the rate of 6% should be paid to them on the entire amount of compensation from the date of taking possession of the land till the payment. However, while calculating interest at 6% adjustment will have to be made in respect of the interest if any paid to the claimants on such portion of the compensation which has been already awarded to them. With this modification the decree of the High Court under appeal is confirmed.

4. In C. A. 1305 of 1970 the claimant has also sought interest at the rate of 6% per annum which is justified. It appears that initially no interest was awarded but on review petition being made by the claimant before the High Court interest at the rate of 4% was awarded on the entire amount of compensation awarded to the claimant. In case of this claimant therefore additional interest at 2% over and above that awarded by the High Court from the date of taking possession of the land till the date of payment is hereby decreed. Subject to this modification the order of the High Court under appeal is confirmed. Each party to bear its own costs.

Order accordingly.

AIR 1982 SUPREME COURT 940

(From: Punjab & Haryana)

A. P. SEN AND A. VARADARAJAN, JJ.

Special Leave Petns. (Civil) Nos. 1288-1290, 3610 and 6389 of 1979, D/- 1-10-1981.

Brig. Sahib Singh Kalha etc., Petitioners v. Amritsar Improvement Trust and others, Respondents.

(A) Land Acquisition Act (1 of 1894), S. 28 — Interest must be allowed on enhanced amount of compensation — Interest @ 6 per cent per annum directed to be paid on enhanced compensation from date of taking possession of land till realisation.

(Para 2)

(B) Land Acquisition Act (1 of 1894), Sec. 23 — Determination of compensation — Matters to be considered — Land acquired, itself, an undeveloped area — Award of Collector based on 'belting' principle — Held, cut of 33 per cent of market value in one case and 20 per cent in others was justified in determining amount of compensation.

(Para 3)

Cases Referred: Chronological Paras (1980) S. L. P. (Civil) Nos. 4320 and 4327 of 1979, D/- 17-1-1980 (SC), Shiv Kumar v. State of Punjab 2 AIR 1972 SC 1417: (1972) 3 SCR 208 3

SEN, J.:— Notice in these special leave petitions is confined to two points, namely, (1) whether interest ought to have been allowed on the enhanced amount of compensation; and (2) whether a cut of 33 per cent of the market value in one case and 20 per cent in the others was justified in determining the amount of compensation.

2. As to point No. (1), the question of interest on the enhanced amount of compensation which is common to all the special leave petitions, is concluded by the judgment of Krishna Iyer, J. in Shiv Kumar v. State of Punjab, SLP (Civil) Nos. 4320 and 4327 of 1979 decided on 17-1-1980, by which the Court refused to grant special leave, 'except to clarify the ambiguity, if there be some, in the matter of award of interest on the enhanced portion of the compensation', and observed that 'there is no reason whatever to withhold such payment of interest'. It was rightly conceded by counsel for the Improvement Trust that a similar direction with regard to interest be also made. We accordingly direct that interest at the rate of 6 per cent per annum shall be payable not only on the amount of compensation, but also on the enhanced

portion thereof from the date of taking of possession of land till realisation.

3. As to point No. (2), a few facts must be stated. An area of 269 kanals and 9 marlas out of a total area of 118.5 acres had been acquired. The Collector based the award on the 'belting' principle and classified the acquired area into two belts, namely, 'A' and 'B'. An area measuring 48 kanals and 13 marlas abutting the roads on three sides to a depth of 40 karams was classified as belt 'A' and the remaining 200 kanals 11 marlas as belt 'B'. The land acquired is situate undoubtedly in the vicinity of a developed locality, but is itself undeveloped, although it is bounded by 4 roads. The 45 bungalows and 5 factories which the claimants speak are, as the High Court observes, situate outside the acquired area. Extensive as it is, it has to be plotted out into small house sites with amenities. These amenities will consist of roads, drainage, lighting and so on, and roads will require space and laying of roads will mean expenditure. The High Court, while upholding a cut of 33 per cent of the market value in one case and 20 per cent in the other towards the cost of development, as made by the Tribunal, observes:

For the purpose of converting the big plot into small plots, it would be necessary to provide roads, parks etc. The benefit of such roads and parks etc. would accrue to the plot holders without payment of any extra price. In other words, the price of the land under roads and parks etc. would be included in the price of the smaller plots made out of the big one. It is in this background that while assessing the market price of the acquired area measuring 269 kanals 9 marlas, the Tribunal applied the 20 per cent cut on the price otherwise assessed

It is well settled principle of valuation that where there is a large area of undeveloped land under acquisition, provision has to be made for providing the minimum amenities of town life such as water connections, well laid-out roads, drainage facility, electric connections etc. The process necessarily involves deduction of the cost of factors required to bring the undeveloped lands on a par with the developed lands. An extent of 20 per cent of the total land acquired is normally taken as a reasonable deduction for the space required for roads. This is apart from the cost of laying roads themselves and the cost of providing other ameni-

ties like electricity, water, underground drainage etc. In *Tribeni Devi v. Collector of Ranchi*, (1972) 3 SCR 208 : (AIR 1972 SC 1417), the Court allowed a deduction of 33-1/3 per cent towards the cost of development. The cost of development may range from 20 to 33 per cent depending on the nature of the land, its situation and the stage of development etc. The Tribunal had before it material on which it directed a cut of 33 per cent of the market value in one and 20 per cent in the other. It cannot be said that the aforesaid deductions were arbitrary or unreasonable having regard to the fact that the land acquired is an undeveloped area and the award of the Tribunal is based on the 'belting' principle.

4. Subject to the direction as to payment of interest at 6 per cent per annum on the enhanced amount of compensation, the special leave petitions are dismissed, but without any order as to costs.

Petitions dismissed.

AIR 1982 SUPREME COURT 941

(From : Allahabad)

V. D. TULZAPURKAR AND
AMARENDRA NATH SEN, JJ.

Criminal Appeal No. 54 of 1982, D/-22-1-1982.

Digpal Singh, Appellant v. State of U. P., Respondent.

Constitution of India, Art. 136 — Appeal by special leave — Reduction in sentence — Sentence reduced, taking into consideration family conditions of appellant. (Penal Code (1860), S. 53). (Para 2)

JUDGMENT :— Special leave granted.

2. After hearing counsel on either sides on the question of sentence, we feel that some reduction in the sentence should be made. Having regard to the family conditions of the appellant which have been put on record in the form of a certificate from the Pradhan of the village, we reduce the sentence to 'six months' rigorous imprisonment. With this modification in the sentence, the appeal is disposed of.

Order accordingly.

BZ/CZ/A825/82/VNP/DVT-H

AIR 1982 SUPREME COURT 942

(From: Allahabad)*

Y. V. CHANDRACHUD, C. J.,**D. A. DESAI AND****AMARENDRA NATH SEN, JJ.**

Criminal Appeals Nos. 932 and 933 of 1981, D/- 1-12-1981.

State of U. P., Appellant v. Jairam and etc., Respondents.

Criminal P. C. (2 of 1974), S. 439 — Detention under Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act (1980) — Grant of bail — Validity. C. M. App. No. 5909 (W) and C. W. No. 8918 of 1981, D/- 23-10-1981 (All), Reversed.

The respondents, who are detained under the provisions of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 filed Habeas Corpus petitions in the High Court of Allahabad challenging the orders of detention passed against them. A Division Bench had heard the petitions for two days but did not think it fit or proper to grant interim relief to the detenues. Another Division Bench was going to rehear the petitions after ten days. In the meanwhile the single Judge granted bail to the respondents on the ground that the State Government had erred in forwarding the respondents' representations to the Advisory Board without considering them for itself.

Held that the order of bail was liable to be set aside. It was not proper that the single Judge should have taken upon himself the task of examining the merits of the matter in order to find whether there was a prima facie case for releasing the detenues on bail. C. M. App. No. 5909 (W) and C. W. No. 8918 of 1981, D/- 23-10-1981 (All), Reversed. (Para 7)

If persons held in detention are released on bail in the manner done by the single Judge, the very object and purpose of detention will be totally frustrated. Grave illness or pressing and personal business may justify an order of release in detention cases for a short period suited to the exigencies of the particular occasion. But a detenu cannot be released on bail as a matter of common practice, on considerations generally applicable to cases of punitive detention. AIR 1966 SC 1441, Distinguished.

(Para 6)

*C. M. App. No. 5909 (W) and C. W. No. 8918 of 1981, D/- 23-10-1981 (All).

Cases Referred: Chronological Paras
AIR 1966 SC 1441; (1966) 3 SCR 344;
1966 Cri LJ 1076 7

Mr. R. K. Bhatt, Advocate, for Appellant; Mr. Shaukat Hussain and Mr. Shakil Ahmed, Advocates, for Respondents.

CHANDRACHUD, C. J.:— Heard counsel. Special leave granted.

2. The respondents, who are detained under the provisions of the "Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 filed Habeas Corpus petitions in the High Court of Allahabad challenging the orders of detention passed against them. Those petitions were almost fully heard by a Division Bench on Oct. 19 and 22, 1981. The learned Judges, however, released the writ petitions from their list since the Court had Diwali holidays from October 24 until November 2, 1981 and they were not likely to be available, perhaps as a Bench, for concluding the hearing of the writ petitions.

3. Another Division Bench took up the Writ Petitions for hearing on October 23 but they adjourned the petitions until the reopening of the Court on November 3. Soon after the Division Bench rose, counsel for the respondents approached a learned single Judge after Court hours and applied for bail. It appears that the Deputy Government Advocate was available. He was sent for and after hearing both the sides, the learned Judge granted bail to the respondents on the ground that the State Government had erred in forwarding the respondents' representations to the Advisory Board without considering them for itself.

4. The writ petitions were taken up for hearing by another Division Bench on November 3, 1981. They concluded the hearing on that date, reserved their judgment and allowed the respondents to continue on bail till November 10 which was fixed for judgment. The judgment is not yet delivered. The learned Judges directed: "It may however be inquired as to how file was sent before the learned single Judge for bail when there was no case fixed before him."

5. These Special Leave Petitions are directed against the order passed by the learned single Judge on October 23, 1981, releasing the respondents on bail "until the next date of hearing of the Habeas Corpus petitions".

6. We are unable to appreciate how the learned single Judge could release the respondents on bail when, in the first

instance, the writ petitions filed by them were listed for hearing before a Division Bench. Secondly, and that involves a question of principle, we are unable to see for what special reason the learned Judge thought it necessary to release the respondents on bail. The order passed by the learned Judge does not show that there was any pressing or particular reason of a unique kind for which it was imperative to enlarge the respondents on bail. If persons held in detention are released on bail in the manner done by the learned Judge, the very object and purpose of detention will be totally frustrated. Grave illness or pressing and personal business may justify an order of release in detention cases for a short period suited to the exigencies of the particular occasion. But a detenu cannot be released on bail as a matter of common practice, on considerations generally applicable to cases of punitive detention. The learned single Judge virtually took upon himself the decision of the writ petitions on merits. He found, evidently on an on-the-spot argument, that the State Government had erred in not considering the representations of the respondents before forwarding them to the Advisory Board and released the respondents on bail as their further continuance in detention was "prima facie" vitiated.

7. In passing the order of bail, the learned Judge has sought the support of a decision of a Constitution Bench of this Court in *State of Bihar v. Rambalak Singh*, (1966) 3 SCR 344: (AIR 1966 SC 1441). In that case, the State of Bihar appealed to this Court against an order of interim bail passed by the Patna High Court in a Habeas Corpus petition which was filed by the respondent to challenge an order of detention issued under R. 30 of the Defence of India Rules, 1962. It was held by this Court that though the High Court has jurisdiction to grant bail in Habeas Corpus petitions filed against orders of detention passed under R. 30, the exercise of the said jurisdiction is inevitably circumscribed by the considerations which are special to such proceedings and which have relevance to the object which it intended to be served by orders of detention passed under the said Rule. If on proof of certain conditions or grounds it is open to the High Court to set aside the order of detention made under R. 30 and direct the release of the detenu, then it cannot be held that in a proper case the High Court has no juris-

diction to make an interim order giving the detenu the relief which the High Court would be entitled to give him at the end of the proceedings. The Court, however, hastened to emphasize (at p. 1443):

".....though we have no hesitation in affirming the jurisdiction of the High Court in granting interim relief by way of bail to a detenu who has been detained under R. 30 of the Rules, there are certain inexorable considerations which are relevant to proceedings of this character and which inevitably circumscribe the exercise of the jurisdiction of the High Court to pass interim orders granting bail to the detenu. There is no doubt that the facts on which the subjective satisfaction of the detaining authority is based, are not justiciable, and so, it is not open to the High Court to enquire whether the impugned order of detention is justified on facts or not. The jurisdiction of the High Court to grant relief to the detenu in such proceedings is very narrow and very limited. That being so, if the High Court takes the view that prima facie, the allegations made in the writ petition disclose a serious defect in the order of detention which would justify the release of the detenu, the wiser and the more sensible and reasonable course to adopt would invariably be to expedite the hearing of the writ petition and deal with the merits without any delay. Take the case where mala fides are alleged in respect of an order of detention. It is difficult, if not impossible, for the Court to come to any conclusion, even prima facie, about the mala fides alleged, unless a return is filed by the State. Just as it is not unlikely that the High Courts may come across cases where orders of detention are passed mala fides, it is also not unlikely that allegations of mala fides are made light heartedly or without justification and so, judicial approach necessarily postulates that no conclusion can be reached, even prima facie, as to mala fides unless the State is given a chance to file its return and state its case in respect of the said allegations; and this emphasises the fact that even in regard to a challenge to the validity of an order of detention on the ground that it is passed mala fide, it would not be safe, sound or reasonable to make an interim order on the prima facie provisional conclusion that there may be some substance in the allegations of mala fides. What is true about mala fides is equally true about other infirmities on which an order of detention may

be challenged by the detenu. That is why the limitation on the jurisdiction of the Court to grant relief to the detenus who have been detained under R. 30 of the Rules, inevitably introduces a corresponding limitation on the power of the Court to grant interim bail."

The Court, speaking through Gajendra-gadkar, C. J. added (at p. 1444):—

"It is no doubt true that a detenu is detained without a trial; and so, the courts would inevitably be anxious to protect the individual liberty of the citizen on grounds which are justiciable and within the limits of their jurisdiction. But in upholding the claim for individual liberty within the limits permitted by law, it would be unwise to ignore the object which the orders of detention are intended to serve. An unwise decision granting bail to a party may lead to consequences which are prejudicial to the interests of the community at large; and that is a factor which must be duly weighed by the High Court before it decides to grant bail to a detenu in such proceedings. We are free to confess that we have not come across cases where bail has been granted in habeas corpus proceedings directed against orders of detention under R. 30 of the Rules, and we apprehend that the reluctance of the courts to pass orders of bail in such proceedings is obviously based on the fact that they are fully conscious of the difficulties — legal and constitutional, and of the other risks involved in making such orders. Attempts are always made by the courts to deal with such applications expeditiously; and in actual practice, it would be very difficult to come across a case where without a full enquiry and trial of the ground on which the order of detention is challenged by the detenu, it would be reasonably possible or permissible to the Court to grant bail on prima facie conclusion reached by it at an earlier stage of the proceedings,

If an order of bail is made by the Court without a full trial of the issues involved merely on prima facie opinion formed by the High Court, the said order would be open to the challenge that it is the result of improper exercise of jurisdiction. It is essential to bear in mind the distinction between the existence of jurisdiction and its proper exercise. Improper exercise of jurisdiction in such matters must necessarily be avoided by the courts in dealing with applications of this character."

The learned single Judge, with respect, has failed to appreciate the weight of these observations while passing the order of interim bail. A Division Bench had heard the petitions for two days but did not think it fit or proper to grant interim relief to the detenus. Another Division Bench was going to rehear the petitions after ten days. It is not proper that, in between, the learned single Judge should have taken upon himself the task of examining the merits of the matter in order to find whether there was a prima facie case for releasing the detenus on bail.

8. Shri Shaukat Hussain, who appears on behalf of the respondents, has drawn our attention to an order passed by the Division Bench itself on November 10, 1981 by which it has permitted the respondents to continue on bail until the delivery of the judgment by it in the writ petitions. Learned counsel says that the special leave petitions filed by the State of Uttar Pradesh against the order passed by the learned single Judge have become infructuous by reason of the order passed by the Division Bench. We are unable to accept this submission because the primary order of bail under which the respondents are at large is the one passed by the learned single Judge. The Division Bench has allowed that order to remain in operation, only for the reason that counsel for the State was unable to say whether the Advisory Board had recommended the confirmation of detention or not. The Division Bench postponed the delivery of the judgment for that reason and directed that the respondents, who are already on bail, will be allowed to continue on bail until further orders.

9. For reasons aforesaid, we set aside the order of bail and direct that the respondents shall be taken in custody forthwith.

10. We hope that the Division Bench which has already heard arguments in the Writ Petitions, will be able to deliver its judgment expeditiously, if it has not already done so.

11. The appeals will stand disposed of in terms of this judgment.

Appeal allowed.

AIR 1982 SUPREME COURT 945

=1980 All LJ 651

(From: Allahabad)*

V. R. KRISHNA IYER AND

P. S. PATHAK, JJ.

Civil Appeal No. 2109 of 1979, D/- 7-5-1980.

Ram Saroop Rai, Appellant v. Smt. Lilavati, Respondent.

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 2 (2) Explanation 1 — New construction — Exemption from operation of the Act — Onus lies on landlord to prove that construction is new — Municipal records as to completion of construction and assessment afford best evidence. Civil Revn. No. 900 of 1978, D/- 7-5-1979 (All), Reversed.

The analysis of the Explanation 1 to S. 2 (2) makes it clear that when a landlord claims that the house owned by him being a new construction is exempt from the operation of the Act the court should rely more on the municipal records rather than on the oral testimony of the parties for the purpose of determining when the building was constructed. The burden is normally on the landlord that the building is out of the ambit of the Act. (Paras 5, 10)

In the instant case the building was purchased by the landlord. He claimed that his predecessor had constructed a new building while the tenant claimed that old construction was remodelled.

Held in the circumstances that neither the present landlord nor the tenant had any direct knowledge about the construction. The best evidence was the municipal record as to completion of building and its assessment etc., as might be available. The case was therefore remanded to the trial court for adducing proper documentary evidence. Civil Revn. No. 900 of 1978, D/- 7-5-1979 (All), Reversed.

(Paras 9, 10)

Mr. A. K. Sen, Sr. Advocate (M/s. B. S. Banerjee and R. N. Kovind, Advocates with him), for Appellant; Mr. J. P. Goyal, Sr. Advocate, (Mr. S. K. Jain, Advocate with him), for Respondent.

KRISHNA IYER, J.:— A brief back-drop leads to the short point in issue. Chronic scarcity of accommodation in al-

*Civil Revn. No. 900 of 1978, D/- 7-5-1979 (All).

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most every part of the country has made eviction litigation explosively considerable, and the strict protection against ejection, save upon restricted grounds, has become the policy of the State. Rent Control Legislation to give effect to this policy exists everywhere, and we are concerned with one such in the State of U. P. (U. P. Act 13 of 1972). The legislature found that rent control law had a chilling effect on new building construction, and so, to encourage more building operations, amended the statute to release, from the shackles of legislative restriction, 'new constructions' for a period of ten years. So much so, a landlord who had let out his new building could recover possession without impediment if he instituted such proceeding within ten years of completion. The respondent is a landlady who claims to fill the bill in this setting and seeks to evict the appellant-tenant untrammelled by the provisions of the Act. She has succeeded in both the courts below and the appellant challenges the order as illegal and vitiated by a basic error of approach.

2. We should have made short work of it had there not been the need for this court to set the sights right in the class of litigation where exemption from the operation of the Act is claimed on the ground that the construction is new and the case is filed within the ten-year moratorium. If the exemption is erroneously liberalised to frustrate the principal measure by failure to stick to basic legal principles, the jurisprudence of rent control may become too jejune to be socially effective. That is why we examine a few fundamentals here in the decisional process of this class of cases.

3. The area of controversy, factual and legal is small. The respondent purchased shop No. 66 in the city of Jhansi in 1969 from one Brij Mohan (DW 2), occupied the first floor and allowed the appellant, as tenant, to occupy the ground floor in 1970 on a lease deed which recited that the building was erected in 1965. In 1975 the present eviction action was instituted on the basis that the building was new, that the Act did not debar eviction of new constructions put up within ten years of the suit and so a decree was inevitable. The tenant resisted the claim on the plea that the building was constructed 50 years ago. The trial court negatived the defence and decreed eviction and this was upheld by the High Court,

4. If it were a bare finding of fact we should not have reopened it, but Shri A. K. Sen argues that fundamental flaws in the understanding of the law have vitiated the decision which, if left uncorrected, will spell a new class of litigation for eviction by easy resort to the 'new construction' expedient. Such possible public mischief persuades us to have a closer look at the Act to the extent relevant.

5. Shri J. P. Goel rightly reminds us that in the normal course the appeal must be dismissed as concluded by findings of fact. But we will probe the matter further to explore whether there is any substance in Shri A. K. Sen's argument of fundamental failure bearing on the legality of the conclusions. The anatomy of the Act is substantially the same as that of other similar legislations. The most important feature we have to notice is the exemption from application of the provisions of the Act for the period of ten years in respect of new constructions. S. 2 (2) is relevant in this context and runs as follows:

Except as provided in sub-sec. (5) of S. 12, sub-s. (1A) of S. 21, sub-s. (2) of S. 24, Ss. 24A, 24B, 24C or sub-sec. (3) of S. 29, nothing in this Act shall apply to a building during a period of ten years from the date on which its construction is completed.

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Explanation I. — For the purposes of the sub-section.

(a) The construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction, and in the case of a building subject to assessment, the date on which the first assessment thereof comes into effect, and where the said dates are different, the earliest of the said dates, and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purposes of supervising the construction or guarding the building under construction) for the first time:

Provided that there may be different dates of completion of construction in respect of different parts of a building which are either designed as separate units or are occupied separately by the landlord and one or more tenants or by different tenants.

(b) 'construction' includes any new constructions in place of an existing building

which has been wholly or substantially demolished;

(c) Where such substantial addition is made to an existing building, that the existing building becomes only a minor part thereof, the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition.

This sub-section and its construction is decisive of the fate of the appeal. Nothing in the rent control legislation shall apply to a building "during a period of ten years from the date on which its construction is completed". The first thing that falls to be emphasised is that in regard to all buildings the Act applies save where this exemption operates. Therefore, the landlord who seeks exemption must prove that exception. The burden is on him to make out that notwithstanding the rent control legislation, his building is out of its ambit. It is not for the tenant to prove that the building has been constructed beyond a period of ten years, but it is for the landlady to make out that the construction has been completed within ten years of the suit. This is sensible not merely because the statute expressly states so and the setting necessarily implies so, but also because it is the landlady who knows best when the building was completed, and not the tenant. As between the two, the owner of the building must tell the court when the building was constructed, and not the tenant thereof. Speaking generally, it is fair that the onus of establishing the date of construction of the building is squarely laid on the landlord, although in a small category of cases where the landlord is a purchaser from another, he will have to depend on his assignor to prove the fact.

6. Firstly, therefore, we must examine whether the respondent has made out her case for exemption from the operation of the Act based on the vital fact that the building has been completed only within ten years of the suit. The second thing we have to remember is Explanation I quoted above: When is a building deemed to have been completed?

An analysis of Explanation I to S. 2 (2) of the U. P. Act indicates:

(1) Where a building has not been assessed, it is the date on which the completion was reported to, or otherwise recorded by, the local authority having jurisdiction.

(2) Where a building has been assessed, it is the date on which the first assessment comes into effect;

Provided that if the date on which the completion was reported to, otherwise recorded by, the local authority is earlier than the date of the first assessment, the date of completion will be such earlier date.

(3) Where there is no report, record or assessment, it is the date of actual occupation for the first time (not being an occupation for the purpose of supervising the construction or guarding the building under construction).

7. It is common case that Shops Nos. 65 and 66 were owned by a common owner, Shri Brij Mohan, DW 2. He sold only Shop No. 66 to the respondent. So, there is no doubt that there was an existing building, Shop No. 66, long prior to the ten-year period mentioned in the statute. According to the testimony of Shri Brij Mohan, DW 2, the old construction continued, but certain additions and remodelling were done. He had submitted a plan to the local authority indicating the original construction and the proposed additions, and that is marked as Exhibit in the case. This shows the existence of a prior building the proposal being for addition or partial reconstruction and not for total demolition. If we go by the plan, it is not possible to conclude automatically that there is a new construction. If we go by Brij Mohan's evidence, the owner of the building at the relevant time, we cannot necessarily hold that the existing building has been substantially demolished and reconstructed. Indeed, his evidence is to the effect that the construction such as was made was beyond the 10-year period.

8. Unfortunately, it is not possible for the purchaser-respondent or the tenant-appellant to give direct testimony about the time of the construction or the nature of the construction vis-a-vis Explanation (b) or (c). The best testimony is the municipal records about the completion of the building and the verification by the municipal authorities as to whether a new construction has come into being or an old construction has been remodelled and if so, when exactly the completion took effect. The municipal assessment record produced in the court merely states "increased assessment". It may suggest the existence of an assessment which has been increased or it may perhaps be argued that when the building was reconstructed a new assessment was made which was more than the previous assessment, therefore, was described as increased assess-

ment. The oral evidence in the case, apart from what we have set out, is inconsequential, being secondhand testimony. Even the recital in the rent deed that there was a new construction in 1965-66 is by the appellant and the respondent, neither of whom has any direct knowledge about the construction. Of course, an admission by the appellant is evidence against him but an admission is not always conclusive especially in the light of the municipal records such as are available and the burden such as has been laid by the statute.

9. Viewed in this perspective, the failure of the trial court specifically to record when the building was completed and what was the extent of re-building, whether it was a case of total demolition and reconstruction or such extensive additions as to push the existing building into a minor part, becomes fatal. These basic issues have failed to receive any attention from the courts below. A finding recorded on speculative basis is no finding, and that is the fate of the holding in the present case.

10. We do not want to dwell on the evidence in greater detail because we propose to remit the case to the trial court (Court of the First Additional District Judge, Jhansi). It is quite conceivable that the municipal records bearing on the completion of the construction may throw conclusive light whatever might have been the original proposal in the plan submitted. It is perfectly possible that on a view of the earlier construction, vis-a-vis the completed new building, the former may form but a small part. It may also be that the implication of the expression "increased assessment" may be explained with reference to earlier assessment records in the municipality. Moreover, whenever a new building is completed, a report has statutorily to be made and only on a completion survey and certificate, occupation is ordinarily permitted. These records must also be available in the office of the local authority. The statute makes it clear that reliance upon the municipal records, rather than on the lips of witnesses, is indicated to determine the date of completion and the nature of the construction. This statutory guideline has been wholly overlooked and the burden lying on the landlord has not been appreciated. The result is that the eviction order has to be demolished.

11. It may still be open to the landlady-respondent to make out her case by

producing better municipal evidence in the light of what we have indicated. We do not wish to deny the landlady this opportunity because the trial court has not approached the problem from the correct legal angle. We set aside the judgment of the courts below and remit the case for hearing to the trial court. The trial court will give an opportunity to both sides to adduce fresh evidence, documentary and oral, to make out the ground of exemption from the application of the Act. Of course, when the entire evidence is before the court, the onus of proof will play a lesser role.

12. Before parting with the case, we wish to notice a submission made by Sri Goel that the landlady's son was an unemployed engineer who needed the premises for personal requirement. Even if the Act applies, it is open to the landlady to make out any of the grounds under the Act for eviction. To avoid prolixity and delay of the proceedings, we permit the trial court to allow the landlady, if she applies in that behalf, to plead on an alternative basis, for eviction on any of the specified grounds under the Act.

13. The appeal is allowed and the case remitted to the Court of the Addl. District Judge, Jhansi for fresh disposal in the light of the observations made above.

Appeal allowed.

AIR 1982 SUPREME COURT 948 (1)

V. D. TULZAPURKAR AND
A. P. SEN, JJ.

Civil Appeal No. 567 of 1982, D/- 15-2-1982.

Mohammad Arif, Appellant v. Allah Rabbul Alamin and others, Respondents.

Civil P. C. (5 of 1908), O. 22. Rr. 4, 11 — Appeal — Abatement of — Party already on record sufficiently representing property of deceased respondent — No necessity of application to bring him as legal representative of deceased on record — Decision of High Court Reversed.

(Para 2)

JUDGMENT:— Special Leave Petition granted.

2. After hearing counsel on either side we are satisfied that the High Court's order stating that the appeal had abated and the appellant Mohammad Arif could not be brought on record as a legal representative of Mohammad Ahmad is clearly wrong. It is true that the appellant did not prefer any appeal to the District Court against the original decree

but in the First Appeal he was a party respondent. But that apart, in the second appeal itself Mohammad Arif had been joined as co-appellant along with his vendor Mohammad Ahmad. On the death of Mohammad Ahmed all that was required to be done was that the appellant who was on record should have been shown as a legal representative inasmuch as he was the transferee of the property in question and at least as an intermeddler was entitled to be treated as legal representative of Mohammed Ahmed. He being on record the estate of the deceased appellant qua the property in question was represented and there was no necessity for application for bringing the legal representatives of the deceased appellant on record. The appeal in the circumstances could not be regarded as having abated and Mohammad Arif was entitled to prosecute the appeal. We, therefore, set aside the order of the High Court and send the appeal back to the High Court for disposal according to law.

3. This disposes of the appeal with no order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 948 (2)

(From: Madhya Pradesh)

V. D. TULZAPURKAR AND
A. P. SEN, JJ.

Criminal Appeal No. 95 of 1982, D/- 12-2-1982.

Bhure Khan, Appellant v. State of Madhya Pradesh, Respondent.

Penal Code (45 of 1860), S. 397 — Offence under — Proof — Accused found in possession of torch and currency notes — Same not satisfactorily proved as forming part of corpus delicti — Victim also failing to identify accused in two identification parades — Accused not liable to be convicted under S. 397. M. P. High Court decision Reversed. (Para 2)

JUDGMENT:— Special Leave granted.

2. The conviction of the appellant, Bhure Khan, rests purely on recovery of a torch and currency notes of the value of Rs. 235 found with him. The identification of these two articles is not satisfactorily proved as forming part of the corpus delicti. Chakradhar Singh failed to identify Bhure Khan at either of the two identification parades and his identification in court will not help the prosecution. So far as the torch is concerned it is a very

common article and no particular mark appearing thereon has been indicated as enabling Chakradhar Singh to identify it as belonging to him. As regards the currency notes it is true that these have not been claimed by Bhure Khan as his money but till these notes are established to be the subject matter of the dacoity which occurred at Chakradhar Singh place the appellant is not called upon to explain its possession. For these reasons it would be difficult to maintain the conviction of Bhure Khan. The appeal is therefore allowed and the appellant is acquitted of the charge under Ss. 397 I.P.C. and 395, I.P.C.

Appeal allowed.

AIR 1982 SUPREME COURT 949

(From: AIR 1981 Cal 157)

Y. V. CHANDRACHUD, C. J.;
A. VARADARAJAN AND
AMARENDRA NATH SEN, JJ.

Civil Appeals Nos. 1129 and 1130 of 1981, D/- 2-2-1982.

State of West Bengal and others, Appellants v. Swapan Kumar Guha and others, Respondents.

And

State of West Bengal and others, Appellants v. Sanchaita Investments and others, Respondents.

(A) Constitution of India, Art. 226 — Nature and scope of proceeding under — F.I.R. not disclosing commission of cognizable offence — High Court justified in quashing investigation. (Criminal P. C. (1974), Ss. 157, 154).

Per A. N. Sen, J.:—

If an offence is disclosed, the High Court under Art. 226 of the Constitution will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed; if, however, the materials do not disclose an offence, no investigation should normally be permitted. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the Court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the Court normally

does not interfere with the investigation of a case where an offence has been disclosed. But it cannot be said that an investigation must necessarily be permitted to continue and will not be prevented by the Court at the stage of investigation.

(Paras 64, 83, 14, 23)

Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. If on a consideration of the relevant materials, the Court is satisfied that an offence is disclosed, the Court will normally not interfere with the investigation into the offence and will generally allow the investigation in the offence to be completed for collecting materials for proving the offence. If, on the other hand, the Court on a consideration of the relevant materials is satisfied that no offence is disclosed, it will be the duty of the Court to interfere with any investigation and to stop the same to prevent any kind of uncalled for and unnecessary harassment to an individual.

(Paras 65, 83, 14, 23)

Per Y. V. Chandrachud, C. J. and A. Varadarajan, J. (Concurring with A. N. Sen, J.):—

A First Information Report which does not allege or disclose that the essential requirements of the penal provision are prima facie satisfied, cannot form the foundation or constitute the starting point of a lawful investigation. (Para 10)

An investigation can be quashed if no cognizable offence is disclosed by the F.I.R. It is surely not within the province of the police to investigate into a Report (F.I.R.) which does not disclose the commission of a cognizable offence and the Code does not impose upon them the duty of inquiry in such cases.

(Paras 20, 40)

The condition precedent to the commencement of investigation under S. 157 of the Code is that the F.I.R. must disclose, prima facie, that a cognizable offence has been committed. It is wrong to suppose that the police have an unfettered discretion to commence investigation under S. 157 of the Code. Their right of inquiry is conditioned by the existence of reason to suspect the commission of a cognizable offence and they cannot, reasonably, have reason so to suspect unless the F.I.R., prima facie, discloses the commission of such offence. If that condition is satisfied, the investigation must go on. The Court has then no power to stop the investigation, for to do so would be to trench upon the lawful

power of the police to investigate into cognizable offences. On the other hand, if the F.I.R. does not disclose the commission of a cognizable offence, the Court would be justified in quashing the investigation on the basis of the information as laid or received. The power to investigate into cognizable offences must, therefore, be exercised strictly on the condition on which it is granted by the Code. AIR 1981 Cal 157, Affirmed.

(Paras 21, 22, 40)

(B) Prize Chits and Money Circulation Schemes (Banning) Act (43 of 1978), Pre; Ss. 2 (c), 3, 4 — Object of Act — Money circulation scheme — What is — Determination — Test — Firm indulging in high risk investments — Not illegal — Payment of interest in excess of stipulated rate — Not a scheme for making easy and quick money.

Per A. N. Sen, J.:—

The main object of the Act is to ban promotion or conduct of any prize chit or money circulation scheme, by whatever name called, and of the participation of any person in such chit or scheme.

(Para 71)

For properly appreciating whether the offence of promoting or conducting a money circulation scheme is disclosed or not, it becomes necessary to consider whether the materials, even if they are all accepted to be correct, indicate that the business carried on by the firm in question satisfies the requirements of money circulation scheme and disclose an offence under the Act.

(Para 75)

To be a money circulation scheme, a scheme must be for the making of quick or easy money on any event or contingency relative or applicable to the enrolment of the members into the scheme. The scheme has necessarily to be judged as a whole, both from the viewpoint of the promoters and also of the members. Various individuals may invest their monies in their business which may yield very high profits. Many individuals also may indulge in speculative business in expectation of high return of their money and may succeed or may not succeed in speculative transactions. If such transactions are made openly and not in violation of any law, it can never be said that such investment has been made for making quick or easy money. If a part of the transaction is not above board and is secretive that will not make any difference and the transaction cannot be considered to be a scheme for the making of quick or easy money, though the trans-

action may offend against revenue laws or any other law. Transactions in black money do not come within the mischief of this Act (Para 77)

In absence of anything to indicate that the firm in question makes any investment in consultation with depositors, the acts of a firm indulging in high risk investments and also advancing monies to political parties do not go to show that the firm makes quick money. It is no doubt true that the firm pays a larger amount by way of interest than payable on the basis of the rates stipulated in the loan certificate. The clandestine manner of payment of interest in excess of the stipulated rate does not, any way, indicate the existence of any scheme for making quick or easy money. None of the requirements of a money circulation scheme is satisfied in the instant case. As there is no money circulation scheme, there can be no scheme as contemplated in the Act in view of the definition of scheme in the Rules. When the materials do not disclose that the firm is promoting or conducting a money circulation scheme, the Act has, therefore, no application to the firm. AIR 1981 SC 504, Dist.

(Para 78)

Per Y. V. Chandrachud, C. J. and A. Varadarajan, J. (Concurring with A. N. Sen, J.):—

Two conditions must be satisfied before a person can be held guilty of an offence under S. 4 read with Ss. 3 and 2 (c) of the Act. In the first place, it must be proved that he is promoting or conducting a scheme for the making of quick or easy money and secondly, the chance or opportunity of making quick or easy money must be shown to depend upon an event or contingency relative or applicable to the enrolment of members into that scheme.

(Para 7)

A transaction under which, one party deposits with the other or lends to that other a sum of money on promise of being paid interest at a rate higher than the agreed rate of interest cannot, without more, be a "money circulation scheme" within the meaning of S. 2 (c) of the Act, howsoever high the promised rate of interest may be in comparison with the agreed rate. It cannot be said that the lender, himself a victim of the machinations of the crafty promoter, is intended by the Act to be arraigned as an accused. AIR 1981 Cal 157, Affirmed.

(Paras 8, 9)

(C) Constitution of India, Arts. 136, 226 — Appeal against decision of High

Court quashing investigation against a money circulating firm and its partners — FIR not disclosing any offence — Quashing of investigation upheld — Firm likely to secret large funds and destroy incriminating documents if returned to it — In the interest of countless small depositors, documents were directed to be retained by police for two months — Government should be given opportunity to institute inquiry into affairs of firm. (i) Prize Chits and Money Circulation Schemes (Banning) Act (1978), S. 4 — (ii) Criminal P. C. (1974), S. 157.

(Paras 38, 40, 84)

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 AIR 1945 PC 18: 71 Ind. App 203: 46 Cri LJ 413 20, 21, 53, 54, 58, 64
 (1871) 6 Ch App 875: 25 LT 369, In re Wier 61

Y. V. CHANDRACHUD, C. J.:— My learned Brother A. N. Sen has dealt fully with the various points argued before us. I agree respectfully with his judgment, but desire to add a few words in view of the importance which this matter has acquired by reason of the immense circulation of 'black money' clearly and almost concededly involved in the affairs of the firm which is facing a prosecution.

2. These appeals by special leave arise out of the judgment dated March 5, 1981 of a learned single Judge of the Calcutta High Court in Matters Nos. 2829 of 1980 and 37 of 1981: (reported in AIR 1981 Cal 157). The appeals are, in substance, by the State of West Bengal while the contesting respondents are a firm called 'Sanchaita Investments' and its three partners, Swapn Kumar Guha, Sambhu Prasad Mukherjee and Beharilal Murarka. The two Matters in the Calcutta High Court were in the nature of

writ petitions under Article 226 of the Constitution which were filed by the firm and its partners for quashing an investigation commenced against the firm. Allowing the writ petitions, the High Court issued a writ of Mandamus directing the State Government and its concerned officers to "forthwith recall, cancel and withdraw the First Information Report..... and all proceedings taken on the basis thereof", since the searches, seizures and arrests made in pursuance of the said F.I.R. are, according to the High Court, illegal and without jurisdiction. It has directed that the books, documents and moneys seized during the search be returned to the firm and its partners, including a sum of Rs. 52,11,930.

3. The short question for consideration in these appeals by special leave is whether the F.I.R. lodged by the Commercial Tax Officer, Bureau of Investigation, against the firm and its partners discloses an offence under S. 3 of "The Prize Chits and Money Circulation Schemes (Banning) Act", 43 of 1978. The Act, which was passed by the Parliament, came into force on Dec. 13, 1978 and the two years' period allowed by S. 12 for winding up every kind of business relating to Prize Chits and Money Circulation Schemes expired on Dec. 12, 1980. The F.I.R., which was lodged the next day on Dec. 13, reads thus:

"To

The Deputy Superintendent of Police,
 Bureau of Investigation,
 10, Madan Street,
 Calcutta-72.
 Sir,

On a secret information that 'Sanchaita Investments' of 5-6, Fancy Lane, Calcutta, is carrying on business or promoting and/or conducting prize chit and/or money circulation scheme enrolling members of such chit and/or scheme, participating in those, and/or receiving and remitting monies in pursuance of such chits and/or scheme in violation of the provisions of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, inquiry was held secretly to verify correctness or otherwise of the aforesaid secret information. Enquiry reveals that the said Sanchaita Investments' is a partnership firm, partners being Shri Bihari Prasad Murarka, Shri Sambhu Mukherjee and Shri Swapn Kumar Guha and that it was floated in or around 1975. Enquiry further reveals that the said firm had been offering fabulous interest @ 48% per annum to its members until very re-

cently. The rate of interest has of late been reduced to 36% per annum. Such high rates of interest were and are being paid even though the loan certificate receipts show the rate of interest to be 12% only. Thus, the amount in excess of 12% so paid clearly shows that the 'Money Circulation Scheme' is being promoted and conducted for the making of quick and/or easy money. Prizes and/or gifts in cash were and are also awarded to agents, promoters and members too.

In view of the above, Sarvashri Bihari Prasad Murarka, Sambhu Mukherjee and Swapan Kumar Guha appear to have been carrying on business in the trade name of 'Sanchaita Investments' in prize chits and money circulation scheme in violation of S. 3 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 and are therefore, punishable under S. 4 of the said Act. Necessary action may therefore, be kindly taken against the aforesaid offenders along with other accomplices as provided in the law.

Yours faithfully,

Sd/-

Commercial Tax Officers,
Bureau of Investigation."

4. Section 4 of the Act provides that whoever contravenes the provisions of S. 3 shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees or with both, provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court, the imprisonment shall not be less than one year and the fine shall not be less than one thousand rupees. Though the F.I.R. is riddled with the "and/or" clauses more appropriate in deeds of conveyancing, it is clear from its tenor and is common ground that the gravamen of the accusation against the accused is that they are conducting a 'money circulation scheme'. The reference in the F.I.R. to 'prize chits' reflects but a common human failing to err on the safe side and the notorious effort of draftsmen to embrace as much as possible so that no argument may be shut out for want of pleading.

5. Since the sole question for consideration arising out of the F.I.R., as laid, is whether the accused are conducting a money circulation scheme, it is necessary to understand what is comprehended within the statutory meaning of that expression. S. 2 (c) of the Act provides:

"'Money circulation scheme' means any scheme, by whatever name called, for the making of quick or easy money, or for the receipt of any money or valuable thing as the consideration for a promise to pay money, on any event or contingency relative or applicable to the enrolment of members into the scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscriptions."

Grammar and punctuation are hapless victims of the pace of life and I prefer in this case not to go merely by the commas used in cl. (c) because, though they seem to me to have been placed both as a matter of convenience and of meaningfulness, yet, a more thoughtful use of commas and other gadgets of punctuation would have helped make the meaning of the clause clear beyond controversy. Besides, how far a clause which follows upon a comma governs every clause that precedes the comma is a matter not free from doubt. I therefore consider it more safe and satisfactory to discover the true meaning of cl. (c) by having regard to the substance of the matter as it emerges from the object and purpose of the Act, the context in which the expression is used and the consequences necessarily following upon the acceptance of any particular interpretation of the provision, the contravention of which is visited by penal consequences.

6. Commas or no commas, and however thoughtfully one may place them if they are to be there, I find it impossible to take cl. (c) to mean that any and every activity "for the making of quick or easy money" is comprehended within its scope. For the matter of that, I cannot believe any law to ban every kind of activity for making quick or easy money, without more, on pain of penal consequences. It is far too vague and arbitrary to prescribe that "whosoever makes quick or easy money shall be liable to be punished with fine or imprisonment". For then, in the absence of any demarcation of legitimate money-making activities from those which fall within the ban, the question whether the penal provision is attracted in a given case will depend upon the will and temper, sweet or sour, of the magistracy. Besides, speaking of law and morals, it does not seem morally just or proper to say that no person shall make quick or easy money, especially quick. A person who makes quick money may do so legiti-

mately by the use of his wits and wisdom and no moral turpitude may attach to it. One need not travel afar to find speaking examples of this. Indeed, there are honourable men (and now women) in all professions recognised traditionally as noble, who make quite quick money by the use of their talents, acumen and experience acquired over the years by dint of hard work and industry. A lawyer who charges a thousand rupees for a Special Leave Petition lasting five minutes (that is as far as a Judge's imagination can go), a doctor who charges a couple of thousands for an operation of tonsillitis lasting ten minutes, an engineer, an architect, a chartered accountant and other professionals who charge likewise, cannot by any stretch of imagination be brought into the drag-net of cl. (c). Similarly, there are many other vocations and business activities in which, of late, people have been notoriously making quick money as, for example, the builders and real estate brokers. I cannot accept that the provisions of cl. (c) are directed against any of these categories of persons. I do not suggest that law is powerless to reach easy or quick money and if it wills to reach it, it can find a way to do it. But the point of the matter is that it will verge upon the ludicrous to say that the weapon devised by law to ban the making of quick or easy money is the provision contained in S. 2 (c) of the "Prize Chits and Money Circulation Schemes (Banning) Act".

7. In order to give meaning and content to the definition of the expression 'money circulation scheme' which is contained in S. 2 (c) of the Act, one has, therefore, to look perforce to the adjectival clause which qualifies the words "for the making of quick or easy money". What is within the mischief of the Act is not "any scheme, by whatever name called, for the making of quick or easy money" simpliciter, but a scheme for the making of quick or easy money, "on any event or contingency relative or applicable to the enrolment of members into the scheme", (whether or not such money or thing is derived from the entrance money of the members of such scheme or their periodical subscriptions). Two conditions must, therefore, be satisfied before a person can be held guilty of an offence under S. 4 read with Ss. 3 and 2 (c) of the Act. In the first place, it must be proved that he is promoting or conducting a scheme for the making of quick or easy money and secondly, the chance or op-

portunity of making quick or easy money must be shown to depend upon an event or contingency relative or applicable to the enrolment of members into that scheme. The legislative draftsman could have thoughtfully foreseen and avoided all reasonable controversy over the meaning of the expression 'money circulation scheme' by shaping its definition in this form:

'money circulation scheme' means any scheme, by whatever name called,

(i) for the making of quick or easy money, or

(ii) for the receipt of any money or valuable thing as the consideration for a promise to pay money, on any event or contingency relative or applicable to the enrolment of members into the scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscriptions; I have reshaped the definition, in order to bring out its meaning clearly, without adding or deleting a single word or comma from the original text of S. 2 (c). The substance of the matter is really not in doubt: only the form of the definition is likely to create some doubt as to the meaning of the expression which is defined and, therefore, I have made a formal modification in the definition without doing violence to its language and indeed, without even so much as altering a comma.

8. There is another aspect of the matter which needs to be underscored, with a view to avoiding fruitless litigation in future. Besides the prize chits, what the Act aims at banning is money circulation schemes. It is manifestly necessary and indeed, to say so is to state the obvious, that the activity charged as falling within the mischief of the Act must be shown to be a part of a scheme for making quick or easy money, dependent upon the happening or non-happening of any event or contingency relative or applicable to the enrolment of members into that scheme. A 'scheme', according to the dictionary meaning of that word, is 'a carefully arranged and systematic programme of action', a 'systematic plan for attaining some object', 'a project', 'a system of correlated things'. (See Webster's New World Dictionary, and Shorter Oxford English Dictionary, Vol. II). The systematic programme of action has to be a consensual arrangement between two or more persons under which, the subscriber

agrees to advance or lend money on promise of being paid more money on the happening of any event or contingency relative or applicable to the enrolment of members into the programme. Reciprocally, the person who promotes or conducts the programme promises, on receipt of an advance or loan, to pay more money on the happening of such event or contingency. Therefore, a transaction under which, one party deposits with the other or lends to that other a sum of money on promise of being paid interest at a rate higher than the agreed rate of interest cannot, without more, be a 'money circulation scheme' within the meaning of S. 2 (c) of the Act, howsoever, high the promised rate of interest may be in comparison with the agreed rate. What that section requires is that such reciprocal promises, express or implied, must depend for their performance on the happening of an event or contingency relative or applicable to the enrolment of members into the scheme. In other words, there has to be a community of interest in the happening of such event or contingency. That explains why S. 3 makes it an offence to "participate" in the scheme or to remit any money "in pursuance of such scheme." He who conducts or promotes a money-spinning project may have manifold resources from which to pay fanciful interest by luring the unwary customer. But, unless the project envisages a mutual arrangement under which, the happening or non-happening of an event or contingency relative or applicable to the enrolment of members into the arrangement is of the essence, there can be no "money circulation scheme" within the meaning of S. 2 (c) of the Act.

9. Numerous persons lend their hard-earned monies in the hope of earning high returns. It is notorious that, eventually, quite a few of them lose both the principal and the interest, for no project can succeed against the basic laws of economics. Sharp and wily promoters pay A's money to B and B's to C in order to finance interest at incredible rates; and eventually, when a high-risk investment made by them at the cost of the credulous lenders fails, the entire arrangement founders on the rock of foolish optimism. The promoters, of course, have easy recourse to gadgets of the law of insolvency. It is difficult to hold that the lender, himself a victim of the machinations of the crafty promoter, is intended by the Act to be arraigned as an accused. I do not

think that any civilised law can intend to add insult to injury.

10. The question as to whether the First Information Report prima facie discloses an offence under S. 4 read with S. 3 of the Act has to be decided in the light of these requirements of S. 2 (c) of the Act. I have already reproduced in extenso the F.I.R. lodged by the Commercial Tax Officer, Bureau of Investigation. Analysing it carefully, and even liberally, it makes the following allegations against the firm 'Sanchaita Investments' and its three partners:

(1) The firm had been offering fabulous interest @ 48% per annum to its members, which rate of interest was later reduced to 36% per annum;

(2) Such high rate of interest was being paid even though the loan certificate receipts show that interest was liable to be paid at the rate of 12% per annum only; and

(3) The fact that interest was paid in excess of 12% shows clearly that a 'Money Circulation Scheme' was being promoted and conducted for the making of quick or easy money.

It seems to me impossible to hold on the basis of these allegations that any offence can be said to be made out prima facie under S. 3 of the Act. In the first place, the F.I.R. does not allege, directly or indirectly, that the firm was promoting or conducting a scheme for the making of quick or easy money, dependent on any event or contingency relative or applicable to the enrolment of members into the scheme. Secondly, the F.I.R. does not contain any allegation whatsoever that persons who advanced or deposited their monies with the firm were participants of a scheme for the making of quick or easy money, dependent upon any such event or contingency. The F.I.R. bears on its face the stamp of hurry and want of care. It seems to assume, what was argued before us by Shri Som Nath Chatterjee on behalf of the prosecution, that it is enough for the purposes of S. 2 (c) to show that the accused is promoting or conducting a scheme for the making of quick or easy money, an assumption which I have shown to be fallacious. An essential ingredient of S. 2 (c) is that the scheme for making quick or easy money must be dependent on any event or contingency relative or applicable to the enrolment of members into the scheme. A First Information

Report which does not allege or disclose that the essential requirements of the penal provision are *prima facie* satisfied, cannot form the foundation or constitute the starting point of a lawful investigation.

11. In answer to the writ petitions filed by the accused in the Calcutta High Court, affidavits were filed on behalf of the prosecuting agency, which do not improve matters in any way. The affidavit filed by Arun Kanti Roy, Deputy Secretary, Finance Department, Government of West Bengal, alleges that:

(i) The actual payment of a very high rate of interest against the professed rate of 12% attracted huge amounts of idle money into circulation;

(ii) The investment of money as collected is not under the regulatory control of the Reserve Bank of India or any other agency of the State dealing with credit control in relation to the country's economy.

(iii) The pooling of the purchasing power and the financial resources and the unfettered deployment thereof have resulted in the concentration of tremendous economic power in the hands of a few, posing a potential threat to the equilibrium of the country's economy;

(iv) The entire process is speculative in nature and directed towards luring away the investing public to the speculative market for making quick and easy money;

(v) The very basis of the so-called contractual arrangement between the firm and its depositors is founded on the fraudulent device to assure to the people a high rate of the interest, the major portion of which is paid through unaccounted for money, thereby encouraging the growth of such unaccounted money in the hands of the investing public;

(vi) The professed rate of interests is a mere subterfuge to provide a cloak of bona fides and legality to the underhand transactions, through which unaccounted for money comes into play in the market, generating further unaccounted for money, a part whereof goes back to the depositors in the form of the balance of interest over 12% paid in cash, month by month;

(vii) The firm did not have enough income or resources so as to be able to pay interest at such high rates;

(viii) The irresistible conclusion, therefore, is that interest was being paid out of the capital itself;

(ix) "The depositor becomes a member of the investment scheme of the firm by subscribing to it and the payment of the quick and easy money by way of high rate of interest is dependent upon the period of investment and/or efflux of time which are very much relative and/or applicable to the membership of the depositors of the scheme to which the depositor agrees to subscribe"; and

(x) In the process of its working, the scheme of the firm generates quick and easy money so as to render such scheme or arrangement a 'money circulation scheme' within the meaning of the Act.

12. The Assistant Commissioner of Police Shri Sunil Kumar Chakravarty has adopted these pleas and statements in his own affidavit.

13. It is clear from these averments that even at the stage when the State of West Bengal and its concerned officers submitted detailed affidavits to the High Court, there was no clear basis for alleging and no material was disclosed to show that, *prima facie*, the firm was promoting or conducting a scheme for making quick or easy money which was dependent upon an event or contingency relative or applicable to the enrolment of members into that scheme. The burden of the State's song is that the scheme conducted by the accused generates black money and will paralyse the economy of the country. These are serious matters indeed and it is unquestionable that a private party cannot be permitted to issue bearer bonds by the back door. The fact that the accused are indulging in an economic activity which is highly detrimental to national interests is a matter which must engage the prompt and serious attention of the State and Central Governments. But the narrow question for our consideration is whether on the basis of the allegations made against the accused, there is reason to suspect that they are guilty of an offence under S. 4 read with Ss. 3 and 2 (c) of the Act. The allegation which we have reproduced in cl. (ix) above from the affidavit of Arun Kanti Roy is the nearest that can be considered relevant for the purposes of S. 2 (c) of the Act. But even that allegation does not meet the requirement of that section since, what it says is that "the payment of quick and easy money by way of high rate of interest is dependent upon the period of investment and/or efflux of time which are very much relative and/or applicable to the membership of the depositors of the scheme to which the de-

positor agrees to subscribe". This is too tenuous to show that the scheme is dependent upon an event or contingency of the description mentioned in S. 2 (c), apart from the fact that the only participation which is alleged as against the depositors is that they become members of the "investment scheme" by subscribing to it. There is no allegation even in any of the affidavits filed on behalf of the State of West Bengal and its concerned officers that the depositors and the promoters are animated by a community of interest in the matter of the scheme being dependent upon any event or contingency relative or applicable to the enrolment of members into it. That being an essential ingredient of the offence charged, it cannot be said in the absence of any allegation whatsoever in that behalf, that there is "reason to suspect" the commission of that offence within the meaning of S. 157 of the Criminal P. C., so as to justify the investigation undertaken by the State authorities.

14. My learned Brother, A. N. Sen, J., has considered exhaustively the various authorities cited at the Bar by both the sides on the question as to the power of the courts to quash an investigation. I fully concur with his careful analysis of those authorities and would content myself with a broad indication of the trend of law bearing on the subject.

15. Shri Ashok Sen and Shri Siddhartha Shankar Ray pressed upon us with considerable insistence the principle reiterated in *W. H. King v. Republic of India*, 1952 SCR 418 at p. 424: (AIR 1952 SC 156 at p. 158), that a statute which creates an offence and imposes a penalty of fine and imprisonment must be construed strictly in favour of the subject. The principle that no person can be put in peril of his life and liberty on an ambiguity is well-established. But, as observed in *M. V. Joshi v. M. U. Shimpi*, (1961) 3 SCR 986 at pp. 993-994: (AIR 1961 SC 1494 at pp. 1497, 1498), when it is said that penal statutes must be construed strictly, what is meant is that the court must see that the thing charged is an offence within the plain meaning of the words used and it must not strain the words: "To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute", and that in case of doubt, the construction favourable to the subject should

be preferred. But I do not think that this rule of strict interpretation of penal statutes in any way affects the fundamental principle of interpretation, that the primary test which can safely be applied is the language used in the Act and, therefore, when the words are clear and plain, the court must accept the expressed intention of the Legislature. It is unnecessary to pursue this matter any further in view of the fact that the language of S. 2 (c) is, in my opinion, clear and admits of no doubt or difficulty.

16. In *R. P. Kapur v. State of Punjab*, (1960) 3 SCR 388 at pp. 392-393: (AIR 1960 SC 366 at pp. 868, 69), the question which arose for consideration was whether a first information report can be quashed under S. 561-A of the Criminal P. C. The Court held on the facts before it that no case for quashing the proceedings was made out but Gajendragadkar J., speaking for the Court observed that though ordinarily, criminal proceedings instituted against an accused must be tried under the provisions of the Code, there are some categories of cases where the inherent jurisdiction of the Court can and should be exercised for quashing the proceedings. One such category, according to the Court, consists of cases where the allegations in the F.I.R. or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises and it is a matter merely of looking at the F.I.R. or the complaint in order to decide whether the offence alleged is disclosed or not. In such cases, said the Court, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused.

17. In *S. N. Sharma v. Bipen Kumar Tiwari*, (1970) 3 SCR 946: (AIR 1970 SC 786), a first information report was lodged naming an Additional District Magistrate (Judicial) as the principal accused. His application under S. 159 of the Criminal P. C. asking that the Judicial Magistrate should himself conduct a preliminary inquiry was dismissed, but the Court observed that though the Criminal P. C. gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases, an aggrieved person can always seek a remedy by invoking the power of the High Court

under Art. 226 of the Constitution and that the High Court could issue a writ of mandamus restraining the police from misusing their legal powers.

18. Shri Som Nath Chatterjee has placed great reliance on the decision of this Court in *State of West Bengal v. S. N. Basak*, (1963) 2 SCR 52: (AIR 1963 SC 447), in which it was held that the statutory powers given to the police under Ss. 154 and 156 of the Criminal P. C. to investigate into the circumstances of an alleged cognizable offence without authority from a Magistrate cannot be interfered with by the exercise of powers under S. 439 or under the inherent powers conferred by S. 561A of the Code. It must be remembered that no question arose in that case as to whether, the allegations contained in the F.I.R. disclosed any offence at all. The contention of the accused in that case was that the statutory power of investigation given to the police under Chapter XIV of the Code is not available in respect of an offence triable under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 and that being so, the investigation undertaken by the police was without jurisdiction. That contention was negatived and, therefore, the application filed by the accused under Ss. 439 and 561A of the Code was dismissed.

19. In *Jehan Singh v. Delhi Administration*, (1974) 3 SCR 794: (AIR 1974 SC 1146), the application filed by the accused under S. 561-A of the Code for quashing the investigation was dismissed as being premature and incompetent, but that was because the Court found (per Sarkaria J., page 797 (of SCR): (at page 1148 of AIR) that prima facie, the allegation in the F.I.R., if taken as correct, disclosed the commission of a cognizable offence by the accused.

20. The only other decision to which I need refer is that of the Privy Council in *King-Emperor v. Khwaja Nazir Ahmad* (1944) 71 Ind App 203: (AIR 1945 PC 18), which constitutes, as it were, the charter of the prosecution all over, for saying that no investigation can ever be quashed. In a passage oft-quoted but much-misunderstood, Lord Porter, delivering the opinion of the Judicial Committee observed:

"In their Lordship's opinion, however, the more serious aspect of the case is to be found in the resultant interference by the court with the duties of the police. Just as it is essential that every one ac-

cused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to intervene in an appropriate case when moved under S. 491 of the Criminal P. C. to give directions in the nature of habeas corpus. In such a case as the present, however, the court's functions begin when a charge is preferred before it, and not until then." (at pp. 212-213 of Ind App): (at p. 22 of AIR).

I do not think that this decision supports the wide proposition canvassed before us by Shri Som Nath Chatterjee. In the case before the Privy Council, similar charges which were levelled against the accused in an earlier prosecution were dismissed. The High Court quashed the investigation into fresh charges after examining the previous record, on the basis of which it came to the conclusion that the evidence against the accused was unacceptable. The question before the Privy Council was not whether the fresh F.I.R. disclosed any offence at all. In fact, immediately after the passage which I have extracted above, the Privy Council qualified its statement by saying:

"No doubt, if no cognizable offence is disclosed, and still more, if no offence of any kind is disclosed, the police would have no authority to undertake an investigation."

If anything, therefore, the judgment shows that an investigation can be quashed if no cognizable offence is disclosed by the F.I.R. It shall also have been noticed, which is sometimes overlooked, that the Privy Council took care to

qualify its statement of the law by saying that the judiciary should not interfere with the police in matters which are within their province. It is surely not within the province of the police to investigate into a Report which does not disclose the commission of a cognizable offence and the Code does not impose upon them the duty of inquiry in such cases.

21. The position which emerges from these decisions and the other decisions which are discussed by Brother A. N. Sen is that the condition precedent to the commencement of investigation under S. 157 of the Code is that the F.I.R. must disclose, prima facie, that a cognizable offence has been committed. It is wrong to suppose that the police have an unfettered discretion to commence investigation under S. 157 of the Code. Their right of inquiry is conditioned by the existence of reason to suspect the commission of a cognizable offence and they cannot, reasonably, have reason so to suspect unless the F.I.R., prima facie, discloses the commission of such offence. If that condition is satisfied, the investigation must go on and the rule in Khwaja Nazir Ahmed will apply. The Court has then no power to stop the investigation, for to do so would be to trench upon the lawful power of the police to investigate into cognizable offences. On the other hand, if the F.I.R. does not disclose the commission of a cognizable offence, the Court would be justified in quashing the investigation on the basis of the information as laid or received.

22. There is no such thing like unfettered discretion in the realm of powers defined by statutes and indeed, unlimited discretion in that sphere can become a ruthless destroyer of personal freedom. The power to investigate into cognizable offences must, therefore, be exercised strictly on the condition on which it is granted by the Code. I may, in this behalf, usefully draw attention to the warning uttered by Mathew J. in his majority judgment in *Prabhu Dayal Deorah v. The District Magistrate, Kamrup*, (1974) 2 SCR 12 at pp. 22-23: (AIR 1974 SC 183 at p. 199), to the following effect:

"We say, and we think it is necessary to repeat, that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of per-

sonal liberty is largely the history of insistence on observance of procedure. Observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law."

23. For these reasons, which, frankly, are no different from those given by my learned Brother A. N. Sen, I am of the opinion that the investigation which has been commenced upon the First Information Report is without jurisdiction and must, therefore, be quashed. I do accordingly and direct that no further investigation shall take place in pursuance or on the basis of the F.I.R. dated Dec. 13, 1980 lodged by the Commercial Tax Officer, Bureau of Investigation, with the Deputy Superintendent of Police, Bureau of Investigation, Madan Street, Calcutta.

24. I am free to confess that it is with considerable regret that I have come to the conclusion that the investigation must be quashed. If the State authorities had applied their mind carefully to the requirements of S. 2 (c) of the Act, this appeal might have had a different story to tell, the bare outlines of which I must now proceed to narrate.

25. The firm 'Sanchaita Investments' commenced its business on July 1, 1975, its three partners contributing a total capital of Rs. 7000 (Rupees seven thousand). On Dec. 25, 1978 an advertisement appeared in the "Hindu" in the name of the firm, claiming falsely that its business was "approved by the Reserve Bank of India". Since the representation was likely to mislead the public, the Reserve Bank advised the firm in May 1979 to issue a suitable corrigendum, which the firm did.

26. On July 6, 1979, Shri Rudolph L. Rodrigues, a Member of the Lok Sabha, wrote a confidential letter to Shri Charan Singh, the then Deputy Prime Minister, complaining that the business of the firm was "a cover-up for a parallel banking system for black money". A copy of Shri Rodrigues' letter was forwarded by the Director, Department of Economic Affairs, Ministry of Finance, to the Chief Officer, Department of Non-Banking Companies, Reserve Bank of India, Calcutta, for inquiry. By his letter dated Aug. 7, 1979 the Chief Officer pointed out the difficulty in directing investigation into the affairs of the firm since, its capital being less

than Rs. one lakh, it did not come within the definition of a Non-Banking institution as provided in S. 54 (c) of the Reserve Bank of India Act, 1934. On Sept. 13, 1980 the Deputy Secretary, Finance Department, Government of West Bengal, wrote a letter to the Chief Officer requesting him to examine the question whether the business of the firm came within the purview of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 and if not, under which Act the affairs of the firm could be regulated. On Oct. 1, 1980, Shri Ashok Mitra, Finance Minister for the State of West Bengal, wrote a letter to Shri Venkataraman, Finance Minister to the Government of India, complaining that the firm was involved in high-risk investments and that large amounts of public moneys were kept in deposit with the firm, which were not subjected to any regulatory control. The letter of Shri Ashok Mitra appears to have been handed over informally to Dr. K. S. Krishnaswamy, Deputy Governor of the Reserve Bank, who, by his reply dated Oct. 22, 1980, informed Shri Mitra that the legal department of the Reserve Bank was of the opinion that the mere acceptance of loans by the firm would not ordinarily be covered by the Prize Chits and Money Circulation Schemes (Banning) Act, 1978. There was further correspondence on the subject between the authorities of the Government of India and the State Government, but nothing came out of it.

27. The Act came into force on Dec. 13, 1978 and immediately on the expiry of the two years' period of grace allowed by it, the F.I.R. was lodged against the firm on Dec. 13, 1980. On that day, the office of the firm at 5-6, Fancy Lane, Calcutta, was searched by the police, during the course of which a sum of Rupees 42,16,530 (Rupees forty two lacs, sixteen thousand, five hundred and thirty) was recovered. The amount was tied in separate bundles of notes of different denominations. Several books of accounts were also seized during the search.

28. On the same date, a search was carried out at the residence of Shambu Prosad Mukherjee, a partner of the firm, when the following articles were seized:

(1) One pass-book of Syndicate Bank, Gariahat Branch, Calcutta, in the name of "Apcar Ave Toon", 9, Royd Street, Calcutta-17. (The account was in a fictitious name and the pass-book shows that a sum of Rs. Twenty-eight crores was lying in credit in that account).

(2) A sum of Rs. 9,95,000 (Rs. nine lacs ninety-five thousand) tied in separate bundles of notes of the denomination of Rs. 100 and 50.

(3) A country-made 6 chamber revolver, with one bullet inside,

29. From the house of another partner, Biharilal Murarka, certain account books were seized.

30. During the course of investigation until Jan. 8, 1981 when it was stopped by an order of this Court, as many as eighty places were searched by the police and a large number of documents were seized. It is apparent from these documents that the firm was paying to its depositors interest at the rate of 48 per cent up to Sept. 1979 and 36 per cent thereafter for a short period. The interest was paid to each depositor every month by the agents who called on each depositor personally for that purpose. The interest in excess of 12 per cent was invariably paid in cash. The oncoming elections to legislative bodies in 1980 appear to have led to reduction in the rate of interest, since the firm's circulating capital was needed by "political parties". Which parties, I do not know, but this much is fairly certain from the facts which have emerged before us that the funds available to the firm were diverted frequently for the use of political parties.

31. Certain lists of agents were seized during the investigation which show that Code numbers were assigned to at least 84 of them. The agents have acquired large properties at various places, consisting of lands, apartments, cars etc. Some of the agents have started new business activities.

32. A staggering revelation which came to light as a result of the searches at the office of the firm is that, as of September 1, 1980, the firm was holding deposits to the tune of Rs. 73,51,23,500 (Rupees seventy-three crores, fifty-one lacs, twenty-three thousand and five hundred). These deposits were received by the firm from persons drawn from all parts of the country, the pride of place belonging to Calcutta, Bombay, Delhi, Madras and Hyderabad. Remittances also appear to have been received by the firm from overseas clients. A compilation prepared by the State authorities in pursuance of an interim order passed by this Court shows that the total amount of deposits made by persons who had deposited a sum of Rs. 10,000 or less each comes to Rs. 11,49,40,950/- (Rupees eleven crores

forty-nine lacs, forty-thousand, nine hundred and fifty).

33. The documents relating to the account in the fictitious name of "Apcar Ave Toon" show that a person alleged to bear that name was introduced to the Syndicate Bank, Gariahat Branch, Calcutta, by the firm's partner Sambhu Prosad Mukherjee. The pass-book relating to the account (Current Account No. 210) shows that the account was opened with a cash deposit of Rs. 28 lacs. A total sum of Rupees twenty-seven crores, ninety-seven lacs, eighty-six thousand and odd was deposited in that account until December 6, 1980, all deposits being in cash. Such cash deposits varied often between 50 to 80 lacs at a time. The amount of nearly Rs. 28 crores was withdrawn from the account steadily from Nov. 11, 1980. The account was closed on Dec. 6, 1980, that is, a week before the F.I.R. was lodged on Dec. 13, 1980. Some of the entries in the pass-book do not tally with the Bank's Ledger.

34. A study of Current Account No. S-502 in the name of the firm with the United Bank of India, High Court Branch, Calcutta, shows that the firm had invested several lacs of rupees in various concerns numbering about forty. Lacs of rupees have been transferred by the firm to various concerns.

35. Documents seized from the office premises of the firm show that the partners and their family members are insured with the L.I.C. in heavy amounts. They have acquired large properties, particularly in Bombay.

36. Several offices and concerns in Bombay were searched by the police and interesting discoveries were made. Their magnitude and variety are too large for the scope of this judgment. I will close this narrative by saying that the income-tax returns of Shambhu Prosad Mukherjee reveal that he had shown a sum of Rs. 8,00,000 as prizes received from Delhi Lotteries in 1979 and that the firm has not filed any income-tax return after the financial year ending June 30, 1977. It had asked for an extension of time on the ground that its accounts were not finalised but the Department rejected that prayer on Dec. 9, 1980. What further indulgence they have managed cleverly to secure is not yet known.

37. These facts disclose a bizarre state of affairs. A token capital of Rs. 7,000 has begotten a wealth of crores of rupees within a span of five years. A Bank ac-

count opened by the firm in a fictitious name had a sum of Rs. twenty-eight crores in it, which was withdrawn within a week before the lodging of the F.I.R. Interest was being paid to depositors at the incredible rate of 48 p.c. p.a. The firm had no ostensible source of income from which much exorbitant amounts could be paid and its account books, such as were seized from its head-office, give no clue to its income or its assets. The partners of the firm have become millionaires overnight. Clerks and Chemists that they and some of their agents were in 1975, today they own properties which will put a prince to shame. "Rags to riches" is how one may justly describe this story of quick and easy enrichment. There is no question that this vast wealth has been acquired by the firm by generating and circulating black money. Indeed, rightly did Shri Ashok Sen appearing for the firm, ask us to be free to proceed on the assumption that the exorbitant amount of interest was being paid from out of unaccounted money.

38. In these circumstances, though I see no alternative save to stop all further investigation on the basis of the F.I.R. as laid, no offence being disclosed by it under S. 4 of the Act, I am unable to accept the contention of Shri Ashok Sen that all documents, books, papers and cash seized so far during the investigation should be returned to the firm and its partners forthwith. The firm appears to be on the brink of an economic crisis, as any scheme of this nature is eventually bound to be. Considering the manner in which the firm has manipulated its accounts and its affairs, I have no doubt that it will secret the large funds and destroy the incriminating documents if they are returned to it. The State Government, the Central Government and the Reserve Bank of India must be given a reasonable opportunity to see if it is possible, under the law, to institute an inquiry into the affairs of the firm and, in the meanwhile, to regulate its affairs. I consider such a step essential in the interests of countless small depositors who, otherwise, will be ruined by being deprived of their life's savings. The big black-money bosses will take any loss within their stride but the small man must receive the protection of the State, which must see to it that the small depositors are paid back their deposits with the agreed interest as quickly as possible. I therefore direct that the documents, books, papers, cash and other articles

seized during the investigation shall be retained by the police in their custody for a period of two months from today and will be returned, on the expiry of that period, to persons from whom they were seized, subject to any lawful directions which may be given or obtained in the meanwhile regarding their custody and return.

39. With this modification, I agree respectfully with Brother A. N. Sen that the appeals be dismissed.

A. VARADARAJAN, J.:— 40. I agree with the judgment and the final order proposed by the learned Chief Justice.

AMARENDRA NATH SEN, J.:— 41. This appeal by special leave has been filed by the State of West Bengal and three officers of the State against an order passed by a learned single Judge of the Calcutta High Court. The facts material for the purpose of this appeal have been fully set out in the judgment of the learned single Judge of the Calcutta High Court. The facts material for the purpose of this appeal may, however, be briefly indicated:

Sanchaita Investments is a partnership firm duly registered under the Partnership Act. Sanchaita Investments (hereinafter referred to as the Firm) has its principal place of business at Nos. 5 and 6 Fancy Lane, Calcutta. Shambhu Prasad Mukherjee, Bihari Lal Murarka and Swapan Kumar Guha are the three partners of the Firm. The capital of the partnership firm is Rs. 7,000. The firm carries on the business as financiers and investors and in its business the firm accepts loans or deposits from the general public, for different periods repayable with interest @ 12% per annum. Under the terms of deposits, the depositors have a right to withdraw their deposits with the firm at any time before the expiry of the fixed period of the deposit. In case of premature withdrawal, the depositors however loses interest of 1% and is paid interest @ 11% per annum. Under the terms and conditions of the deposits, the firm has also the liberty to repay the amount with interest to any depositor at any time before the expiry of the stipulated period of the deposit and in the event of such repayment by the firm, the firm is not required under the terms and conditions of the deposit or loan, to give any reason. It appears that the firm has been carrying on its business on a very extensive scale.

42. In the year 1978, the Parliament passed an Act called the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 (hereinafter referred to as the Act).

43. On the 13th Dec., 1980, the Commercial Tax Officer, Bureau of Investigation lodged a complaint of violation of the Act by the firm with the Police. The F.I.R. has been set out in full in the judgment of the learned Trial Judge and the same reads as follows:—

13-12-1980

The Deputy Superintendent of Police,
Bureau of Investigation,
10, Madan Street,
Calcutta-72,
Sir,

On a secret information that 'Sanchaita Investments' of 5 and 6 Fancy Lane, Calcutta, is carrying on business of promoting and/or conducting prize chit and/or money circulation scheme enrolling members of such chit and/or scheme, participating in these, and/or receiving and remitting monies in pursuance of such chits and/or scheme in violation of the provisions of the Prize Chits & Money Circulation Scheme (Banning) Act, 1976, Inquiry was held secretly to verify correctness of otherwise of the aforesaid secret information. Enquiry reveals that the 'said' 'Sanchaita Investments' is a Partnership firm, partners being Shri Behari Prasad Murarka, Sri Sambhu Mukherjee and Swapan Kumar Guha and that it was floated in or around 1975. Enquiry further reveals that the said firm had been offering fabulous interest @ 48% per annum to its members until very recently. The rate of interest has of late been reduced to 36% per annum. Such high rates of interest were and are being paid even though the loan certificate receipts show the rate of interest to be 12% only. Thus, the amount in excess of 12% so paid clearly shows that the 'Money Circulation Scheme' is being promoted and conducted for the making of quick and/or easy money, prizes and/or gifts in cash were and are also awarded to agents, promoters and members too.

In view of the above, Sarvashri Bihari Prasad Murarka, Sambhu Prasad Mukherjee and Swapan Kumar Guha appear to have been carrying on business in the trade name of 'Sanchaita Investments' in prize chits and money circulation scheme in violation of S. 3 of the Prize Chits and Money Circulation Scheme (Banning)

Act, 1978 are therefore, punishable under S. 4 of the said Act. Necessary action may, therefore, be kindly taken against the aforesaid offenders along with other accomplice as provided in the law.

Yours faithfully,

Sd/- Illegible

13-12-1980

Commercial Tax Officer, Bureau of Investigation."

44. On the 13th of Dec., two of the partners of the firm were arrested. The office of the firm and also the houses of the partners were searched. Various documents and papers were seized and a large amount of cash was also seized from the office and also from the residence of one of the partners. Two partners who were arrested were, however, thereafter enlarged on bail.

45. The firm and its two partners, namely, Shambhu Prasad Mukherjee and Bihari Lal Murarka filed this writ petition in the High Court challenging the validity of the F.I.R. and the proceedings arising out of the same including the validity of the searches and seizures of documents, papers and cash. The respondents in the writ petition were six. The first respondent was the State of West Bengal, respondent No. 2 was the Officer who had lodged the F.I.R., respondent No. 3 was the Assistant Commissioner of Police and Superintendent of Police, Bureau of Investigation, and respondent No. 4 was the Investigating Officer in the cases pending before the Chief Metropolitan Magistrate, Calcutta. Respondent No. 5 was the Reserve Bank of India and respondent No. 6 was the Union of India.

46. In brief the case made by the firm and its partners in the writ petition is that the firm is a non-banking financial institution which carries on business of accepting deposits or loans from the general public on terms and conditions mentioned in the agreement of loan or deposit, pays interest to persons who invest or advance money to the firm in terms of the agreement between the parties and repays all amounts received from the parties with interest in terms of the agreement between the parties. The further case made by the writ petitioners in the writ petition is that the amounts which they receive from parties are re-invested by them and out of the investments made by the firm, the firm pays the interest to the depositors and also the principal amount deposited by them in

terms of the agreement between the parties. In the writ petition, there is a denial of the allegations made in the F.I.R. and the case is further made that even if the allegations made in the F.I.R. are assumed to be correct, there cannot be any question of any violation of the Act and no offence under the Act is disclosed. It is the positive case of the writ petitioners in the writ petition that the Act has no application to the firm. In the writ petition, the validity of the F.I.R. and the proceeding arising therefrom is challenged mainly on the ground that the F.I.R. does not disclose any offence under the Act which does not apply to the firm and there can be no question of any violation of any provisions of the Act which has no application to the firm at all.

47. In answer to the averments made in the writ petition, an affidavit affirmed by Shri Arun Kanti Roy, was filed on behalf of respondents Nos. 1 and 2, an affidavit affirmed by Shri Sunil Kumar Chakravorty on behalf of respondents Nos. 3 and 4 was filed and an affidavit affirmed by Shri Rani Annaji Rao on behalf of the Reserve Bank of India was also filed. In the affidavit affirmed by Arun Kanti Roy, Deputy Secretary, Finance Department and Ex-officio Director of Small Savings, Government of West Bengal, on behalf of respondents Nos. 1 and 2, that is, the State of West Bengal and Shri B. K. Kundu, there is an assertion that the respondents come within the mischief of the Act and they have violated S. 3 of the Act. The relevant averments are contained in paragraphs 6, 7, 8, and 9 of the said affidavit and it is necessary to set out the same in their entirety:—

"6. With reference to paragraphs 3 and 4 of the petition, I say that the petitioner-firm accepts loans and/or deposits from all and sundry for varying periods without any authority of law. Although the professed rate of interest of such deposit is at the rate of 12% per annum, the petitioner firm was actually paying interest at the rate of 48% per annum, which was recently reduced to 36% per annum. The actual payment of such high rate of interest against the professed rate of 12% attracts huge amount of idle money into circulation and the investment of money, as collected is not under the regulatory control of the Reserve Bank of India or any other agency of the State dealing with credit control in relation to the country's economy. The receipt of such money from the members of public at such high rate of interest is without any,

letters as against the case of the receipt of money by banking companies as also non-banking companies which are regulated under different provisions of law, to which I will crave reference at the time of hearing, if necessary. The pooling of the purchasing power and/or the financial resources and the deployment thereof being unfettered has resulted in the concentration of tremendous economic power in the hands of a few posing a potential threat to the equilibrium of the country's economy. The terms of the deposits are unilaterally determined without any scrutiny by the Reserve Bank of India or with reference to the norms as to the credit control which the said Bank lays down and follows from time to time. The acceptances of such deposits from the members of public with unrestricted use of the moneys so collected are completely repugnant to the accepted modes of public savings and investment thereof for generation of goods and services contributing to the economic growth of the country. The entire process is speculative in nature and directed towards luring away the investing public to the speculative market for making quick and easy money. These are some of the activities which are sought to be banned by the banning provisions of the said Act, which has replaced similar regulatory measures contained in the several directions issued by the Reserve Bank of India under the Reserve Bank of India Act, 1934 to the various financial institutions and non-banking companies. The present Act is applicable not only to such companies but also to individuals and firms. All allegations contrary to and save as aforesaid are denied.

7. With reference to paragraph 5 of the petition I call upon the petitioner to disclose full particulars of their deposit scheme, which if disclosed will go to show that the terms and conditions are wholly arbitrary and contrary to the economic norms. The very basis of the so-called contractual arrangement between the petitioner firm and its depositors is founded on the fraudulent device to assure the people with a high rate of interest, the major portion of which is paid through unaccounted for money, thereby encouraging growth of such unaccounted for money in the hands of the investing public. The professed rate of interest is a mere subterfuge to provide a cloak of bona fide and legality over the underground transactions through which unaccounted for money comes into play in

the market generating further unaccounted for money, a part thereof goes back to the depositors in the form of the balance of interest over 12% paid in cash month by month. All allegations contrary to and save as aforesaid are denied.

8. With reference to paragraph 8 of the petition I say that the petitioners have been very much working on the above scheme to which the depositors have subscribed. Whether such deposits are one time deposits and whether such deposits actually earn income in excess of the interest actually paid to the depositors or (sic) a matter of detailed investigation, which were in progress until the same was stopped by the order of the learned Court of Appeal passed on 8th Jan., 1981. From whatever particulars are so far available to the answering respondents it can be stated that the firm did not have so much income as the quantum of interest that was being paid by it and the irresistible conclusion from such state of affairs is that payment of interest was being made out of capital itself. All allegations contrary to and save as aforesaid are denied.

9. With reference to paragraph 7 of the petition I reiterate the statements made hereinbefore and deny all allegations contrary thereto. I specifically deny that no quick or easy money is accepted or received by the depositors or lenders or that payment of any such money is not contemplated or made by the firm as purported to be alleged. The depositor becomes a member of the investment scheme of the company by subscribing to it and the payment of the quick and easy money by way of high rate of interest is dependent upon the period of investment and/or efflux of time which are very much relative and/or applicable to the membership of the depositors of the scheme, to which the depositor agrees to subscribe. In the process of its working the scheme of the firm generates quick and easy money so as to render such scheme or arrangement as a money circulation scheme within the meaning of the said Act. All allegations contrary to and save as aforesaid are denied."

48. The following further averments contained in paragraph 22 and in paragraph 30 of the said affidavit may also be noted:

"22"

I further say that payment of interest at the clandestine rate of 36% or 46% as against the aforesaid rate of 12% is in the

context of the scheme promoted and conducted by the petitioners tantamount to activity which is banned under the banking provisions of the said Act.

30.

No question of the depositors being ruined should arise if the petitioners had been running their business on sound economic line and had invested the fund collected from the depositors in safe and sound investment. The very fact that the petitioners are apprehensive of innumerable depositors being ruined goes to show that they engaged themselves and also the depositors in the speculative market and have rendered the investment insecure by reasons of the very nature of the business i.e. money circulation scheme, transacted by them."

In the affidavit affirmed by Shri Sunil Kumar Chakravorty, Assistant Commissioner of Police and Deputy Superintendent of Police, Bureau of Investigation, Government of West Bengal, Finance, Taxation Department and filed on behalf of respondents Nos. 3 and 4, the deponent adopts the statements made in the affidavit of Arun Kanti Roy and the deponent denies that the searches and seizures were unlawful and illegal. The deponent further stated that as a result of the searches effected a mass of documents and a large amount of cash had been seized and the documents were being scrutinised.

49. In the affidavit affirmed by Sri Rani Annaji Rao, filed on behalf of Reserve Bank of India, the deponent has stated that the Reserve Bank of India which has no regulatory control over the firm has been unnecessarily made a party to the proceeding. It has been further stated in the said affidavit that as desired by the parties and the Court, the Reserve Bank of India was placing the materials which had come to the knowledge of the Reserve Bank. In this affidavit reference has been made to certain correspondence between the State Finance Minister, Union Finance Minister and the Deputy Governor of the Reserve Bank of India and also to various queries made and the enquiries made by the Reserve Bank of India. It has been further stated that the view of the legal department of the Reserve Bank on the basis of the enquiries made had been indicated to the Finance Minister of the State of West Bengal. In this connection it will be relevant to set out two letters which have been annexed to the said affidavit filed on behalf of

the Reserve Bank of India and are annexures D and E thereto. Annexure D is the copy of a letter addressed by Shri Ashok Mitra, State Finance Minister to the Union Minister for Finance and the said letter reads as follows:—

"Informally handed over to
DG (K) at Calcutta,

Ashok Mitra

D. O. No. IM. 28-2-80

Calcutta, October 1, 1980

Dear Shri Venkataraman,

In the context of the action being taken by the Government of West Bengal under the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, a question has arisen whether an organisation called "Sanchaita Investments" with the address at 5 & 6, Fancy Lane, Calcutta-1 come within the purview of the above Act. A reference in the matter has been made by our authorised officer under the above act to the Chief Officer, Department of Non-Banking Companies, Reserve Bank of India, Calcutta today. I am enclosing a copy of an advertisement published by the above organisation in the local newspapers as also a copy of a loan certificate receipt issued by the said organisation. I may mention that the authorised officer has issued notice under the above Act to a "Sanchaita Savings Scheme (P.) Ltd." which is to be distinguished from "Sanchaita Investments". It appears that the organisation called "Sanchaita Investments" is receiving large amount of monies from the public ostensibly as loans, and in lieu they are issuing loan certificates receipts. While we have no documentary evidence, the news is strongly circulating in the market that the organisation is in fact offering rates of interest as high as 30 to 40 per cent even though the loan certificate receipts indicate a rate of interest of 12 per cent only. There seems reasonable grounds for suspicion that this organisation is involved in extremely high-risk investments which only can enable them to pay such rates of interest. Since the security of monies deposited by the public is involved, we would suggest that a thorough enquiry be conducted by the Government of India into the activities of this organisation particularly for finding out whether they are infringing provisions of any relevant statute. It is felt necessary to conduct such an investigation on an urgent basis since large amounts of public monies are reported to be kept with this organisation, which does not seem as yet to have sub-

jected to any regulatory control. We are meanwhile awaiting a reply to our reference (copy enclosed) to the Reserve Bank of India regarding the applicability of the Prize Chits & Money Circulation Schemes (Banning) Act, 1978 to this organisation.

With regards,

Yours sincerely,
Sd/- Ashok Mitra

Shri R. V. Vankataraman,
Union Minister for Finance,
North Block,
New Delhi-110001".

Annexure E is a letter by Sri K. S. Krishnaswamy, Deputy Governor of Reserve Bank to Dr. Ashok Mitra, State Finance Minister. The said letter is also hereunder set out:—

"D. O. DNBC No. 2020/102 (Gen) LO-80/81
22nd Oct., 1980

My dear Ashok, Sanchaita Investments,

You might recall that during my recent visit to Calcutta, you had sent me a copy of your D. O. Letter dated October 1, 1980 to Shri Venkataraman, Union Minister for Finance as also of a letter dated Sept. 30, 1980 addressed to our Chief Officer, DNBC, Calcutta, in connection with the above firm. I have had the position examined by our Legal Department. According to them (vide extract of the note dated 17th Oct., 1980, enclosed for your confidential information) the acceptance of loans simpliciter by the firm by issue of receipts (as per the specimen received by us from our Calcutta Office) without floating any scheme or arrangement would not ordinarily be covered by the definition of "Prize Chit" and hit by the provisions of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978. However, you may also like to consult your Legal Adviser on the subject.

2. As you may know, there are a few writ petitions pending in the Calcutta High Court where the interpretation of S. 2 (e) of the Banning Act is involved. In that context I have thought it advisable to write to you on a confidential basis, rather than send a separate official reply. I shall therefore be grateful if you could leave instructions with your staff to keep this matter and the views of our legal department strictly confidential.

With warm regards,

Sd/- K. S. Krishnaswamy
Dr. Ashok Mitra, Minister of Finance."

50. Further supplementary affidavits had also been filed. On consideration of

the facts and circumstances of this case and the materials which were placed before the learned Judge, the learned Judge came to the conclusion that the Act did not apply to the firm and the learned Judge further held that the searches and seizures were also wrongful, illegal and improper; and in view of his finding the learned Judge quashed the proceedings and directed the return of all documents and the refund of cash monies seized, to the writ petitioners. It appears from the judgment of the learned Judge that the matter had been very fully argued before him and the learned Judge in an elaborate judgment had considered the arguments advanced before him and thereupon recorded his findings and passed the order allowing the said writ petition.

51. Against the judgment and order passed by the learned Judge, the State of West Bengal and its three officers have preferred this appeal with special leave granted by this Court. The writ petitioners, the Reserve Bank of India and Union of India have been made respondents in this appeal. It does not appear that Union of India has participated in the proceedings before the learned Judge and no affidavit on behalf of the Union of India appears to have been filed before the learned Judge.

52. Mr. Som Nath Chatterjee, learned counsel appearing on behalf of the appellant has attacked the judgment under appeal on the main ground that the learned Judge in this extraordinary jurisdiction should not have held that the Act has no application to the respondent-Firm and should not have on the basis of the said finding interfered with the investigation into the affairs of the firm. Mr. Chatterjee contends that the question of applicability of the Act will only come for consideration after the investigation has been completed and all relevant materials have been gathered on such investigation. It is the contention of Mr. Chatterjee that at the investigation stage, the Court does not interfere and does not quash any proceedings before the investigation has been completed. In support of this contention, Mr. Chatterjee has referred to a number of decisions of this Court. I shall consider the relevant decisions referred to by Mr. Chatterjee at the appropriate time. Mr. Chatterjee has submitted that after the investigation has been completed and all relevant materials have been gathered a charge under the Act may or may not be framed against the appellant firm for violation

of the provisions of the Act. It is his submission that if the materials collected do not indicate any infringement of the Act, no charge against the firm will be preferred, and all the accused persons will be discharged; if, on the other hand, materials gathered disclose an offence under the Act, proper charge against the accused persons will be framed and it will be open to the accused persons to raise the plea in the course of the prosecution that no offence under the Act has been committed by them and the Act has no application to the transactions of the firm and to the firm.

53. In the case of *State of West Bengal v. S. N. Basak*, (1963-2 SCR 52): (AIR 1963 SC 447), this Court held at pages 55-56 (of SCR): (at p. 448 of AIR) as follows:—

"The powers of investigation into cognizable offences are contained in Chapter XIV of the Code of Criminal Procedure. Section 154 which is in that Chapter deals with information in cognizable offences and S. 156 with investigation into such offences and under these sections the police has the statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and this statutory power of the Police to investigate cannot be interfered with by the exercise of power under S. 561-A of Criminal P. C. As to the powers of the judiciary in regard to statutory right of the police to investigate, the Privy Council in *King Emperor v. Khwaja Nazir Ahmed* (1944) 71 Ind App 203, 212: (AIR 1945 PC 18 at p. 22) observed as follows:—

"The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under S. 491 of the Criminal P. C. to give directions in the nature of habeas corpus. In such a case as the present, however, the court's functions begin when a charge is preferred before it, and not until then. It has sometimes been thought that S. 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so, the section give no new powers, it only provides that those which the Court already inherently possesses shall be preserved and is inserted as their Lordships think, lest it should be con-

sidered that the only powers possessed by the Court are those expressly conferred by the Criminal P. C. and that no inherent powers had survived the passing of that Act."

With the interpretation which has been put on the statutory, duties and powers of the police and of the powers of the Court, we are in accord. The High Court was in error therefore in interfering with the powers of the police in investigating into the offence which was alleged in the information sent to the officer-in-charge of the police station."

54. In the case of *State of Bihar v. J. A. C. Saldhana*, (1980-2 SCR 16): (AIR 1980 SC 326), this Court at pp. 39-40 (of SCR): (at pp. 337, 338 of AIR) observed:—

"The next contention is that the High Court was in error in exercising jurisdiction under Art. 226 at a stage when the Addl. Chief Judicial Magistrate who has jurisdiction to entertain and try the case has not passed upon the issues before him, by taking upon itself the appreciation of evidence involving facts about which there is an acrimonious dispute between the parties and giving a clean bill to the suspects against who the first information report was filed. By so directing the learned Addl. Chief Judicial Magistrate the judgment of the High Court virtually disposed of the case finally. As we are setting aside the judgment of the High Court with the result that the case would go back to the learned Additional Chief Judicial Magistrate, it would be imprudent for us to make any observation on facts involved in the case.

There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take cognizance of the offence under

S. 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in Section 173 (8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence proved to the satisfaction of the Court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate".

Same views have been reiterated by this Court in the other decisions which were cited by Mr. Chatterjee. In the case of *S. N. Sharma v. Bipen Kumar Tiwari*, (1970-3 SCR 946): (AIR 1970 SC 786), this Court at p. 951 (of SCR): (at pp. 788, 89 of AIR), referred to the observations of the Privy Council in the case of *King Emperor v. Khwaja Nazir Ahmed*, (1944) 71 Ind App 203: (AIR 1945 PC 18), which have been quoted in the judgment of this Court in the earlier decision and then proceeded to hold at pp. 951-952 (of SCR): (at p. 789 of AIR):—

"Counsel appearing on behalf of the appellant urged that such an interpretation is likely to be very prejudicial particularly to Officers of the Judiciary who have to deal with cases brought up by the police and frequently give decisions which the police dislike. In such cases, the police may engineer a false report of a cognizable offence against the judicial officer and may then harass him by carrying on a prolonged investigation of the offence made out by the report. It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable person can always seek a remedy by invoking the power of the High Court under Art. 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers".

55. Relying on these decisions and the principles enunciated therein, Mr. Chatterjee has argued that the learned Judge clearly erred in interfering with the investigation and quashing the proceedings

at the stage of investigation before framing of charges against the accused persons. Mr. Chatterjee argues that there is no allegation of mala fide in the instant case and the learned Judge has also come to a conclusion that there is no case of any mala fide on the part of the appellants. Mr. Chatterjee has submitted that the materials which have been gathered as a result of the investigation which could be carried on only for a short while go to indicate that the transactions of the firm are not above board and they are not what they pretend or purport to be. It is his submission that materials gathered clearly indicate that though the loan certificates stipulate interest to be paid @ 12% a much larger sum by way of interest ranging between 36% to 48% is actually paid to the depositors, and the amount which is paid in excess of the rate stipulated in the loan certificates is paid in cash in a clandestine manner, depriving and defrauding revenue of its legitimate dues. Mr. Chatterjee comments that the payment of interest in this clandestine manner at a very high rate which is not shown or otherwise accounted for results not only in generation of black-money, but paralyses the economy of the State. Mr. Chatterjee has further commented that in view of this allurements to the depositors of payment of large sums of money in a clandestine manner, the firm which has a share-capital of only Rs. 7,000 has succeeded in alluring depositors and the deposits received by the firm with the capital of Rs. 7,000 now exceed crores of rupees. Mr. Chatterjee submits that a firm which carries on clandestine business of this nature is not entitled to invoke the extraordinary jurisdiction conferred on the Court under Art. 226 of the Constitution.

56. Mr. Chatterjee has contended that the violation of S. 3 of the Act has been alleged and it is his contention that the nature of business carried on by the firm indicates that the firm is conducting a 'Money Circulation Scheme'. According to Mr. Chatterjee, 'Money Circulation Scheme' by virtue of its definition in Section 2 (c) of the Act means any scheme, by whatever name called, for the making of quick or easy money. It is his argument that the transactions disclose that the firm and the depositors are both trying to make quick or easy money, the scheme being that the depositors will deposit money against certificate stipulating interest to be paid @ 12% but they will in fact be paid interest at a much

higher rate and thereby make quick or easy money and the firm invests the money received from the depositors in such transactions as to enable them to earn easy or quick money. Mr. Chatterjee has further argued that money circulation scheme has to be interpreted to mean any scheme for the making of quick or easy money, or for the receipt of any money or valuable thing as the consideration for a promise to pay money on any event or contingency relative or applicable to the enrolment of members into the scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscription. Further investigation according to Mr. Chatterjee, can only show whether the scheme of making quick or easy money depends on any contingency relative in the enrolment of members into the scheme. Mr. Chatterjee submits that the question of proper interpretation of the provisions of the Act and also of what money circulation scheme means, should come up only after investigation has been completed and all relevant materials have been collected. It is Mr. Chatterjee's submission that the interpretation of the provisions of the Act and particularly what 'Money Circulation Scheme' means, is not to be made in a hypothetical way in the absence of relevant materials being gathered on completion of investigation. Mr. Chatterjee has argued that after all the materials have been collected on completion of the investigation, it may be that materials may show that the firm is not conducting a Money Circulation Scheme and no charge against the firm may at all be preferred; if, however, on the other hand, the materials, indicate that the firm is conducting a money circulation scheme and a charge is preferred, it will be open to the accused persons to take the defence that the business conducted by them is not one which will be considered to be a money circulation scheme within the meaning of the Act. As I have earlier observed, the main grievance of Mr. Chatterjee is that the Court should (not) have interfered at the stage of investigation and quashed the proceedings.

57. Mr. Chatterjee has next contended that S. 7 of the Act, clearly empowers a Police Officer not below the rank of an officer in charge of a police station to enter, search and seize in the manner provided in the said section. It is Mr. Chatterjee's contention that the searches have

been carried out duly in terms of the provisions contained in the said section and cash money and other books and documents have been lawfully seized in terms of the provisions contained in the said section. Mr. Chatterjee has further submitted that even if there had been any irregularity in the matter of searches and seizure, the searches and seizure are not rendered illegal and void as a result thereof. Various decisions were also referred to by Mr. Chatterjee in support of his submissions.

58. Mr. A. K. Sen, learned counsel appearing on behalf of the firm has submitted that the learned Judge on a proper consideration of all the relevant materials and the provisions of the Act has correctly come to the conclusion that no offence under the Act is disclosed and the Act has no application to the firm and in that view of the matter the learned Judge was perfectly justified in quashing the proceedings against the firm, and in directing the return of the documents and cash money seized by the police to the firm. Mr. Sen has argued that investigation has to be done when an offence is disclosed for collecting materials for establishing an offence. It is the argument of Mr. Sen that if no offence is disclosed there cannot be any investigation and any investigation when no offence is disclosed by the F.I.R. and the other materials, means unnecessary harassment for the firm and its partners and illegal and improper deprivation of their liberty and property. Mr. Sen submits that it is no doubt true that when an offence is disclosed, the Court normally does not interfere with the investigation into an offence. He, however, contends that when no offence is disclosed, it, indeed, becomes the duty of the Court to interfere with any investigation which is improperly and illegally carried on to the serious prejudice of the persons. In support of this contention Mr. Sen has referred to the decision of the Judicial Committee in the case of *King Emperor v. Khwaja Nazir Ahmed* (1944-71 Ind App 203: AIR 1945 PC 18) (supra) and has relied on the following observations at p. 213 (of Ind App): (at p. 22 of AIR):—

"No doubt, if no cognizable offence is disclosed and still more, if no offence of any kind is disclosed, the police would have no authority to undertake investigation."

In this connection, Mr. Sen also referred to the decision of this Court in the case of *R. P. Kapur v. State of Punjab*,

(1960) 3 SCR 388 : [AIR 1960 SC 866] and has placed very strong reliance on the following observations at p. 393 (of SCR): (at p. 869 of AIR):—

"Cases may also arise where the allegations in the first information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person."

Mr. Sen has also referred to the decision of this Court in *Jehan Singh v. Delhi Administration*, (1974) 3 SCR 794 : (AIR 1974 SC 1146); in which the aforesaid observations made by Gajendragadkar, J. in the case of *R. P. Kapur v. State of Punjab* (AIR 1960 SC 866) (supra) have been reproduced and reiterated. Mr. Sen further points out that in the case of *S. N. Sharma v. Bipin Kumar Tiwari* (1970-3 SCR 946 : AIR 1970 SC 786) (supra), this Court at p. 951 (of SCR): (at pp. 788, 789 of AIR) recognises that "in appropriate cases the aggrieved person can always seek remedy by invoking powers of the High Court under Art. 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers".

59. Mr. Sen has argued that the learned Judge having properly appreciated the legal position has made the correct approach to the consideration of the present case. It is his argument that the learned Judge has carefully considered the materials which have been placed before him including the F.I.R. and he has properly analysed the provisions of the Act and on a proper interpretation of the Act and on a proper appreciation of the materials which were there before the learned Judge, the learned Judge has come to the conclusion that no offence under the Act is disclosed and the Act has no application to the firm. Mr. Sen argues that for a proper appreciation of the question whether the materials disclose any offence under the Act, it is im-

perative to interpret the Act. He contends that it will not be a proper approach to leave the question of interpretation to the stage after the investigation is complete, as according to Mr. Sen, there can be no investigation unless an offence has been disclosed. Mr. Sen argues that if the materials do not disclose any offence, no investigation can be permitted to find out whether as a result of the investigation an offence may be disclosed or not. Mr. Sen submits that investigation can legitimately go on, once an offence is disclosed for collecting materials for establishing and proving the offence. It is the contention of Mr. Sen that the case of the appellants is that the firm is conducting money circulation scheme which is banned by the Act. Mr. Sen argues that to find out whether the firm is conducting a money circulation scheme, it is necessary to consider what a money circulation scheme is within the meaning of the Act and to find out whether on the materials alleged in the F.I.R. and also in the affidavits, it can be said that the business carried on by the firm is one in the nature of conducting a money circulation scheme. Mr. Sen has argued that the learned Judge in his judgment has correctly interpreted what constitutes 'money circulation scheme' within the meaning of the Act, and it is the argument of Mr. Sen that such interpretation is absolutely essential to find out whether the allegations made in the F.I.R. make out a case that the firm is conducting a money circulation scheme. Mr. Sen submits that the materials on record including the allegations made in the F.I.R., even if they are all assumed to be correct, do not go to show that the firm is conducting a money circulation scheme; and, in that view of the matter there can be no investigation, if no offence under the Act is disclosed. Analysing the F.I.R. and the other materials which have been placed before the Court, Mr. Sen submits that the materials go to indicate— (1) that the firm is accepting deposits or loans from the public for a term against loan certificates which stipulate payment of interest @ 12%, (2) though interest is stipulated to be paid @ 12%, the firm, in fact, is paying interest at a much higher rate. It used to pay interest @ 48% previously and is now paying interest @ 36%. The amount of interest paid in excess of the stipulated rate of 12% is paid in cash in a clandestine manner to the depositors. The excess amount of interest paid is not ac-

counted for and results in accumulation of black-money; (3) the firm invests the monies received from the depositors in high risk investments earning huge amount of unaccounted profits. The investments made by the firm and the earnings from the investments made, also result in generation of black-money; (4) because of the allurements of high rate of interest offered to the depositors, a major part of which is given in unaccounted black-money, the firm which has a share-capital of about Rs. 7,000 only has received deposits over crores of rupees.

60. It is the contention of Mr. Sen that even if all these allegations which are there in the F.I.R. and also in the other materials which have been placed before the Court are accepted to be correct, the said allegation do not go to show that the firm is conducting a money circulation scheme and do not disclose any offence under the Act. Mr. Sen in this connection has commented that though in the F.I.R. it has been alleged that the firm is carrying on business of promoting Prize Chits, no such case was sought to be made out before the learned Judge or before this Court and there are no allegations or materials to show that the firm is carrying on business of promoting prize chits; and the only case that has been sought to be made before the trial Court and also this Court is that the firm is carrying on business of conducting or promoting money circulation scheme. Mr. Sen has argued that the money circulation scheme has been defined in Section 2 (c) of the Act to mean "any scheme, by whatever name called, for the making of quick or easy money, or for the receipt of any money or valuable thing as the consideration for a promise to pay money, on any event or contingency relative or applicable to the enrolment of members into the scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscription". According to Mr. Sen, the essential requirements of a money circulation scheme are— (1) There must be a scheme for the making of quick or easy money on any event of contingency relative or applicable to the enrolment of members into the scheme whether or not such money is derived from the entrance money of the members of such scheme or periodical subscription; or (2) there must be a scheme for the receipt of any money or valuable thing as the consideration for promise to pay money on any event or

contingency relative or applicable to the enrolment of members into a scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or from periodical subscription. Mr. Sen submits that neither F.I.R. nor any of the other materials go to show that the business carried on by the firm is, in any way, in the nature of conducting or promoting a money circulation scheme. In this connection Mr. Sen has drawn our attention to the statement of objects for the passing of this enactment. Mr. Sen has further submitted that this enactment which is in the nature of penal one has to be construed in the event of doubt or ambiguity in a manner beneficial to the party against whom any accusation is made.

61. Mr. Sen has further argued that the rules framed under the Act can also be taken into consideration for proper interpretation of the Act and the learned Judge in the instant case was justified in referring to the rules in construing the provisions of the Act. In this connection Mr. Sen has referred to the decision in *Ex parte Wier in re Wier*, (1871) 6 Ch App 875 and has relied upon the following observations at p. 879:—

"We do not think that any other section of the Act throws any material light upon the proper construction of this section, and if the question had depended upon the Act alone we should have had great doubt what the proper construction was; but we are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction."

Mr. Sen in this connection has drawn our attention to the relevant rules and he has argued that the rules leave no room for doubt that the Act has no application to the firm and no offence under the Act has been disclosed by the firm. Mr. Sen has submitted that the construction of the Act by the learned Judge is correct and it is his submission that in view of the provisions of the Act properly interpreted, there cannot be any doubt that the Act has no application to the instant case and there can be no question of any violation of the said Act by the firm. It is the submission of Mr. Sen that the approach and the reasoning of the learned

ed Judge are both sound. Mr. Sen has next contended that the search and seizure carried on in the instant case are also illegal and unjustified. It is the argument of Mr. Sen that if no offence under the Act is disclosed and the Act has no application, there cannot be any question of any search or seizure under the Act. Mr. Sen has argued that the search and seizure done in the instant case have also not been done in conformity with the provisions of law. Mr. Sen has submitted that learned judge has correctly come to the conclusion that the search and seizure in the instant case were also illegal. In this connection Mr. Sen referred to a number of decisions.

62. Mr. Ray and Mr. Sibal who followed Mr. Sen mainly adopted the submissions made by Mr. Sen. Mr. Ray, further contended that to be a chit fund or to be a money circulation scheme; an element of uncertainty or luck is essential. It is the argument of Mr. Ray that in so far as the transactions carried on by the firm in the instant case are concerned the said element is nowhere there. Mr. Ray, in this connection referred to the definition of conventional chit and has argued that the conventional chits have not been brought within the purview of this Act. Mr. Ray has drawn our attention to the decision of this Court in the case of *Srinivasa Enterprises v. Union of India* (1980) 4 SCC 507: (AIR 1981 SC 504) in which the validity of the Act came to be challenged in this Court and was upheld by this Court.

63. The appeal before us has been argued at great length. A number of decisions have also been cited from the Bar. I have already referred to some of the decisions which were cited before us. I do not propose to consider all the cases which were referred to in the course of argument by the learned counsel appearing on behalf of the parties as I do not consider the same to be necessary. I have already stated that the matter appears to have been elaborately argued before the learned trial Judge who in his judgment has fully set out the relevant facts and circumstances of the case, has noted the arguments which were advanced before him and the learned Judge has also referred to a number of decisions. I may, however, note that Mr. Chatterjee, appearing on behalf of the appellants, has made a grievance before us that some of the decisions cited by him have not been considered by the learned Judge. Though the matter has been argued at

great length, yet, to my mind, the case appears to rest in a fairly short compass.

64. In my opinion, the legal position is well-settled. The legal position appears to be that if an offence is disclosed, the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed; if, however, the materials do not disclose an offence, no investigation should normally be permitted. The observations of the Judicial Committee and the observations of this Court in the various decisions which I have earlier quoted, make this position abundantly clear. The propositions enunciated by the Judicial Committee and this Court in the various decisions which I have earlier noted, are based on sound principles of justice. Once an offence is disclosed, an investigation into the offence must necessarily follow in the interests of justice. If, however, no offence is disclosed, an investigation cannot be permitted, as any investigation, in the absence of any offence being disclosed, will result in unnecessary harassment to a party, whose liberty and property may be put to jeopardy for nothing. The liberty and property of any individual are sacred and sacrosanct and the Court zealously guards them and protects them. An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interest of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the Court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the Court normally does not interfere with the investigation of a case where an offence has been disclosed. The decisions on which Mr. Chatterjee has relied are based on this sound principle, and in all these cases, an offence had been disclosed. Relying on the

well-settled and sound principle that the Court should not interfere with an investigation into an offence at the stage of investigation and should allow the investigation to be completed, this Court had made the observations in the said decisions which I have earlier quoted reiterating and reaffirming the sound principles of justice. The decisions relied on by Mr. Chatterjee, do not lay down, as it cannot possibly be laid down as a broad proposition of law that an investigation must necessarily be permitted to continue and will not be prevented by the Court at the stage of investigation, even if no offence is disclosed. While advertg to this specific question as to whether an investigation can go on even if no offence is disclosed, the Judicial Committee in the case of *King Emperor v. Khwaja Nizam Ahmed* (AIR 1945 PC 18) (supra) and this Court in *R. P. Kapur v. State of Punjab* (AIR 1960 SC 866) (supra), *Jehan Singh v. Delhi Administration* (AIR 1974 SC 1146) (supra), *S. N. Sharma v. Bipen Kumar Tiwari* (AIR 1970 SC 786) (supra) have clearly laid down that no investigation can be permitted and have made the observations which I have earlier quoted and which were relied on by Mr. Sen. As I have earlier observed this proposition is not only based on sound logic but is also based on fundamental principles of justice, as a person against whom no offence is disclosed, cannot be put to any harassment by the process of investigation which is likely to put his personal liberty and also property which are considered sacred and sacrosanct into peril and jeopardy.

65. Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. In considering whether an offence into which an investigation is made or to be made, is disclosed or not, the Court has mainly to take into consideration the complaint or the F.I.R. and the Court may in appropriate cases take into consideration the relevant facts and circumstances of the case. On a consideration of all the relevant materials, the Court has to come to the conclusion whether an offence is disclosed or not. If on a consideration of the relevant materials, the Court is satisfied that an offence is disclosed, the Court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence. If, on the other hand,

the Court on a consideration of the relevant materials is satisfied that no offence is disclosed, it will be the duty of the Court to interfere with any investigation and to stop the same to prevent any kind of uncalled for and unnecessary harassment to an individual.

66. In the instant case, the offence complained of is violation of the Act. For a proper adjudication of the case and for a proper appreciation of the question, it, therefore, becomes necessary to consider the relevant materials and also the provisions of the Act for being satisfied as to whether the relevant materials go to indicate any violation of the Act and disclose any offence under the Act. The materials are mainly contained in the F.I.R. which has been earlier set out in its entirety. An analysis of the F.I.R. mentions the following allegations on the basis of which the said F.I.R. has been lodged:—

1. Sanchaita Investments is a partnership firm. Its partners are Behari Prasad Murarka, Sri Sambhu Mukherjee and Sri Swapan Kumar Guha. The firm was started in and around 1975;

2. The firm had been offering fabulous interest @ 48% to its members until very recently. The rate of interest has of late been reduced to 36% per annum.

3. Such high rate of interest were and are being paid even though the loan certificate receipts show rate of interest to be 12% only.

4. Thus, the amount in excess of 12% so paid clearly shows that 'Money Circulation Scheme' is being promoted and conducted for the making of quick and/or easy money, prizes and/or gifts.

5. Prizes or gifts in cash are also being awarded to agents, promoters and members too.

6. In view of the above, Sarv/Shri Behari Prasad Murarka, Sambhu Mukherjee and Swapan Kumar Guha appears to have been carrying on the business in the trade name of 'Sanchaita Investments' in prize chits and money circulation scheme in violation of Section 3 of the Prize Chits and Money Circulation Scheme (Banning) Act, 1978.

67. The other materials are contained in paragraphs 6, 7, 8, 9, 22, 27 and 30 of the affidavit and the two documents, namely, the article published in the Newspaper 'Business Standard' dated 16-11-1980 and the documents seized in the course of searches. I have earlier set out in extenso the statement made in the

said paragraphs of the affidavit filed on behalf of the State. A copy of the article has been enclosed to the affidavit filed on behalf of the State. The document seized in the course of searches and handed over to Court in the course of the arguments was a letter addressed by an officer of the Air Force to the firm in which the officer makes a grievance that the Firm which was paying interest @ 48% has now reduced the same to 36% in view of advances made to political parties. The letter further records the fact that the firm hopes to pay the enhanced rate of interest of 48% in the near future. An analysis of these materials suggests that the firm is carrying on activities of accepting deposits from the members promising to pay them interest on such deposits at an agreed rate of 12% as stipulated in the loan certificate, but in fact, it has been paying interest to them at much higher rate of interest. The materials further indicate that the firm is making high risk investments of the monies received from the depositors and has also been advancing monies to political parties.

68. The crux of question is whether these allegations disclose an offence under the Act namely, violation of S. 3 of the Act even if all these allegations are deemed to be correct.

69. The question whether these allegations disclose an offence under the Act and can be the basis for any suspicion that an offence under S. 3 of the Act has been committed or not, must necessarily depend on the provisions of the Act and its proper interpretation.

70. The Act has been enacted for implementing the recommendations of a Study Group of the Reserve Bank of India under the Chairmanship of Shri James S. Raj the then Chairman of the Unit Trust of India, constituted for examining the depth the provisions of Chapter IIIB of the Reserve Bank of India Act, 1934 and the directions issued thereunder to Non-Banking Companies in order to assess their adequacy in the context of ensuring the efficacy of the monetary and credit policies of the country and affording a degree of protection to the interests of the depositors who place their savings with such companies. Paragraph 2 of the Statement of Objects and Reasons of the Act states:—

"Prize chits would cover any kind of arrangement under which moneys are collected by way of subscriptions, contributions, etc. and prizes, gifts, are

awarded. The prize chit is really a form of lottery. Its basic feature is that the foreman or promoter who ostensibly charges no commission collects regular subscriptions from the members. Once a member gets the prize. He is very often not required to pay further instalments and his name is dropped from further lots. The institutions conducting prize chits are private limited companies with a very low capital base contributed by the promoters, directors, or their close relatives. Such schemes confer monetary benefit only on a few members and on the promoter companies. The Group had, therefore, recommended that prize chits or money circulation schemes, by whatever name called, should be totally banned in the larger interests of the public and suitable legislative measures should be undertaken for purpose."

71. The relevant portion of paragraph 3 of the Statement of Objects and Reasons reads as follows:—

"The Bill proposes to implement the above recommendation of the Group by providing for the banning of the promotion or conduct of any prize chit or money circulation scheme, by whatever name called, and of the participation of any person in such chit or scheme. The Bill provides for a period of two years within which the existing units carrying on the business of prize chits or money circulation schemes may be wound up and provides for penalties and other incidental matters."

It is, therefore, clear that the main object of the Act is to ban promotion or conduct of any Prize Chit or Money Circulation Scheme, by whatever name called, and of the participation of any person in such chit or scheme. S. 2 of the Act deals with definitions. Money Circulation Scheme is defined in S. 2 (e) in the following words:—

"'Money Circulation Scheme' means any scheme, by whatever name called, for the making of quick or easy money, or for the receipt of any money or valuable thing as the consideration for a promise to pay money, on any event or contingency relative or applicable to the enrolment of members into the scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscriptions".

Prize Chit is defined in S. 2 (e) in the following terms:—

"'prize chit' includes any transaction or arrangement by whatever name called

under which a person collects whether as a promoter, foreman, agent or in any other capacity, monies in one lump sum or in instalments by way of contributions or subscriptions or by sale of units, certificates or other instruments or in any other manner or as membership fees or admission fees or service charges to or in respect of any savings, mutual benefit, thrift or any other scheme or arrangement by whatever name called, and utilises the monies so collected or any part thereof or the income accruing from investment or other use of such monies for all or any of the following purposes, namely:—

(i) giving or awarding periodically or otherwise to a specified number of subscribers as determined by lot, draw or in any other manner, prizes or gifts in cash or in kind, whether or not the recipient of the prize or gift is under a liability to make any further payment in respect of such scheme or arrangement;

(ii) refunding to the subscribers or such of them as have not won any prize or gift, the whole or part of the subscriptions, contributions or other monies collected with or without any bonus, premium, interest or other advantage by whatever name called, on the termination of the scheme or arrangement, or on, or after the expiry of the period stipulated therein, but does not include a conventional chit."

A Conventional Chit which is specifically excluded in the definition of prize chits in S. 2 (c) (ii) is defined in S. 2 (a) as follows:—

"Conventional Chit" means a transaction whether called chit, chit fund, kuzi or by any other name by or under which a person responsible for the conduct of the chit enters into an agreement with a specified number of persons that every one of them shall subscribe a certain sum of money (or certain quantity of grain instead) by way of periodical instalments for a definite period and that each subscriber shall, in his turn, as determined by lot or by auction or by tender or in such other manner as may be provided for in the chit agreement, be entitled to a prize amount."

Section 3 of the Act the violation of which alleged reads:—

"No person shall promote or conduct any prize chit or money circulation scheme or enrol as a member to any such chit or scheme, or participate in it otherwise, or receive or remit any money in pursuance of such chit or scheme".

Section 7 of the Act provides:—

"(1) It shall be lawful for any police officer not below the rank of an officer in charge of a police station:

(a) to enter, if necessary by force, whether by day or night with such assistance as he considers necessary any premises which he has reason to suspect, are being used for purposes connected with the promotion or conduct of any prize chit or money circulation scheme in contravention of the provisions of this Act;

(b) to search the said premises and the persons whom he may find therein;

(c) to take into custody and produce before any Judicial Magistrate all such persons as are concerned or against whom a complaint has been made or credible information has been received or a reasonable suspicion exists of their having been concerned with the use of the said premises for purposes connected with, or with the promotion or conduct of, any such prize chit or money circulation scheme as aforesaid;

(d) to seize all things found in the said premises which are intended to be used, or reasonably suspected to have been used, in connection with any such prize or money circulation scheme as aforesaid.

(2) Any officer authorised by the State Government may—

(a) at all reasonable times, enter into and search any premises which he has reason to suspect, are being used for the purposes connected with, or conduct of, any prize chit or money circulation scheme in contravention of the provisions of this Act;

(b) examine any person having the control of, or employed in connection with, any such prize chit or money circulation scheme;

(c) order the production of any documents, books or records in the possession or power of any person having the control of, or employed in connection with, any such prize chit or money circulation scheme; and

(3) All searches under this section shall be made in accordance with the provisions of the Code of Criminal Procedure, 1973."

S. 13 confers necessary powers to make rules and reads as under:—

"(1) The State Government may, by notification in the Official Gazette and in consultation with the Reserve Bank,

make rules for the purpose of carrying out the provisions of the Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the office of the Reserve Bank to whom full information regarding any prize chit or money circulation scheme may be furnished under the first proviso to sub-section (1) of Section 12, and the form in which and the period within which such information may be furnished;

(b) the particulars relating to the winding up plan of the business relating to prize chits or money circulation schemes."

72. The complaint alleges violation of S. 3 of the Act. In other words, the complaint is that the firm is promoting or conducting a prize chit or a money circulation scheme. The definition of prize chit has been earlier set out. I have also earlier analysed the F.I.R. and the other materials on the basis of which the complaint is made and the materials which have been placed before the Court. The materials do not indicate anything to disclose that the firm is promoting or conducting any prize chit. I may also here note that no arguments have been advanced on behalf of the appellants that the firm is promoting or conducting any prize chit; and in my opinion, rightly, as the allegations do not give any indication whatsoever of any case of a prize chit being promoted or conducted by the firm. The argument on behalf of the appellants has been that the firm is promoting or conducting a money circulation scheme. Though the Statement of Objects and Reasons of the Act may suggest that the prize chit and a money circulation scheme are more or less of like nature, yet, in view of the separate definitions of these two being given in cl. 2 of the Act and in view of the further fact that S. 3 speaks of prize chit or money circulation scheme, each of the aforesaid must be considered to be separate and distant for the purposes of the Act; and promoting or conducting either prize chit or any money circulation scheme or both must be held to be an offence under the Act.

73. I shall now proceed to consider whether the materials disclose that the firm is promoting or conducting a money circulation scheme. I have already set out the definition of money circulation scheme as given in S. 2 (c) of the Act. On a plain reading of the said definition, the requirements of a money circulation scheme are—

(i) there must be a scheme;
(ii) there must be members of the scheme;

(iii) the scheme must be for the making of quick or easy money on any event or contingency relative or applicable to the enrolment of members into the scheme or there must be a scheme for the receipt of any money or valuable thing as the consideration for a promise to pay money on any event or contingency relative or applicable to the enrolment of members into the scheme;

(iv) the event of contingency relative or applicable to the enrolment of members into the scheme will however not be in any way affected by the fact whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscription.

74. On a proper interpretation of this definition, it clearly appears that the condition in the said definition— 'on any event or contingency relative or applicable to the enrolment of members into the scheme whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscription' qualifies both the provisions contained therein, namely, (i) money circulation scheme means a scheme by whatever name called, for the making of quick or easy money, (ii) or money circulation scheme means any scheme for the receipt of any money or valuable thing as the consideration for the promise to pay money. Taking into consideration the language used in the section and particularly the two commas, one after the words "easy money" and the other after the words "pay money", it becomes clear that this stipulation, is intended to cover both; and the interpretation contended for by Mr. Chatterjee that the further provision in the definition, namely, "on any event or contingency relative or applicable to the enrolment of members into the scheme, whether or not such money or thing is derived from entrance money of such scheme or periodical subscription" applies only to the second part, namely, money circulation scheme 'means any scheme, by whatever name called, for the receipt of any money or valuable thing as the consideration for a promise to pay money, is not sound'. On this interpretation, of Mr. Chatterjee, the provision in the definition, namely 'money circulation scheme' means any scheme by whatever name called for the making of quick or

easy money' will indeed become vague and meaningless.

75. For properly appreciating whether the offence of promoting or conducting a money circulation scheme is disclosed or not, it becomes necessary to consider whether the materials, even if they are all accepted to be correct, indicate that the business carried on by the firm satisfies the requirements of money circulation scheme and disclose an offence under the Act.

76. The materials show that the firm accepts loans or deposits from general public for a term against loan certificates which stipulate payment of interest @ 12%. Materials also indicate that the firm pays stipulated amount of interest and further pays a much larger amount of interest in a clandestine manner to the persons who invest their monies in the firm against loan certificates. The materials further indicate that the persons who have invested their monies with the firm against loan certificates used to receive, in fact, the stipulated amount of interest @ 12% and also used to receive an additional sum as further interest @ 36% in a clandestine manner. The materials also indicate that this further rate of interest @ 36% paid clandestinely in addition to the stipulated rate of 12% has been reduced now to 24%, because of investments by the firm with political parties. In other words, the materials go to show that though the rate of interest stipulated in the loan certificate was 12%, the firm used to pay altogether interest @ 48% previously and is now paying interest @ 36% inclusive of payment of interest stipulated in the loan certificate. The materials also indicate that the firm invests the deposits or loans received from the general public in high risk investments. The materials, however, do not show that the payment of interest at the stipulated rate of 12% or at any enhanced rate in excess of the stipulated rate depends on any event or contingency relative or applicable to the enrolment of any new depositors. The materials also do not indicate that the firm makes any discrimination in the matter of payment of interest to its depositors. The materials also do not indicate that the payment of interest to the depositors whether at the stipulated rate or at the enhanced rate is dependent on any element of chance and the materials do not indicate that any kind of gifts is made by the firm to the de-

positors in addition to the payment of interest.

77. The first question that requires to be considered is whether these materials go to indicate that there is any scheme. The word 'scheme' has not been defined in the Act. The word 'scheme', however, has been defined in the Rules, in Cl. 2 (g) thereof. Cl. 2 (g) of the Rules state that a "scheme means a money circulation scheme or as the case may be a prize chit as defined in cls. (c) and (e) respectively of S. 2". The word 'scheme' as contemplated in S. 2 (c) of the Act is therefore, to be money circulation scheme within the meaning of the Act. To be a money circulation scheme, a scheme must be for the making of quick or easy money on any event or contingency relative or applicable to the enrolment of the members into the scheme. The scheme has necessarily to be judged as a whole, both from the viewpoint of the promoters and also of the members. Even if it be assumed that the firm may be considered to be the promoter and the persons who invest their monies in the firm are members, the question has still to be considered whether investments of the monies with the firm in expectation of getting interest @ 48% and a big part of it in black in a clandestine manner, can be said from the viewpoint of the depositors that the investment is for the making of quick or easy money. If any individual invests his money in expectation of getting a high return, say 50% or more and there is nothing clandestine in the transaction which is above board, can it be said that the investment is for making easy money or quick money? Various individuals may invest their monies in their business which may yield very high profits. Many individuals also may indulge in speculative business in expectation of high return of their money and may succeed or may not succeed in speculative transactions. If such transactions are made openly and not in violation of any law, I have no doubt in my mind that it can never be said that such investment has been made for making quick or easy money, and such transactions can never come within the scheme for making easy or quick money, as enumerated in the Act. The further question that, however, arises for consideration is whether the position will be any different if a part of the transaction is not above board and is secretive in nature. In my mind, that will not make any difference and the transaction cannot be considered to be a scheme

for the making of quick or easy money; though the transaction may offend against revenue laws or any other law. Transactions in black money do not come within the mischief of this Act. Judged from the point of view of the depositors, it cannot, therefore, be said that their investment in the firm for high return by way of interest, part of which is above board and a part of which is clandestine, will form any part of a scheme for making easy or quick money. It is further to be noted that this return on investment by way of interest is not dependent on any event or contingency whatsoever and has nothing to do with any event or contingency relative or applicable to the enrolment of any new members, even if the depositors be assumed to be members,

78. Judged from the point of view of the firm, there is nothing to indicate that the firm makes any investment in consultation with its depositors. The materials only indicate that the firm indulges in high risk investments and also advances monies to political parties. Neither of these acts appears to be illegal and they do not go to show that the firm makes easy or quick money. It is no doubt true that the materials go to show that the firm pays a larger amount by way of interest than payable on the basis of the rates stipulated in the loan certificate and the firm pays the excess amount of interest to the depositors in a clandestine manner. The clandestine manner of payment of interest in excess of the stipulated rate does not, in any way, indicate the existence of any scheme for making quick or easy money. It is again to be pointed out that in any event the materials do not indicate that the payment of interest by the firm in excess of the stipulated rate is in any way dependent on any event or contingency. There is nothing to indicate any scheme for the receipt of the money by the firm from its depositors as a consideration for promise to pay the interest in excess of the stipulated rate and also to pay back principal amount on the expiry of the term dependent in any way on any event or contingency relative or applicable to the enrolment of new depositors, considering the depositors to be members. I am, therefore, of the opinion, that not any of the requirements of a money circulation scheme is satisfied in the instant case. As there is no money circulation scheme, there can be no scheme as contemplated

in the Act in view of the definition of scheme in the Rules. The materials, appear to disclose violation of revenue laws. They, however, do not disclose any violation of the Act. The materials do not disclose that the firm is promoting or conducting money circulation scheme and the question, therefore, of any violation of S. 3 of the Act does not arise in the instant case. As the firm is not conducting or promoting a money circulation scheme, and as no case is made that the firm is conducting or promoting a chit fund, the Act cannot be said to be applicable to the firm. In my opinion, it does not become necessary to refer to the rules for coming to the conclusion. I may, however, add that a consideration of the rules also clearly lends support to the conclusion to which I have come. I find that the learned Judge has very carefully and elaborately considered all the aspects in his judgment and in the course of elaborate discussion, he has noted all the contentions raised by the parties and has carefully considered them. The learned Judge on a careful consideration of all aspects and on a proper interpretation of the Act, has expressed the view that no offence under the Act is disclosed against the firm which does not conduct or promote money circulation scheme or a chit fund and the Act has no application to the firm. It may also be noted that the learned Judge has also in his judgment referred to the report of the Reserve Bank and the opinion of the learned Advocate General of the State which lent support to the view taken by the learned judge. The view expressed by the learned Judge that the materials do not disclose that the firm is promoting or conducting a money circulation scheme and the Act has, therefore, no application to the firm meets with my approval and I agree with the same.

79. Before concluding it will be proper to refer to the decision of this Court in the case of *Srinivas Enterprises v. Union of India*, (1980) 4 SCC 507: (AIR 1981 SC 504), which were relied on before the learned Judge and has been considered by me. In this case, the validity of the Act was challenged before this Court while upholding the validity of the Act for reasons stated in the judgment, Krishna Iyer, J. who spoke for the Bench observed at p. 514 (of SCC): (at p. 508 of AIR) as follows:—

"In many situations, the poor and unwary have to be saved from the seducing processes resorted to by unscrupulous racketeers who glamourize and prey upon the gambling instinct to get rich quick through prizes. So long as there is the resistless spell of a chance, though small, of securing a prize, though on paper, people chase chance the prospect by subscribing to the speculative scheme only to lose what they had. Can you save moths from the fire except by putting out the fatal glow? Once this prize facet of the chit scheme is given up, it becomes substantially a 'conventional chit' and the ban of the law ceases to operate. We are unable to persuade ourselves that the State is wrong in its assertion, based upon expert opinions that a complete ban of prize chits is an overall or excessive blow. Therefore, we decline to strike down the legislation on the score of Article 19 (1) (f) and (g) of the Constitution."

80. As I have earlier noticed the materials in the instant case do not disclose any element of chance in the matter of business carried on by the firm. It may, however, be said that these observations which were made while dealing with a case of chit fund are not of very great assistance while considering what may be a money circulation scheme within the meaning of the Act.

81. As no offence under the Act is at all disclosed, it will be manifestly unjust to allow the process of criminal code to be issued or continued against the firm and to allow any investigation which will be clearly without any authority.

82. In the view that I have taken, I do not consider it necessary to deal with other aspects, namely, as to whether the searches and seizures were lawfully and properly done.

83. I, therefore, hold that the proceedings against the firm and its partners arising out of the F.I.R. must be quashed as the F.I.R. and the other materials do not disclose any offence under the Act and as such no investigation into the affairs of the firm under the Act can be permitted or allowed to be continued. I, accordingly, quash the proceedings against that firm and its partners and order that no investigation under the Act into affairs of the firm is to be carried on or continued.

84. I agree with the final order proposed by the learned Chief Justice in regard to the return of the documents, books and cash.

85. The appeal, therefore, fails and is dismissed. I, however, make no order as to costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 978

R. S. PATHAK AND E. S. VENKATARAMIAH, JJ.

Writ Petns. (Criminal) Nos. 8333 and 8365 of 1981, D/- 10-12-1981.

Ashok Kumar Binny, Petitioner v. State of Jammu and Kashmir and others, Respondents.

And

Hans Raj, Petitioner v. State of Jammu and Kashmir and others, Respondents.

J. & K. Public Safety Act (6 of 1978), S. 16 (1) — Prescribed period of submission of its report by Advisory Board — Expiry of — Further detention is invalid. (Constitution of India, Art. 21).

The obligation placed on the Advisory Board u/s. 16 (1) to submit its report within the prescribed period must be construed strictly inasmuch as the personal liberty of a person is involved and having regard to the emphasis which the Constitution has placed, and which emphasis is reflected in the Act, on the necessity of expeditiously determining whether the detention of the person concerned should be continued. (Para 3)

Where the period prescribed by subsec. (1) of S. 16 of the Act for the submission of its report by the Advisory Board has already expired, it must be held that the further detention is invalid. AIR 1973 SC 847, Rel. on. (Para 4)

Cases Referred: Chronological Paras AIR 1973 SC 847: (1972) 2 SCC 586: 1973 Cri LJ 670 4

Mr. Bhim Singh and Mr. P. D. Sharma, Advocates, for Petitioner; Mr. Altaf Ahmad, Advocate, for Respondents.

PATHAK, J.:— The petitioners Ashok Kumar Binny and Hans Raj have been detained by the Government of Jammu & Kashmir under Section 8 of the Jammu & Kashmir Public Safety Act, 1978. They have filed these petitions for a writ in the nature of habeas corpus directing their release.

2. The petitioner Hans Raj was detained on 17th August, 1981 while the petitioner Ashok Kumar Binny was detained on 1st October, 1981. It is pointed out that although their cases have been

referred to the Advisory Board, the Advisory Board has not submitted its report yet to the Government, and as eight weeks from the date of detention have expired there has been a violation of sub-sec. (1) of S. 16 of the Public Safety Act. In the circumstances, it is urged, the further detention of the petitioners is invalid. When these petitions were called on for hearing, Mr. Altaf Ahmed, appearing for the respondents, placed before us a wireless communication received by him from the State Government stating that the Advisory Board was programmed to sit today and instructing him to seek adjournment in these cases. We are unable to grant the adjournment because it seems to us that any proceeding now taken by the Advisory Board can be of no consequence in supporting the further detention of the petitioners.

3. The petitioners enjoy a fundamental right under Article 21 not to be deprived of their personal liberty except according to procedure established by law. In cases where the Government resorts to preventive detention, cls. (4) to (7) of Article 22 prescribe the conditions relating to preventive detention. A perusal of these clauses will make it immediately apparent that the Constitution places the greatest emphasis on severely limiting the period of preventive detention and envisages time-bound stages for the processing of a case as it reaches its determination. The Jammu and Kashmir Public Safety Act contains provisions which specify the successive stages and also prescribe the period within which each stage must be completed. Section 15 declares that after a detention order has been made the Government must, within four weeks from the date of the detention order, place before the Advisory Board the grounds on which the order has been made, the representation made by the person effected by the order, and, where the order has been made by an officer, also the report by such officer. Thereafter, sub-sec. (1) of S. 16 provides that the Advisory Board, after considering the material before it and such further material as it may deem necessary and after hearing the person concerned, shall "submit its report to the Government within eight weeks from the date of detention". The obligation placed on the Advisory Board to submit its report within the prescribed period must be construed strictly inasmuch as the personal liberty of a person is involved and having regard to the emphasis which the

Constitution has placed, and which emphasis is reflected in the Act, on the necessity of expeditiously determining whether the detention of the person concerned should be continued.

4. In the cases before us, it is clear that the period prescribed by sub-sec. (1) of S. 16 of the Act for the submission of its report by the Advisory Board has already expired. On that ground alone, it must be held that the further detention of the two petitioners is invalid. We are supported in this view by *Shri Mritunjay Pramanik v. State of West Bengal*, (1972) 2 SCC 586: (AIR 1973 SC 847).

5. We allow these writ petitions and direct the State of Jammu and Kashmir and other respondents to release the petitioners Ashok Kumar Binny and Hans Raj forthwith. Immediately on their release, the Chief Secretary, State of Jammu and Kashmir, will intimate to this Court that their release has been effected. Petitions allowed.

AIR 1982 SUPREME COURT 979

(From: Rajasthan)*

A. D. KOSHAL; V. BALAKRISHNA
ERADI AND R. B. MISRA, JJ.

Civil Appeal No. 1825 of 1970, D/- 5-3-1982.

Thakur Narain Singh, Appellant v. State of Rajasthan, Respondent.

Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952), Ss. 7, 2 (n) and 21 — Jaipur State Grants Land Tenures Act (1 of 1947), Ss. 82 (1) (a) and (b) and 86 — Resumption of Jagir — Village unsettled on date of resumption — Compensation has to be determined under S. 7 of Act of 1952. Civil Writ Petn. No. 365 of 1962, D/- 28-8-1969 (Raj), Reversed.

The appellant's father was a Jagirdar in the erstwhile State of Jaipur. His Jagir was resumed on 1-7-1954 under S. 21 of Rajasthan Act of 1952. He became entitled to compensation under Act. Settlement operations were going on under Jaipur Act of 1947. On the date of resumption, rent rates assessed by the Settlement Officer and approved by the Govt. on 25-11-1953 were in force. Writ petition filed by the appellant was allowed by the High Court on 23-11-1954, quashing the rent rates as they were in

*Civil Writ Petn. No. 365 of 1962, D/- 28-8-1969 (Raj).

CZ/CZ/B60/82/MVJ

flagrant violation of S. 82 (1) (a) and (b) of the Jaipur State Grants Land Tenures Act, 1947. The High Court gave a direction for fresh rates to be proposed in accordance with the provisions. Pursuant to the direction the rent rates were revised and fresh rent rates were fixed by the Settlement Officer on 6-6-1955 and they were applied retrospectively from 1st of July, 1953. The revised rent rates were substantially lower than the rent rates assessed in 1953. In a subsequent petition the High Court, however, held that it was open to the Settlement Officer to apply rent rates retrospectively under S. 86 of the Jaipur State Grants Land Tenures Act, 1947. But the High Court specifically left open the question whether or not the rent rates assessed in 1955 and applied retrospectively from 1st July, 1953 could form the basis for determining compensation payable to the Jagirdar under the Act. In a claim for compensation the Commissioner granted compensation on the basis of rent rates assessed in 1955.

Held, that the Jagir Commissioner was not justified in assessing the compensation on the basis of the assessment of rent rates in 1955. The only correct basis will be to treat the jagir in question as an unsettled one and determine the compensation in accordance with S. 7 of the Act. Civil Writ Petn. No. 365 of 1962, D/- 28-8-1969 (Raj), Reversed. (Para 16)

After the quashing of the settlement made in 1953 it cannot be said that the settlement of the jagir still existed the settlement of 1953 was quashed by the High Court on the ground that the procedure laid down in the statute had not been followed. The quashing of such an order only means tabula rasa (clean slate) as if there was no determination of rent rates in 1953. In this view of the matter the jagir would be taken to be an unsettled village on the date of resumption. (Para 12)

The criterion to determine whether a particular jagir is a settled one or not is to see whether the rent rates determined in settlement operations have been made applicable. It is only from the date of effectuation of a valid settlement of rent rates in respect of a particular jagir which makes the jagir a settled one. (Para 13)

A plain reading of S. 86 of the Act of 1947 indicates that the rent fixed by the Settlement Officer shall normally be payable from 1st of July next following the date of such order. The section, how-

ever, further authorises the Settlement Officer to direct that the same shall be payable from some earlier date. The realisation of rent from a retrospective date will not make the jagir in question a settled one as from that date. The settlement of rent rates is one thing and the realisation of rent on the basis of the settlement is quite another. In case of a settled village the compensation would be determined on the basis of the rent rates settled during a settlement operation recorded in the revenue papers on the date of resumption. Thus, it is the applicability of the rent rates determined during a settlement made prior to the date of resumption which would make the village a settled village as on that date. (Para 14)

The jagirdar became entitled to compensation on the date of resumption. If the village was an unsettled village on the date of resumption he would be entitled to compensation on the basis of the village being unsettled. The right of compensation vested in the jagirdar on the date of resumption and he could not be deprived of his right by a subsequent amendment unless the amendment in law specifically or by necessary implication provided for depriving the jagirdar of his vested right. There is nothing in the definition of the term "settled" under S. 2 (n) of the Act of 1952 or in S. 86 of the Jaipur State Grants Land Tenures Act to indicate that the legislature intended to affect the vested right. (Para 15)

Mr. S. N. Kacker, Sr. Advocate, M/s. K. K. Jain, P. Dayal and S. K. Gupta, Advocates with him, for Appellant; Mr. Badri Das Sharma, Advocate, for Respondent.

MISRA, J.:— The present appeal by certificate granted under Art. 133 (1) (a) of the Constitution is directed against the judgment of the High Court of Rajasthan dated 28th of August, 1969 dismissing writ petition No. 365 of 1962.

2. Thakur Sangram Singh, the father of the appellant was a jagirdar of Thikana Diggi in the erstwhile State of Jaipur. His jagir was resumed on 1st of July, 1954 under S. 21 of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952, hereinafter referred to as 'the Jagirs Act, 1952'. The jagirdar became entitled to compensation on the date of resumption of his jagir under S. 26 of the Jagirs Act. The compensation was to be determined according to the principles laid down in the second schedule

attached to that Act. He filed his claim for compensation in August, 1954. He claimed compensation on the basis of rent rates which were in force on the date of resumption.

3. It appears that settlement operations were going on under the Jaipur State Grants Land Tenures Act, 1947. The rent rates proposed by the Settlement Officer were published in the Rajasthan Gazette dated 23rd of August, 1952. The final proposals of the Settlement Officer were sanctioned by the Government on 25th of Nov., 1953. The rent rates fixed were made applicable with effect from 1st of July, 1953. Obviously, therefore, on the date of resumption, namely, 1st of July, 1954, rent rates assessed by the Settlement Officer and approved by the Government on 25th Nov., 1953 were in force.

4. Sangram Singh, however, challenged the validity of the rent rates fixed under the settlement by means of writ Petition No. 308 of 1953, which was allowed by the High Court on 23rd of Nov., 1954, quashing the rent rates as they were in flagrant violation of Section 82 (1) (a) and (b) of the Jaipur State Grants Land Tenures Act, 1947. The High Court gave a direction for fresh rates to be proposed in accordance with the said provisions. Pursuant to the order of the High Court dated 23rd Nov, 1954 the rent rates were revised and fresh rent rates were fixed by the Settlement Officer on 6th of June, 1955 and they were applied retrospectively from 1st of July, 1953. The revised rent rates were substantially lower than the rent rates assessed in 1953. According to the rent rates of 1953 the total rental income from the Jagir was Rs. 1,31,657.48 while according to the revised rent rates the rental income was reduced to Rs. 82,501.50.

5. The Jagirdar again filed a writ petition No. 135 of 1955 for a direction to the State Government not to apply the rent rates assessed in 1955 retrospectively with effect from 1st of July, 1953. The High Court, however, held that it was open to the Settlement Officer to apply rent rates retrospectively under S. 86 of the Jaipur State Grants Land Tenures Act, 1947. But the High Court specifically left open the question whether or not the rent rates assessed in 1955 and applied retrospectively from 1st July, 1953 could form the basis for determining compensation payable to the jagirdar under the Act.

6. When the jagirdar filed his claim for compensation in August, 1954 his writ petition challenging the rent rates enforced by the Government order dated 25th of Nov. 1953 was pending. The jagirdar, therefore, based his claim for compensation alternatively under Ss. 6 and 7 respectively of the Jagirs Act. As pointed out earlier, on the basis of the settlement of 1953 the rental income from the jagir came to Rs. 1,31,657.48. If on the other hand the jagir was taken to be unsettled, he was entitled to compensation on the basis of actual rental income for three years which came to about Rs. 3 lakhs. The Jagir Commissioner by his order dated 25th of Nov., 1960 granted compensation on the basis of rent rates assessed in 1955. The jagirdar preferred an appeal before the Board of Revenue but the same was dismissed.

7. Sangram Singh died in Dec., 1961 and the order of the Board of Revenue was challenged by his son, the petitioner-appellant in the High Court of Rajasthan. Two alternative contentions were raised before the High Court on behalf of the petitioner: (1) that the compensation should have been assessed on the basis of rent rates determined in 1953 as they were the rent rates assessed on the jagir lands as entered in the revenue records of the village within the meaning of Section 6 (3) (a) (i) read with the definition of 'settled village' contained in S. 2 (n) as it stood on the date of resumption; (2) that in the absence of a valid settlement on the date of resumption the jagir should be treated as not being a 'settled village' and compensation should be assessed on the actual income from rents during the three agricultural years: 1949-50, 1950-51 and 1951-52, as provided in S. 7 of the Act.

8. The High Court declined to accept either of the contentions. The first contention was rejected by the High Court on the ground that the petitioner was estopped from taking up the position by his own conduct inasmuch as his father had challenged the rent rates assessed in 1953 by means of a writ petition which was allowed and the rent rates assessed in 1953 were quashed, and secondly because the rent rates assessed in 1953 were a nullity and in the eye of law there were no valid rent rates assessed and entered in the revenue records on the basis of which compensation could have been determined. The second contention was also negatived on the ground that fresh rent rates in accordance with the directions of

the High Court were assessed in 1955 and were applied retrospectively with effect from 1st July, 1953 and, therefore, the jagir could not be taken to be an unsettled village. The petitioner has now come to challenge the order of the High Court by the present appeal.

9. It may be pointed out that if the jagir was a settled one the compensation would be assessed on the basis of the rent rates as settled in settlement operations which were prevalent on the date of resumption and as entered in the revenue records of the village within the meaning of S. 6 (3) (a) (i) read with the definition of 'settled village' contained in S. 2 (n). If on the other hand, the jagir was an unsettled one the compensation would have to be assessed on the actual income from the rents during the three agricultural years: 1949-50, 1950-51 and 1951-52 as provided in S. 7 of the Act.

10. Shri S. N. Kacker has contended on behalf of the appellant that the rent rates settled in 1953 having been quashed by the High Court, the jagir would be deemed to be an unsettled village and, therefore, the compensation should be determined in accordance with the provisions of S. 7 of the Act and not in accordance with the rent rates determined in 1953. From the observations made by the High Court itself it is evident that the rent rates notified in 1953 were quashed as invalid. After the quashing of rent rates determined in 1953 it can by no stretch of imagination be said that the settlement made in 1953 still stood for the purpose of determining the compensation for the jagir in question.

11. Shri Badri Das Sharma appearing for the State on the other hand has contended that it is true that the determination of rent rates in 1953 had been quashed, but the High Court had directed re-determination of the rent rates in accordance with the provisions of S. 32 and, therefore, the direction of the High Court was for rectifying the mistake that had cropped in in the determination of the rent rates of 1953 and if this be so, the rent rates determined in 1953 were still there and the compensation could be determined on that basis.

12. Having given our anxious consideration to the contentions raised on behalf of the parties we are of the positive view that after the quashing of the settlement made in 1953 it cannot be said that the settlement of the jagir still existed. It is to be noted at this stage

that the settlement of 1953 was quashed by the High Court on the ground that the procedure laid down in the statute had not been followed. The quashing of such an order only means *tabula rasa* (clean slate) as if there was no determination of rent rates in 1953. In this view of the matter the jagir would be taken to be an unsettled village on the date of resumption.

13. Shri Badri Das Sharma, however, contended that pursuant to the direction of the High Court in Writ No. 308 of 1953 fresh rent rates were assessed in 1955 which were made applicable with retrospective effect from 1st of July, 1953 and that, therefore, the rent rates assessed in 1955 will be taken to be the rent rates prevalent on the date of resumption and as such the Board of Revenue as well as the High Court were fully justified in taking the view that compensation was to be determined on the basis of the rent rates assessed in 1955. In support of his contention Shri Sharma referred to the definition of the 'settled village' in Section 2 (n), which reads:

"(n) 'Settled' when used with reference to a village or any other area, means the village or other area to which the rent rates determined during settlement operations have been made applicable whether prospectively or retrospectively, and the whole of such village or other area shall be deemed, for the purposes of this Act and the rules and orders made thereunder, to be so settled if such rates have been made so applicable to not less than three-fourths of such village or other area."

On the strength of this definition it is sought to be contended that the jagir in question would be deemed to be a settled village as it is open to the authorities to apply the settlement either prospectively or retrospectively, and it was made applicable by the Settlement Officer retrospectively. We are afraid, the argument cannot be accepted. The criterion to determine whether a particular jagir is a settled one or not is to see whether the rent rates determined in settlement operations have been made applicable. It is only from the date of effectuation of a valid settlement of rent rates in respect of a particular jagir which makes the jagir a settled one.

14. Reliance was also placed on S. 86 of the Jaipur State Grants Land Tenures Act, 1947, which runs thus:

"86. Any rent fixed by order of the Settlement Officer under this Act shall be payable from the first day of July next following the date of such order, unless the Settlement Officer thinks fit, for any reason to direct that it shall be payable from some earlier date."

A plain reading of this section indicates that the rent fixed by the Settlement Officer shall normally be payable from 1st of July next following the date of such order. The section, however, further authorises the Settlement Officer to direct that the same shall be payable from some earlier date. The realisation of rent from a retrospective date will not make the jagir in question a settled one as from that date. The settlement of rent rates is one thing and the realisation of rent on the basis of the settlement is quite another. In case of a settled village the compensation would be determined on the basis of the rent rates settled during a settlement operation recorded in the revenue papers on the date of resumption. Thus, it is the applicability of the rent rates determined during a settlement made prior to the date of resumption which would make the village a settled village as on that date.

15. There is yet another aspect from which the matter can be looked into. The jagirdar became entitled to compensation on the date of resumption and, therefore, we have to examine the position as it stood on the date of resumption. If the village was an unsettled village on the date of resumption he would be entitled to compensation on the basis of the village being unsettled. The right of compensation vested in the jagirdar on the date of resumption and he could not be deprived of his right by a subsequent amendment unless the amendment in law specifically or by necessary implication provided for depriving the jagirdar of his vested right. We do not find anything in the definition of the term 'settled' under Section 2 (n) of the Act or in Section 86 of the Jaipur State Grants Land Tenures Act to indicate that the legislature intended to affect the vested right.

16. In this view of the legal position, the Jagir Commissioner was not justified in assessing the compensation on the basis of the assessment of rent rates in 1955. The only correct basis will be to treat the jagir in question as an unsettled one and determine the compensation in accordance with S. 7 of the Act.

17. In the result the appeal is allowed with costs. The orders of the High Court,

the Board of Revenue and that of the Jagir Commissioner are set aside and the case is sent back to the Jagir Commissioner to determine the compensation afresh treating the jagir in question to be unsettled one and in accordance with the provisions of Sec. 7 of the Act. The appellant will also be entitled to interest at the rate of ten per cent per annum on the amount of compensation so determined, from the date of resumption till the date of payment of the compensation.

Appeal allowed.

AIR 1982 SUPREME COURT 983

(From: (1981) 85 Cal WN 532)

R. S. PATHAK AND O. CHINNAPPA
REDDY, JJ.

Civil Appeal No. 1553 of 1980, D/- 26-2-1982.

Jyoti Basu and others, Appellants v.
Debi Ghosal and others, Respondents.

Representation of the People Act (43 of 1951), Ss. 82, 86 (4), 87 (1) and 99 — Election petition — Persons mentioned in Ss. 82 and 86 (4) only can be joined as respondents. (1981) 85 Cal WN 532, Reversed.

No one may be joined as a party to an election petition otherwise than as provided by Ss. 82 and 86 (4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition. (1981) 85 Cal WN 532, Reversed. (Paras 9, 13)

It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has been given, the Court finds that there is sufficient material to hold a person guilty of a corrupt practice, the Court may then issue a notice to him to show cause under S. 99 and proceed with further action. The legislative provision contained in Section 99 which enables the Court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be "named" in sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition. AIR 1952 SC 64; AIR 1954 SC 510; AIR 1969 SC 677 and AIR 1969 SC 272, Rel. on. (Para 11)

Cases Referred: Chronological Paras
AIR 1973 Punj & Har 163 (FB) 13

CZ/CZ/B19/82/CWM

AIR 1969 SC 677 : (1969) 1 SCR 630	10
AIR 1969 SC 872 : (1969) 1 SCR 679	10
AIR 1969 Bom 177	13
AIR 1963 Cal 218	13
AIR 1958 Mad 171	13
AIR 1954 SC 210	7
AIR 1952 SC 64 : 1952 SCR 218	7

Mr. Somnath Chatterjee, Sr. Advocate, Mr. Rathin Das and Mr. Aninda Mitter, Advocates with him, for Appellants; Mr. Sidhartha Shankar Ray, Sr. Advocate, M/s. R. K. Lala and T. V. S. N. Chari, Advocates with him, for Respondent No. 1.

CHINNAPPA REDDY, J.:— The first appellant, Jyoti Basu, is the Chief Minister and appellants two and three Buddhadeb Bhattacharya and Hashim Abdul Halim, are two Ministers of the Government of West Bengal. They have been impleaded by the first respondent as parties to an election petition filed by him questioning the election of the second respondent to the House of the People from the 19-Barrackpore Parliamentary Constituency in the mid-term Parliamentary election held in January, 1970. There were five candidates who sought election from the Constituency. Mod. Ismail, the first respondent, whose candidature was sponsored by the Communist Party of India (Marxist) was, elected securing 2,66,698 votes as against Debi Ghosal, a candidate sponsored by the Indian National Congress led by Smt. Indira Gandhi who secured 1,62,770 votes. The other candidates Ramjit Ram, Robi Shankar Pandey and Bejoy Narayan Mishra secured 25,734, 12,271 and 2,763 votes respectively. The first respondent filed an election petition in the High Court of Calcutta questioning the election of the second respondent Mohd. Ismail on various grounds. He impleaded the returned candidate as the first respondent, and the other three unsuccessful candidates as respondents 2, 3 and 4 to the election petition. Besides the candidates at the election, he impleaded several others as respondents. The District Magistrate and Returning Officer was impleaded as the fifth respondent, Buddhadeb Bhattacharya, the Minister for Information and Publicity, Government of West Bengal as the sixth respondent, Jyoti Basu, the Chief Minister as the seventh respondent, Md. Amin, the Minister of the Transport Branch of the Home Department as the eighth respondent, Hashim Abdul Halim, the Minister of the Legislative and the Judicial Department as the ninth respondent and the Electoral Registration Officer as the tenth respondent. It was aver-

red in the election petition that the Chief Minister and the other Ministers of the Government of West Bengal who were impleaded as parties to the election petition had colluded and conspired with the returned candidate to commit various alleged corrupt practices. Apart from denying the commission of the various alleged corrupt practices, the Chief Minister and the other Ministers claimed in their written statements that the election petitioner was not entitled to implead them as parties to the election petition. They claimed that as they were not candidates at the election they could not be impleaded as parties to the election petition. The Chief Minister and two of the other ministers, Hashim Abdul Halim and Buddhadeb Bhattacharya filed an application before the High Court of Calcutta to strike out their names from the array of parties in the election petition. The application was dismissed by the Calcutta High Court on the ground that the applicants (appellants) were proper parties to the election petition and, therefore, their names should not be struck out of the array of parties. The appellants have preferred this appeal after obtaining special leave of this Court under Art. 136 of the Constitution.

2. Shri Somnath Chatterjee, learned counsel for the appellant submitted that the concept of a proper party was not relevant in election law and that only those persons could be impleaded as parties who were expressly directed to be so impleaded by the Representation of the People Act, 1951. He claimed that in any case such persons were entitled to be struck out from the array of parties. On the other hand Shri Sidhartha Shankar Ray, and Shri R. K. Lala, learned counsel for the first respondent submitted that the appellants were proper parties to the election petition and their presence was necessary for a complete, final and expeditious decision on the questions involved in the action.

3. To properly appreciate the rival contentions it is necessary to refer to the relevant provisions of the Constitution of India and the two Representation of the People Acts of 1950 and 1951.

4. First the Constitution, Part XV deals with elections. Art. 324 vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls and the conduct of all elections to Parliament and to the Legislatures of the State. Art. 325 provides that there shall be one general

electoral roll for every territorial constituency and that no person shall be ineligible for inclusion in such rolls on grounds only of religion, caste, sex or any of them. Art. 326 provides that election to the House of the People and to the Legislative Assemblies of States shall be on the basis of adult franchise. Art. 327 enables Parliament to make laws with respect to all matters relating to elections to either House of Parliament or to the Houses of the Legislature of a State, Art. 328 enables the Legislature of a State, if Parliament has not made such legislation, to make laws with respect to all matters relating to elections to the Houses of the Legislature of the State. Art. 329 bars interference by Courts in electoral matters and clause (b), in particular, provides that no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature.

5. Next, the Representation of the People Act, 1950. This Act provides for the delimitation of the constituencies for the purpose of elections to the House of the People and the legislatures of States, the qualification of voters at such elections, the preparation of electoral rolls and other matters connected therewith.

6. Last, the Representation of the People Act of 1951. Part VI of the Act deals with "Disputes regarding elections". Sec. 79 defines various terms and expressions used in the Parts VI and VII. Cl. (b) defines a 'candidate' as meaning "a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate". Sec. 80 imposes a statutory ban on an election being called in question except by an election petition presented in accordance with the provisions of Part VI of the Act. Sec. 80-A vests in the High Court, the jurisdiction to try an election petition. Sec. 81 provides for the presentation of an election petition on one or more of the grounds specified in Sec. 100 (1) and Sec. 101 by any candidate at such election or any elector who was entitled to vote at the election. Sec. 82 is entitled "Parties to the petition" and is as follows:

"82. Parties to the petition.— A petitioner shall join as respondents to his petition—

(a) Where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition."

Section 83 prescribes the contents of the petition. Sec. 84 provides that a petitioner may, in addition to claiming a declaration that the election of the returned candidate is void, claim a further declaration that he himself or any other candidate has been duly elected. Sec. 86 deals with trial of election petitions. Subsec. (4) provides for an application by a candidate who is not already a respondent to be joined as a respondent. It is in these terms:

"(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent."

Section 87 is concerned with the procedure before the High Court and it is as follows:

"87. (1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits;

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872, shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition."

Section 90 enables the returned candidate or any other party to "re-criminate" in cases where in the election petition a declaration that a candidate other than the returned candidate has been elected is claimed. Sec. 98 prescribes the orders that may be made by the High Court at the conclusion of the trial of an election petition. It provides that the High Court shall make an order dismissing the election petition or declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected. Sec. 99 enables the High Court to make, at the time of making an order under Sec. 98 an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of corrupt practice; and the names of all persons, if any, who have been proved at the trial to have been guilty of corrupt practice and the nature of that practice. The proviso to Sec. 99 (1), however, prescribes that no person who is not a party to the petition shall be named in the order unless he had been given notice to appear before the High Court to show cause why he should not be so named and he had also been given an opportunity to cross-examine any witness who had already been examined by the High Court and had given evidence against him and an opportunity of calling evidence in his defence and of being heard. Sec. 100 enumerates the grounds on which an election may be declared void. The High Court, it is said, among other grounds, shall declare the election of a returned candidate void in cases where corrupt practices are proved, where such corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent. Where the corrupt practice has been committed in the interests of the returned candidate by an agent other than his election agent, the result of the election in so far as it concerns the returned candidate must also be shown to have been materially affected. Sec. 101 prescribes the grounds for which a candidate, other than the returned candidate may be declared to have been elected. Sec. 110 provides for the procedure when an application for withdrawal of an election petition is made to the Court. Sec. 110 (3) (c) says that a person who might himself have been a petitioner may apply to the Court to be substituted as a petitioner

in place of the party withdrawing. Section 112 (3) provides for the continuance of the election petition on the death of the sole petitioner in an election petition or of the survivor of several petitioners, by any person who might himself have been a petitioner and who applies for substitution within the stipulated period.

7. The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the Court in *N. P. Fonnuswami v. Returning Officer, Namakkal Constituency*, 1952 SCR 218: (AIR 1952 SC 64) and *Jagan Nath v. Jaswant Singh*, AIR 1954 SC 210. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951.

and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?

9. Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency; it may be none else. Sec. 82 is headed "Parties to the petition" and clause (a) provides that the petitioner shall join as respondents to the petition the returned candidates if the relief claimed is confined to a declaration that the election of all or any of the returned candidates is void and all the contesting candidates if a further declaration is sought that he himself or any other candidate has been duly elected. Clause (b) of S. 82 requires the petitioner to join as respondent any other candidate against whom allegations of any corrupt practice are made in the petition. Section 86 (4) enables any candidate not already a respondent to be joined as a respondent. There is no other provision dealing with the question as to who may be joined as respondents. It is significant that while cl. (b) of S. 82 obliges the petitioner to join as a respondent any candidate against whom allegations of any corrupt practice are made in the petition, it does not oblige the petitioner to join as a respondent any other person against whom allegations of any corrupt practice are made. It is equally significant that while any candidate not already a respondent may seek and, if he so seeks, is entitled to be joined as a respondent under S. 86 (4), any other person cannot, under that provision seek to be joined as a respondent, even if allegations of any corrupt practice are made against him. It is clear that the contest of the election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the

election. If such is the design of the statute, how can the notion of 'proper parties' enter the picture at all? We think that the concept of 'proper parties' is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in S. 82 and S. 86 (4) and no others. However, desirable and expedient it may appear to be, none else shall be joined as respondents.

10. It is said, the Civil Procedure Code applies to the trial of election petitions and so proper parties whose presence may be necessary in order to enable the Court 'effectually and completely to adjudicate upon and settle all questions involved' may be joined as respondents to the petitions. The question is not whether the Civil Procedure Code applies because it undoubtedly does, but only 'as far as may be' and subject to the provisions of the Representation of the People Act, 1951 and the rules made thereunder. Section 87 (1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Representation of the People Act does not. Quite obviously the provisions of the Code cannot be so invoked. In *Mohan Raj v. Surendra Kumar Taparia*, (1969) 1 S. C. R. 630: (AIR 1969 SC 677), this Court held that the undoubted power of the Court (i.e. the Election Court) to permit an amendment of the petition cannot be used to strike out allegations against a candidate not joined as a respondent so as to save the election petition from dismissal for non-joinder of necessary parties. It was said, "The Court can order an amendment and even strike out a party who is not necessary. But where the Act makes a person a necessary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Representation of the People Act and any rules made thereunder. When the Act enjoins the penalty of dismissal of the petition for non-joinder of a party the provisions of the Civil Procedure Code cannot be used as a curative means to save the petition". Again, in *K. Venkateswara Rao v. Bekkam Narasimha Reddi*, (1969) 1 SCR 679: (AIR 1969 SC 872 at p. 877), it was observed:—

"With regard to the addition of parties which is possible in the case of a suit

under the provisions of O. 1, R. 10 subject to the added party's right to contend that the suit as against him was barred by limitation when he was impleaded, no addition of parties is possible in the case of an election petition except under the provisions of sub-sec. (4) of S. 86."

11. The matter may be looked at from another angle. The Parliament has expressly provided that an opportunity should be given to a person who is not a candidate to show cause against being 'named' as one guilty of a corrupt practice. Parliament, however, has not thought fit to expressly provide for his being joined as a party to the election petition either by the election petitioner or at the instance of the very person against whom the allegations of a corrupt practice are made. The right given to the latter is limited to show cause against being 'named' and that right opens up for exercise when, at the end of the trial of the election petition notice is given to him to show cause why he should not be 'named'. The right does not extend to participation at all stages and in all matters, a right which he would have if he is joined as a party at the commencement. Conversely the election petitioner cannot by joining as a respondent a person who is not a candidate at the election subject him to a prolonged trial of an election petition with all its intricacies and ramifications. One may well imagine how mischievous minded persons may harass public personages like the Prime Minister of the country, the Chief Minister of a State or a political leader of a national dimension by impleading him as a party to election petitions, all the country over. All that would be necessary is a seemingly plausible allegation, casually or spitefully made, with but a facade of truth. Everyone is familiar with such allegations. To permit such a public personage to be impleaded as a party to an election petition on the basis of a mere allegation, without even prima facie proof, an allegation which may ultimately be found to be unfounded, can cause needless vexation to such personage and prevent him from the effective discharge of his public duties. It would be against the public interest to do so. The ultimate award of costs would be no penance in such cases, since the public mischief cannot be repaired. That is why Public Policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons

other than those mentioned in Sections 82 and 86 (4). It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has been given, the Court finds that there is sufficient material to hold a person guilty of a corrupt practice, the Court may then issue a notice to him to show cause under Section 99 and proceed with further action. In our view the legislative provision contained in Sec. 99 which enables the Court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be 'named' is sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition.

12. There is yet another viewpoint. When in an election petition in addition to the declaration that the election of the returned candidate is void a further declaration is sought that any candidate other than the returned candidate has been duly elected, Sec. 97 enables the returned candidate or any other party to 'recriminate' i.e. to give evidence to prove that the election of such candidate would have been void if he had been a returned candidate and a petition had been presented to question his election. If a person who is not a candidate but against whom allegations of any corrupt practice are made is joined as a party to the petition then, by virtue of his position as a party, he would also be entitled to 'recriminate' under Sec. 97. Surely such a construction of the statute would throw the doors of an election petition wide open and convert the petition into a 'free for all' fight. A necessary consequence would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Sec. 86 (6) of the Act that the trial of the election petition should be concluded in six months. It is just as well to remember that 'corrupt practice' as at present defined by Sec. 123 of the Act is not confined to the giving of a bribe but extends to the taking of a bribe too and, therefore, the number of persons who may be alleged to be guilty of a corrupt practice may indeed be very large, with the consequence that all of them may possibly be joined as respondents.

13. In view of the foregoing discussion we are of the opinion that no one may be joined as a party to an election petition otherwise than as provided by

Sections 82 and 86 (4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition. The appeal is therefore, allowed with costs and the names of the appellants and the seventh respondent in the appeal are directed to be struck out from the array of parties in the election petition. We may mention that in arriving at our conclusion we have also considered the following decisions cited before us: S. B. Adityan v. S. Kandaswami, AIR 1958 Mad 171. Dwijendra Lal Sen Gupta v. Harekrishna Konar, AIR 1963 Cal 218, H. R. Gokhale v. Bharucha Noshir C. AIR 1969 Bom 177 and S. Iqbal Singh v. S. Gurdas Singh Badal, AIR 1973 Punj & Har 163 (FB).

Appeal allowed.

AIR 1982 SUPREME COURT 989

(From: Madhya Pradesh)*

D. A. DESAI AND R. B. MISRA, JJ.

Civil Appeals Nos. 1144-1145 of 1969, D/- 15-12-1981.

Sardar Govindrao Mahadik and another, Appellants v. Devi Sahai and others, Respondents.

(A) Constitution of India, Art. 133 — New plea — Contentions of facts based on evidence advanced for the first time — Contentions arising from the record and proceedings — Supreme Court examined them on merits. (Para 12)

(B) Transfer of Property Act (4 of 1882), S. 53-A — Doctrine of part-performance — Applicability — Conditions precedent for — Acts anterior to contract or merely incidental to contract — No evidence of part performance. First Appeal No. 14 of 1959, D/- 5-3-1964 (Madh. Pra.), Reversed.

To qualify for the protection of the doctrine of part-performance it must be shown that there is a contract to transfer for consideration immovable property and the contract is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. These are pre-requisites to invoke the equitable doctrine of part-performance. After establishing the aforementioned circumstances it must be further shown that a transferee had in part performance of the

contract either taken possession of the property or any part thereof or the transferee being already in possession continues in possession in part-performance of the contract and has done some act in furtherance of the contract. There must be a real nexus between the contract and the acts done in pursuance of the contract or in furtherance of the contract and must be unequivocally referable to the contract. (Para 31)

Anything done in furtherance of the contract postulates the pre-existing contract and the acts done in furtherance thereof. Therefore, the acts anterior to the contract or merely incidental to the contract would hardly provide any evidence of part performance. (Para 32)

Mere oral agreement to discharge a mortgage can hardly be said to be an act of part performance unless in fact such an act is done by a discharged mortgage deed being returned to the mortgagor. (Para 36)

This mere recital in the unregistered sale deed is hardly indicative of the change in the nature of possession, when there is no evidence to show that he moved the authorities that he would be liable to pay taxes as owner. (Para 38)

There is an understandable and noteworthy difference in the probative value of entering into possession for the first time and continuing in possession with a claim of change in character. Where person claiming benefit of part performance of a contract was already in possession prior to the contract, the Court would expect something independent of the mere retention of possession to evidence part performance. Therefore mere retention of possession, quite legal and valid, if mortgage with possession is not discharged, could hardly be said to be an act in part performance unequivocally referable to the contract of sale. (Paras 40, 39)

Section 53-A requires that the person claiming the benefit of part performance must always be shown to be ready and willing to perform his part of the contract. And if it is shown that he was not ready and willing to perform his part of the contract he will not qualify for the protection of the doctrine of part performance. (Para 41)

Where, therefore, the mortgagee has failed to prove that he did any act in furtherance of the contract, continued retention of possession being a circumstance of neutral character in the facts and circumstances of the case and it being further established that the mortgagee was not willing to perform his part of the contract, it is clear that the mortgagee is not entitled to the benefit of

*First Appeal No. 14 of 1959, D/- 5-3-1964, (Madh. Pra.).

the equitable doctrine of part performance. First Appeal No. 14 of 1959, D/- 5-3-1964 (Madh. Pra.), Reversed. (Para 44)

(C) Civil P. C. (5 of 1908), O. 22, R. 10, S. 146; O. 21, Rr. 92, 94 — Sale of suit property in favour of decree-holder auction-purchaser confirmed and sale certificate granted — His application under O. 22, R. 10 in another redemption suit — Maintainability — Auction-purchaser not acquiring equity of redemption — Relief open to him. (Transfer of Property Act (1882), Section 60).

A was the mortgagor and B was the mortgagee. C was a purchaser of the mortgaged property from A under registered sale deed dated 14-10-1950. D filed suit against A in 1947 for recovery of certain amount and obtained attachment before judgment of suit property on 6-11-1947. In execution of the decree obtained by D, in Court auction sale the suit property was purchased by D himself. The sale in D's favour was confirmed on 23-9-1952 and the sale certificate was issued on 25-3-1953. But A's appeal was allowed and D's suit was dismissed on 27-3-1953. On further appeal by D, High Court allowed his appeal on 4-9-1958. In another suit by A and C filed against B for redemption of mortgage at the appellate stage D filed application under O. 22, R. 10, C. P. C. for being joined as party to that suit on the basis of sale certificate dated 25-3-1953 issued in his favour. High Court directed D to be impleaded as party and ultimately held him to be entitled to recover the balance of decretal amount obtained by him. On appeal to Supreme Court:

Held (i) that even if *stricto sensu* the application would not fall under O. 22, R. 10, C. P. C., yet S. 146 of the Civil P. C. would certainly enable D to maintain the application, under O. 22, R. 10. (Para 53)

(ii) that even on the date of the decree obtained by D as also on the date of his filing of the execution application, A had no subsisting interest in the property which could be sold at the court auction. Therefore, it can be said that D did not acquire under the sale certificate equity of redemption of the mortgage. (Para 55)

(iii) that the order of the High Court that the auction-purchaser decree holder D would be entitled to recover the decretal amount with interest at the rate of 4% per annum and proportionate costs could be styled as manifestly equitable. While not granting the substantial relief claimed by D and looking to the conduct of all the parties, it was

directed that D should be paid Rs. 7,500/- inclusive of decretal amount, interest, proportionate costs and costs of the litigation till date, and for that amount there would be a charge on suit property. First Appeal No. 14 of 1959, D/- 5-3-1964 (Madh. Pra.), Affirmed. (Para 62)

(D) Civil P. C. (5 of 1908), O. 38, R. 5 — Attachment before judgment — Object of.

The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree. If attachment before judgment is obtained in a suit which ends in a decree but if in appeal the decree is set aside the attachment of necessity must fall. (Para 58)

(E) Civil P. C. (5 of 1908), O. 21, Rr. 72, 92 and 94 — Auction-purchaser, decree-holder himself — Setting aside of decree in appeal — Auction-purchaser, if entitled to any protection.

Ordinarily, if the auction-purchaser is an outsider or a stranger and if the execution of the decree was not stayed of which he may have assured himself by appropriate enquiry, the court auction held and sale confirmed and resultant sale certificate, having been issued would protect him even if the decree in execution of which the auction-sale has been held is set aside. This proceeds on the footing that the equity in favour of the stranger should be protected and the situation is occasionally reached on account of default on the part of the judgment-debtor not obtaining stay of the execution of the decree during the pendency of the appeal. But if the auction-purchaser is the decree-holder himself the situation would materially alter and this decree-holder auction-purchaser should not be entitled to any protection. (Paras 60, 61)

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Mr. S. S. Ray, Sr. Advocate, M/s. G. S.
 Salanki, S. Kachwah and K. J. John, Ad-
 vocates with him, for Appellant in C. A.
 No. 1144/69 and for Respondent Nos. 2
 and 3 in C. A. No. 1145/69.

Mr. G. L. Sanghi, Sr. Advocate, M/s.
 A. G. Ratnaparkhi and K. K. Gupta, Ad-
 vocates with him, for Appellant in C. A.
 No. 1145/69 and for Respondent No. 2 in
 C. A. No. 1144 of 1969.

Mr. V. S. Desai and Dr. Y. S. Chitale,
 Sr. Advocates, Mr. Rameshwar Nath, K. A.
 Chitale and Mrs. S. Ramachandran, Ad-
 vocates with them, for Respondent No. 1 in
 both the Appeals.

D. A. DESAI, J.—What constitutes part
 performance within the meaning of the ex-
 pression in S. 53-A of the Transfer of Pro-
 perty Act ('Act' for short) so as to clothe a
 mortgagee in possession with the title of
 ownership which would defeat the suit of
 the erstwhile mortgagor for redemption, is
 the question canvassed in these two appeals by
 common certificate.

2. Facts first. Sardar Govindrao Mahadik
 original plaintiff 1 (now deceased prosecuting
 these appeals through his legal representatives)
 and Gyarsilal original plaintiff 2 (appellant 2)
 filed Civil Suit No. 14/51 in the Court of the
 District Judge, Indore, for redemption of a
 mortgage in respect of house No. 41 more
 particularly described in plaint paragraph 1,
 dated Feb. 22, 1951. A loan of Rs. 10,000/-
 was secured by the mortgage. The mortgage
 was mortgage with possession. Plaintiff 1
 was the mortgagor and the sole defendant
 Devi Sahai was the mortgagee. Plaintiff 2 is

a purchaser of the mortgaged property from
 plaintiff 1 under a registered sale deed Ex. P-1,
 dated Oct. 14, 1950. Plaintiff 1 will be re-
 ferred to as mortgagor, defendant Devi Sahai
 as a mortgagee and plaintiff 2 Gyarsilal as
 subsequent purchaser in this judgment.
 Even though the mortgage was mortgage
 with possession, it was not a usufructuary
 mortgage but an anomalous mortgage in that
 the mortgagor had agreed to pay interest at
 the rate of 12% and the mortgagee was liable
 to account for the income of the property
 earned as rent and if the mortgagee himself
 occupied the same he was bound to account
 for the rent at the rate of Rs. 515/- per
 annum. Mortgagor served notice dated
 Oct. 5, 1945, calling upon the mortgagee to
 render true and full account of the mortgage
 transaction. The mortgagee failed to com-
 ply with the notice. Subsequently it appears
 that there were some negotiations between
 the mortgagor and the mortgagee which ac-
 cording to the mortgagee, culminated in a
 sale of the mortgaged property in favour of
 mortgagee for Rs. 50,000/-. Account of the
 mortgage transaction was made and the con-
 sideration of Rs. 50,000/- for the sale of the
 house which would mean sale of equity of
 redemption was worked out as under :

Rs. 25,000/- Principal mortgage money
 plus the amount found due
 as interest on taking ac-
 counts of mortgage.

Rs. 17,735/- Given credit for the amounts
 taken from time to time by
 the mortgagor from the
 mortgagee for domestic ex-
 penses. This is disputed as
 incorrect and it was sug-
 gested that the entry be
 read as amount retained to
 pay off other creditors of
 the mortgagor.

Rs. 1,000/- Taken in advance for pur-
 chasing stamps and incur-
 ring registration expenses.

Rs. 6,265/- To be paid in cash at the
 time of registration before
 the Sub-Registrar.

Rs. 50,000/-

Requisite stamps were purchased and the
 draft sale deed was drawn up on Oct. 10,
 1950, but it was never registered. On Oct.
 14, 1950, 1st plaintiff-mortgagor sold the
 suit house by a registered sale deed to plain-
 tiff 2 Gyarsilal for Rs. 50,000/- with an
 agreement for resale. Thereafter the mort-
 gagor and the subsequent purchaser as

plaintiffs 1 and 2 respectively filed a suit on Feb. 22, 1951 against mortgagee defendant Devi Sahai for taking accounts of the mortgage transaction and for a decree for redemption.

3. The mortgagee Devi Sahi defended the suit on diverse grounds but the principal and the only defence canvassed was one under S. 53-A of the Act, namely that even though the sale deed purporting to sell equity of redemption having not been registered would not clothe the mortgagee with title of owner to the mortgaged property, yet he could defend his possession as transferee owner under the doctrine of part performance inasmuch as not only is the mortgagee in possession in part performance of the contract of sale but has continued in possession in part performance of the contract and has done several acts unequivocally referable or attributable to the contract and that the mortgagee as transferee has not only performed but is willing to perform his part of the contract and, therefore, the mortgagor is debarred from enforcing against the mortgagee any right in respect of the mortgaged property. As a necessary corollary, it was also contended that plaintiff 2 has acquired no right, title or interest in the mortgaged property under the alleged sale deed dated Oct. 14, 1950, in view of the fact that the transferor, viz., original mortgagor had no subsisting title to the property on the date of the sale which he could have transferred to the 2nd plaintiff.

4. Arising from the pleadings of the parties, trial Court framed five issues. The trial Court held that plaintiff 1 executed a sale deed of the mortgaged property in favour of the defendant mortgagee but as the sale deed was not registered the transaction of sale is not complete. On the issue of protection of S. 53-A claimed by the defendant mortgagee the trial Court held against him. It was held that the mortgage being mortgage with possession, continued possession of the mortgagee after the date of the contract dated Oct. 10, 1950, would not be in part performance of the contract. The trial Court further held that no payment was made which could remotely be said to be in part performance of the contract. With regard to the payment of Rs. 1,000/- for purchase of stamps and expenses of registration, it was held that the same was paid before the execution of the contract, and therefore, could not be said to be in furtherance of the contract. On these findings the trial Court held that S. 53-A of the Act was not attracted and the mortgage was accordingly

held to be subsisting and a preliminary decree for taking accounts was passed. A Commissioner was appointed for taking accounts.

5. Defendant-mortgagee Devi Sahai preferred Civil First Appeal No. 14/66 to the Indore Bench of the Madhya Pradesh High Court. When this appeal was pending, appellant Motilal in cognate Civil Appeal No. 1145/69 applied under O. 22, R. 10, Civil P. C., for being joined as a party to the appeal claiming that under the sale certificate dated Mar. 25, 1953, issued by the Additional City Civil Judge First Class, Indore, he had purchased the equity of redemption in respect of the mortgaged property and that he has a subsisting interest in the property involved in the dispute and, therefore, he would contest the rights of the plaintiffs as well as of the mortgagee-defendant to claim any right, title or interest in the property. In his application Motilal alleged that he had filed Civil Suit No. 243/47 dated Nov. 3, 1947 for recovering a certain amount against the 1st plaintiff-mortgagor and had secured attachment before judgment of the mortgaged property on Nov. 6, 1947. His suit was decreed to the extent of Rs. 2,500/- by the trial Court. He filed execution application No. 216/51 and in this proceeding the mortgaged property was sold subject to mortgage and he purchased the same for Rs. 300/-. The auction-sale was confirmed on Sept. 25, 1953. It may also be mentioned that the mortgagor-1st plaintiff had preferred appeal against the decree of the trial Court and the appellate Court by its judgment dated March 27, 1953, allowed the appeal and dismissed the suit of Motilal in entirety. Against the appellate decree Motilal filed Second Appeal No. 78/53 in the High Court and by its judgment dated Sept. 4, 1958, Motilal's claim to the tune of Rs. 500/- against the 1st plaintiff-mortgagor along with proportionate interest and costs was decreed. The application of Motilal for being impleaded as a party was contested by the 1st and the 2nd plaintiffs as well as by the defendant-mortgagee. The High Court allowed the application of Motilal for being joined as party to the appeal and examined the contentions advanced on his behalf on merits.

6. The only contention canvassed by the mortgagee in his appeal in the High Court was that he is entitled to the protection conferred by S. 53-A of the Act. In order to attract S. 53-A it was urged that Rs. 1,000/- advanced to mortgagor for purchase of stamps etc. was in furtherance of the con-

tract. The only such act pleaded was payment of Rs. 1,000/- and no other act or circumstance was relied upon. The High Court was of the opinion that original mortgagee Devi Sahai was entitled to the benefit of the doctrine of part performance as against the 1st plaintiff-mortgagor Govindrao Mahadik and his subsequent transferee Gyarsilal because he was in possession and continued to be in possession and paid Rs. 1,000/- in furtherance of the contract. While so holding the High Court imposed a condition that the mortgagee must pay or deposit in the Court an amount of Rs. 24,000/- with interest at the rate of 4% per annum from the date of delivery of possession to him as vendee till the date of payment or deposit on the footing that that was the balance consideration promised but not paid by the mortgagee. The deposit was directed to be made in the trial Court within three months from the date of the judgment of the High Court for payment to the 2nd respondent which would enable the mortgagee to retain possession of the mortgaged property. The High Court gave a further direction that if the payment or deposit as directed in the judgment was not made, the appeal of the mortgagee would stand dismissed and if the amount directed in the judgment of the High Court was paid or deposited in the trial Court within the stipulated time the appeal of the mortgagee would stand allowed and in that event the suit of the mortgagor would stand dismissed. In respect of Motilal's claim the High Court directed that in either event he shall be entitled to recover the balance of his decretal amount and interest at the rate of 4% per annum from the date of the auction sale till the date of realisation and to the extent of that amount there shall be a charge on the mortgaged property enforceable at the instance of Motilal. In the circumstances of the case the High Court did not award costs to either side.

7. Both the original plaintiffs and Motilal made separate applications for certificate under Art. 133 (1) (a) and (b) of the Constitution which were granted. Hence these two appeals.

8. The Appeal (CA 1144/69) preferred by the original plaintiffs — plaintiff 1 being the mortgagor, may be dealt with first. In this appeal 1st defendant (mortgagee) seeks to non-suit the plaintiff on the only ground that he is entitled to the benefit of equitable doctrine of part performance as enacted in Section 53-A of the Act. According to the defendant-mortgagee the mortgagor agreed to

sell the mortgaged property to the mortgagee for consideration of Rs. 50,000/- made up in the manner set out in the sale deed Ex. D-1 dated Oct. 10, 1950 and pursuant to the agreement he has given Rs. 1,000/- being part of the consideration for purchasing stamps and for expenses of registration and after stamps were purchased, sale deed Exhibit D-1 was drawn up and executed and since then he being in possession retained the same as a vendee and accordingly he is entitled to the protection of S. 53-A of the Act.

9. This necessitates focussing of the attention on the requirements of what constitutes part performance as enacted in Section 53-A. Even though at the hearing of the appeals what was the state of law prior to the introduction of Section 53-A in the Act by the Transfer of Property (Amendment) Act, 1929, was canvassed at length, we would like to steer clear of this confusing mass of legal equables and, proceed to analyse the contents of S. 53-A, subsequently referring to legislative cum legal history so far as it is relevant for interpretation of the section. Section 53-A reads as under :

"53-A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract.

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continues in possession, other than a right expressly provided by the terms of the contract;

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

10. In order to qualify for the protection conferred by the equitable doctrine of part performance as enacted in S. 53-A, the following facts will have to be established:

"(1) That the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) That the transferee has in part-performance of the contract taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract;

(3) That the transferee has done some act in furtherance of the contract; and

(4) That the transferee has already or is willing to perform his part of the contract." (see *Nathulal v. Phool Chand*, (1970) 2 SCR 854 at p. 858: (AIR 1970 SC 546 at p. 548)). There was no dispute that the aforementioned conditions have to be satisfied to make good the defence of part performance. The controversy is on their application to the facts of the case.

11. The High Court which accepted the defence of part performance as canvassed on behalf of the mortgagee who claimed to have purchased the property under a sale deed Ext. D-1 dated Oct. 10, 1950, found that payment of Rs. 1,000/- for purchase of stamps was an unequivocal act in furtherance of the contract. The defendant mortgagee did not invite the High Court to consider any other act as having been done by him under the contract or in furtherance of the contract or unequivocally referable to the contract. However, when the matter was heard in this Court, Mr. V. S. Desai, learned counsel appearing for the respondent mortgagee urged the following acts as having been done by the mortgagee in furtherance of the contract which would constitute part performance;

(a) payment of Rs. 1,000/- as agreed to under the contract for purchase of stamps for drawing up and registering the sale deed;

(b) discharge of a debt of Rs. 541/- which was included in the amount of Rs. 7,735/- retained by the mortgagee from the total consideration payable for discharging other debts;

(c) mortgagee agreed to discharge the mortgage subsisting on the property in his favour on settlement of accounts;

(d) all dues owed by the mortgagor to the mortgagee may have to be taken as cleared on completion of the contract;

(e) nature and character of possession changed as recited in the contract;

A few more circumstances were relied upon to show that the mortgagee was willing to perform his part of the contract and the omissions pointed out are not fatal to his case. They are:

(f) failure to offer the amount agreed to be paid before the Registrar and/or not discharging debts agreed to be discharged as having been given credit in the consideration for the sale would not detract from part performance because they have to be evaluated in the facts and circumstances of the case;

(g) conduct of the 1st plaintiff-mortgagor in executing and registering a sale deed in respect of the mortgaged property in favour of the 2nd plaintiff Gyarsilal and thereby frustrating the contract of sale in favour of the defendant mortgagee evidence that the 1st plaintiff mortgagor was aware of the contract in favour of the defendant mortgagee and he was retaining possession in furtherance of the contract;

(h) defendant mortgagee made all attempts to get the deed registered by approaching the Sub-Registrar;

(i) the defendant mortgagee initiated criminal proceedings against the 1st plaintiff mortgagor for misusing the stamp papers.

12. Ordinarily this Court would be loath to examine contentions of facts based on evaluation of evidence advanced for the first time before this Court without any attempt at inviting the adjudication of the same by the High Court. However, as all the contentions arise from the record and proceedings, we propose to examine them on merits more so because we do not propose to rest this judgment on a technical ground also because we are inclined to reverse the decision of the High Court which is in favour of 1st defendant-mortgagee.

13. Section 4 of the Statute of Frauds, 1677 of United Kingdom provided that no person shall be charged upon any contract for sale of lands or any interest in land etc. unless the agreement or some memorandum or some note thereof shall be in writing and signed by the party to be charged thereunder or some other person thereunto by him lawfully authorised. This provision has been substantially re-enacted in S. 40 (1) of the Law of Property Act, 1925 with this departure that sub-section (2) specifically provides that the substantive provision in sub-sec. (1)

does not affect the law relating to part-performance or sales by the Court. As no action could be brought on oral agreement the doctrine of part performance was devised by the Chancery Court with a view to mitigating the hardship arising out of an advantage taken by a person under an oral contract and failure to enforce it would permit such person to retain the undeserved advantage by the Equity Court enforcing the contract. The situation must be such that not to enforce the contract in face of the defence of Statute of Frauds after taking advantage of oral contract would perpetuate the fraud which the statute sought to prevent. The party who altered its position under the contract must have done some act under the contract and it would amount to fraud in the opposite party to take advantage of the contract not being in writing. Such a situation arose where one of the parties to the oral agreement altered its position and when specific performance was sought after taking advantage under oral contract, set-up the defence available under the Statute of Frauds. The Chancery Court while granting relief of specific performance wanted to be wholly satisfied that the pleaded oral contract exists and is established to its utmost satisfaction and in order to ascertain the existence of the oral contract before granting a relief of specific performance the Court wanted to be satisfied that some such act has been done which would be unequivocally referable to the oral contract as would prove the existence beyond suspicion, meaning part performance of the contract. The departure under our law is that when giving its statutory form in S. 53-A of the Act the existence of a written contract has been made sine qua non and simultaneously the statute also insists upon proof of some act having been done in furtherance of the contract. The act relied upon as evidencing part performance must be of such nature and character that its existence would establish the contract and its implementation. Each and every act subsequent to contract by itself may not be sufficient to establish part performance. The act must be of such a character as being one unequivocally referable to the contract and having been performed in performance of the contract. In *Lady Thynne v. Earl of Glengall*, (1848) 2 HL Cas 131 (158), it was observed that: "part performance to take the case out of the Statute of Frauds, always, supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be

under the terms of the agreement and by force of the agreement." This approach would necessitate that the act relied upon as being in the part-performance of the contract was such as by its own force would show the very same contract as is alleged by the person seeking the protection of part-performance.

14. In the fact situation as it unfolds itself in this case, continued possession of the mortgagee hardly offers any clue to the question of part performance. Defendant-mortgagee was in possession of the mortgaged property. Therefore, physical possession having not changed hands, it would be for the mortgagee to show that he continued to retain possession in part performance of the contract and has done some act in furtherance of the contract. Where physical and actual possession was already with the person claiming the benefit of the doctrine of part performance its continued retention by itself without anything more would hardly be indicative of an act unequivocally referable to part performance of the contract. He must further establish that he has done some act in furtherance of the contract. This was not disputed and, therefore, the mortgagee defendant urged before the High Court and reiterated before us that, payment of Rs. 1,000/- inter alia to the 1st plaintiff-mortgagor for purchase of stamps and for expenses incidental to registration was an act unequivocally done in furtherance of the contract.

15. Before evaluating the submission a few relevant facts may be noticed. By letter Ext. P-3 dated Oct. 9, 1950, 1st plaintiff wrote to defendant mortgagee portion of which may be extracted as it has some bearing on the question under consideration:

"... .. it is requested that we have entered into a contract with you for the sale-condition of our house No. 12 situated in Kalai Mohalla. Therefore to buy stamps etc. for the sale you should pay Rs. 1,000/- (Rupees one thousand only) to our Mukhtar Shri Madhavraoji Vishnu Joshi, 82, Ada Bazar, Indorewale, I agree for the same and shall deduct the amount at the time of registration."

16. Pursuant to this letter defendant mortgagee paid Rs. 700/- to the Mukhtar and an endorsement to that effect is found as Exhibit P-4. On the next day that is Oct. 10, 1950, a further amount of Rs. 300/- was given and stamps were purchased and on the same day sale deed Ext. D-1 was drawn up. While reciting the consideration for the sale deed a credit was given for Rs. 1,000/- paid by the mortgagee for purchase of stamps. So

far there is no dispute. The grievance is that according to the 1st plaintiff mortgagor he had agreed to sell the house to the mortgagee but the sale was to be a conditional sale with a right to repurchase and that was agreed to between the parties. Subsequently when the sale deed Ext. D-1 was drawn up he found that it was an absolute sale in breach of the agreement and therefore he did not complete the transaction and sold the house subsequently on Oct. 14, 1950 to the 2nd plaintiff, under Ext. P-1 which is a conditional sale with a right to repurchase.

17. It would thus transpire that payment of Rs. 1,000/- consisting of two separate payments — one of Rs. 700/- on Oct. 9, 1950, and an amount of Rs. 300/- on Oct. 10, 1950, by the defendant mortgagee to 1st plaintiff mortgagor for purchasing stamps for execution of a sale deed is not in dispute. What is in dispute is whether the payment was made towards some contract anterior to the letter Ext. P-3 dated Oct. 9, 1950, or it was in pursuance to the contract dated Oct. 10, 1950, as reflected in the unregistered sale deed. In this connection the stand taken by the mortgagee defendant is both equivocal and fluctuating. In the written statement filed on his behalf on April 10, 1951, there is no specific, clear and unambiguous plea of part performance. Under the heading 'additional plea' in para 9 it is contended that the sale deed having been executed in favour of the mortgagee in settlement of mortgage transaction mutually between the parties and that the mortgaged property has been given to the mortgagee as an owner, the mortgage transaction does not subsist in law. This has been understood to mean a plea for the protection of the doctrine of part performance. Be that as it may, it is not suggested that there was any oral contract anterior to the one as found in the unregistered sale deed Ext. D-1. Nor is there any suggestion of any draft agreement prior to the drawing up of the sale deed Ext. D-1. What transpires from the diverse recital is that there was some oral discussion between the parties prior to the letter Ext. P-3 dated Oct. 9, 1950, at which the understanding was that there was to be a conditional sale with a right of repurchase by the mortgagor and that becomes evident from the recital in Ext. P-3, "sale condition" which is contemporaneous evidence having its intrinsic worth and a stamp of truthfulness because at that time no dispute had arisen and the mortgagor was seeking to work out and implement the agreement by seeking a loan of Rs. 1,000/- for purchase of stamps and for expenses incidental to re-

gistration so as to complete the transaction. But there was no written contract. It must be stated that there was dispute about the nature of transaction is also borne out by the parol evidence. Mortgagee Devi Sahai DW 1 has deposed in para 6 that mortgagor in Chit Ex. P-3 proposed a conditional sale to which he did not agree whereupon mortgagor agreed to give absolute sale. This establishes that there was a dispute as to the nature of the transaction. Section 53-A postulates a written contract from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. There was no concluded contract prior to Ext. D-1. The only written contract which is relied on is the unregistered sale deed Exhibit D-1 of Oct. 10, 1950. On the admission of the mortgagee himself it is crystal clear that out of Rs. 1,000/-, an amount of Rupees 700/- was paid on Oct. 9, 1950, and that was prior to the agreement. As for the payment of Rs. 300/- it is not specifically claimed that that was payment in furtherance of the contract. In any event, stamps were purchased prior to the drawing up of Ext. D-1 which is the contract relied upon for the purposes of S. 53-A. And it must be shown that the act has been done in furtherance of the contract, i.e. subsequent to the contract or at best simultaneously with the contract but unequivocally attributable or referable to the contract. It must follow that acts anterior to and done previous to the agreement cannot be presumed to be done in pursuance of it and cannot, therefore, be considered as acts of part performance. See *Whitbread v. Brockhurst*, (1784-28 ER 1205) quoted by White and Tudor, leading cases on Equity, 8th Edn. at p. 416).

18. The High Court while evaluating the probative value of the circumstances of payment of Rs. 1,000/- started on a wrong premise when it observed that the act envisaged by the phrase "in furtherance of the contract" in S. 53-A should be in pursuance of the contract and not that it should either proceed or follow the agreement or the contract. If a written contract is a *sine qua non* for seeking coverage of the umbrella of the equitable doctrine of part performance any act preceding the contract could conceivably never be in furtherance of that contract which was yet to materialise. Negotiations for a contract and a concluded contract stand apart from each other. Anything at the negotiating stage cannot be claimed as contract unless the contract is concluded between the parties, i.e. the parties are *ad idem*. Coupled with this is the further requirement that it

should be a written contract in that the contract which would purport to transfer for consideration the immovable property must be by writing and the writing must be such that the necessary ingredients to constitute the transfer can be ascertained with reasonable certainty. The High Court overlooking the very important fact situation that the only contract relied upon by the mortgagee defendant was one contained in the unregistered sale deed Ext. D-1 dated Oct. 10, 1950, committed an error in holding that the payment of Rs. 1,000/- prior to October 10, 1950, would undoubtedly be an act in pursuance of the contract which is evidenced by the writing Ext. D-1 duly signed by the 1st respondent. This approach overlooks a vital dispute between the parties, and the High Court could not have utilised this circumstance without resolving the dispute inasmuch as unquestionably there were some negotiations between the parties either on Oct. 9, 1950, or some time prior thereto but there was no concluded contract because the very letter Ext. P-3 by which the 1st plaintiff mortgagor sought a loan of Rs. 1,000/- for purchasing the stamps etc. was pursuant to a conditional sale and that is totally denied and repudiated by the mortgagee as shown hereinabove. Accordingly when the amount of Rs. 1,000/- was paid it was the stage of negotiations and not a concluded contract. And when the contract was drawn up as evidenced by Ext. D-1 being the unregistered sale deed dated Oct. 10, 1950, the parties were not ad idem, because the mortgagor declined to agree to registration of the sale deed as it was contrary to the understanding arrived at between the parties though no doubt he had executed the sale deed. The contention therefore that the amount of Rs. 1,000/- was paid in furtherance of the contract does not bear scrutiny.

19. However, assuming that the finding of fact recorded by the High Court that the amount of Rs. 1,000/- was paid in furtherance of the contract, is a finding of fact recorded on appreciation and evaluation of evidence and ordinarily not interfered with by this Court unless shown to be perverse, the alternative contention that payment of part or even whole of the consideration could not be said to be in furtherance of the contract and, therefore, not sufficient to constitute part performance, may now be examined.

20. How far payment of part or even whole of the consideration would constitute part performance so as to take the case out of S. 4 of the Statute of Frauds may now be

examined with reference first to the English decisions because S. 53-A enacts with some modification the English equitable doctrine of part-performance.

21. In order to mitigate the hardship arising out of the rigorous provisions of the Statute of Frauds equitable doctrine of part performance was devised by the Court of Chancery. Commenting upon S. 4 of the Statute of Frauds, 1677, Lord Redesdale observed in *Foxcroft v. Lester*, (1703) 2 Vern 456, (quoted in White and Tudor's leading cases on Equity, 8th Edn., p. 413) as under :

"The Statute of Frauds says that no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the Court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief. The first case (apparently) of this kind was *Foxcroft v. Lyster* (c), which was decided on a principle acted upon in Courts of law, but not applicable to the particular case. It was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out."

22. The question often arises whether payment of part or even whole of the consideration can be unequivocally attributed to the contract. At p. 416 the authors observe :

"Payment of part or even of all the purchase-money will not be considered an act of part performance to take a parol contract out of the Statute of Frauds. Nor will payment of the auction duty."

23. The payment of a part or even a whole of the consideration was not treated unequivocal act of part performance because it was believed that money can be repaid or can be reclaimed and, therefore, it is not an unequivocal act evidencing an act in furtherance of the contract (See *Hanbury & Maudsley*, Modern Equity, 10th Edn., p. 37). Similarly, *Story's Equity Jurisprudence* 14th Edn., para 1046, p. 424, neatly sets out the history of the approach to payment of money as evidence of part performance. It may be extracted :

"... It seems formerly to have been thought that a deposit, or security, or payment of the purchase money, or of a part of it, or at least of a considerable part of it, was such a part performance as took the case out of the statute. But that doctrine

was open to much controversy, and is now finally overthrown. Indeed the distinction taken in some of the cases between the payment of a small part and the payment of a considerable part of the purchase-money seems quite too refined and subtle, for independently of the difficulty of saying what shall be deemed a small and what a considerable part of the purchase money, each must, upon principle, stand upon the same reason, namely, that it is a part performance in both cases, or not in either. One ground why part payment is not now deemed a part performance, sufficient to take a case out of the statute, is that the money can be recovered back again at law, and therefore the case admits of full and direct compensation."

24. Equity by G. M. Keeton and L. A. Sheridan, 2nd Edn., p. 366 sets out chronologically the approach of the Court to payment of money as evidencing part performance. Attitude to the payment of money as an act of part performance had varied from time to time. In *Elizabeth Maddison v. John Alderson*, (1882-83) 8 AC 467 Lord Selborne, L. C. pointed out:

"... the payment of money is an equivocal act not (in itself) unless connection is established by parol testimony indicative of a contract consisting of land."

25. In Snell's *Principles of Equity*, 20th Edn., p. 587, under the heading 'Insufficient Acts to bring the case out of the doctrine of part performance', it is noted that payment of a part of the purchase-money, or even apparently the whole, is not sufficient for part performance of a contract for the sale of land for the payment of money is an equivocal act (not in itself), until the connection is established by parol testimony, indicative of a contract concerning land. *E. Maddison v. J. Alderson* is relied upon in support of this statement.

26. A few cases to which our attention was drawn may now be referred to. In *Clinan v. Cooke*, 1775-1802 All ER (Reprint) 16, Cooke inserted an advertisement in the public papers inviting offers to let a piece and parcel of land for the period set out in the advertisement. In response to this advertisement the plaintiffs applied to Edmund Meagher to whom the application was to be addressed and entered into a treaty with him for lease of land. A memorandum of agreement was entered into between the parties and the intending tenant deposited 50 guineas which the advertiser received in consideration of the lease on the recommendation of Meagher who also appeared to have received a sum of 20 guineas from the plaintiffs for

which no receipt was given. Subsequently Mr. Cooke refused to perform the agreement and he granted a new term of lease to the defendants who entered into the same with the knowledge of the agreement with the plaintiffs. An action was brought by the plaintiffs for specific performance. Declining to grant that relief Lord Redesdale held as under:

"But I think this is not a case in which part performance appears. The only circumstance that can be considered as amounting to part performance is the payment of the sum of fifty guineas to Mr. Cooke. It has always been considered that the payment of money is not to be deemed part performance to take a case out of the statute."

27. In *Maddison's case* ((1882-83) 8 AC 467) Lord Selborne, L. C. in unequivocal terms observed that it may be taken as now settled that part payment of purchase money is not enough, and judges of high authority have said the same even of payment in full. *Clinan v. Cooke*, 1775-1802 All ER (Reprint) 16, *Hughes v. Morris*, (1852-2 De G. M. & G 356) and *Britain v. Rossiter*, ((1879) 11 QBD 123), were relied upon in support of this. Again at p. 484 Lord O'Hagan taking note of the conflict of decisions pertinently observed as under:

"I confess I have found it hard to follow the reasoning of the judges in some of the cases to which the Lord Chancellor has referred to reconcile the rulings, in others of them — and to regard as entirely satisfactory the state of the law in which the taking of possession or receipts of rent is dealt with as an act of part performance, and the giving and acceptance of any amount of purchase money, confessedly in pursuance and affirmation of a contract of sale, is not. As to some of the judgments prompted no doubt by a desire to defeat fraud and accomplish justice, I am inclined to concur with the present Master of the Rolls in *Britain v. Rossiter*, when he called them "bold decisions"."

It may be noted that in that case an intestate induced a woman to serve him as his house-keeper without wages for many years and to give up other prospects of establishment in life by a verbal promise to make a Will leaving her a life estate in land and afterwards signed a Will, not duly attested, by which he left her the life estate. It was contended on behalf of the woman who worked as house-keeper that she had wholly performed her part by serving the intestate as house-keeper till the intestate's death without wages yet the Court in its equity jurisdiction declined to hold such an act as referable to any con-

tract and was not such a part performance as to take the case out of the operation of Section 4 of the Statute of Frauds. This case is being referred to to show how firmly established and entrenched the view was that part payment is not enough. Offer to work without wages was treated as evidencing some payment not enough to sustain the plea of part performance. That equity should take such a view of human service and sacrifice is difficult to appreciate. Modern notions of equity, fairplay and just approach would stand rudely shaken by the view taken in that case and quoting the case is not to be interpreted to mean sharing the view.

28. In *Chaproniere v. Lambert*, 1916-17 All ER (Reprint) 1089, the Court of Appeal reinforced the view which held the field till then that the mere payment of rent is not such part performance to take the case out of the statute and even payment of whole of the purchase money has been held not to be sufficient to take the case out of the statute. In so doing it reiterated the view taken in *Maddison v. Alderson*.

29. In England the law took a sharp U-turn in *Steadman v. Steadman*, (1974) 2 All ER 977 Lord Simon of Glaisdale under the heading 'Payment of money' observed as under:

"It has sometimes been said that payment of money can never be a sufficient act of part performance to raise the required equity in favour of the plaintiff or, more narrowly, that payment of part or even the whole of the purchase price for an interest in land is not a sufficient act of part performance. But neither of the reasons put forward for the rule justifies it as framed so absolutely. The first was that a plaintiff seeking to enforce an oral agreement to which the statute relates needs the aid of equity; and equity would not lend its aid if there was an adequate remedy at law. It was argued that a payment could be recovered at law, so there was no call for the intervention of equity. But the payee might not be able to repay the money (he might have gone bankrupt), or the land might have a particular significance for the plaintiff (of the equitable order for specific delivery of a chattel of particular value to the owner: *Duke of Somerset v. Cookson*), (1735-24 ER 1114) or it might have greatly risen in value since the payment, or money may have lost some of its value. So, it was sought to justify the rule, alternatively, on the ground that payment of money is always an equivocal act, it need not imply a pre-existing contract, but is equally consistent

with many other hypotheses. This may be so in many cases, but it is not so in all cases. Oral testimony may not be given to connect the payment with a contract; but circumstances established by admissible evidence (other acts of part performance, for example) may make a nexus with a contract the probable hypothesis. In the instant case, for example, what was said (i.e. done) in the magistrates' Court in part performance of the agreement makes it plain that the payment of the £108 was also in part performance of the agreement and not a spontaneous act of generosity or discharge of a legal obligation or attributable to any other hypothesis."

30. To some extent, therefore the statement of law in *Maddison's case* ((1882-83) 8 AC 467) that it may be taken as well settled that the payment of part of purchase money or even the whole of the consideration is not sufficient act of part performance can be taken to have been shaken considerably from its foundation.

31. While text book writers and English decisions may shed some light to illuminate the blurred areas as to whether part payment of purchase money or even the whole of the consideration would not be sufficient act of part performance, it is necessary that this aspect may be examined in the background of statutory requirement as enacted in Section 53-A. To qualify for the protection of the doctrine of part-performance it must be shown that there is a contract to transfer for consideration immovable property and the contract is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. These are prerequisites to invoke the equitable doctrine of part performance. After establishing the aforementioned circumstances it must be further shown that a transferee had in part performance of the contract either taken possession of the property or any part thereof or the transferee being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract. The acts claimed to be in part performance must be unequivocally referable to the pre-existing contract and the acts of part performance must unequivocally point in the direction of the existence of contract and evidencing implementation or performance of contract. There must be a real nexus between the contract and the acts done in pursuance of the contract or in furtherance of the contract and must be unequivocally referable to the contract. When series of

acts are done in part performance, one such may be payment of consideration. Any one act by itself may or may not be of such a conclusive nature as to conclude the point one way or the other but when taken with many others payment of part of the consideration or the whole of the consideration may as well be shown to be in furtherance of the contract. The correct approach would be, what Lord Reid said in *Steadman's case* (1974-2 All ER 977) that one must not first look at the oral contract and then see whether the alleged acts of part performance are consistent with it. One must first look at the alleged acts of part performance and see whether they prove that there must have been a contract and it is only if they do so prove that one can bring in the oral contract. This view may not be wholly applicable to the situation in India because an oral contract is not envisaged by S. 53-A. Even for invoking the equitable doctrine of part performance there has to be a contract in writing from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. Therefore, the correct view in India would be, look at that writing that is offered as a contract for transfer for consideration of any immovable property and then examine the acts said to have been done in furtherance of the contract and find out whether there is a real nexus between the contract and the acts pleaded as in part performance so that to refuse relief would be perpetuating the fraud of the party who after having taken advantage or benefit of the contract backs out and pleads non registration as defence, a defence analogous to S. 4 of the Statute of Frauds.

32. We may recall here that the acts preliminary to the contract would be hardly of any assistance in ascertaining whether they were in furtherance of the contract. Anything done in furtherance of the contract postulates the pre-existing contract and the acts done in furtherance thereof. Therefore, the acts anterior to the contract or merely incidental to the contract would hardly provide any evidence of part performance.

33. The contention of Mr. Desai that payment of Rs. 1,000/- for purchase of stamps is an act of part performance unequivocally attributable or referable to the contract dated Oct. 10, 1950, cannot be accepted for two reasons, one being that Rs. 700/- out of the amount of Rs. 1,000/- was paid on Oct. 9, 1950, that is prior to the date of contract. Then there is a serious dispute as to the nature of contract which was negotiated on Oct. 9, 1950, the day on which payment of

Rs. 700/- was made. Mortgagor was insisting upon a conditional sale and defendant mortgagee declined to accept the conditional sale and that is borne out by his evidence also. There was thus no concluded contract on Oct. 9, 1950, and, therefore, the payment of Rs. 700/- out of Rs. 1,000/- in any case could not be said to be part performance and the same reasons would *mutatis mutandis* apply to the payment of Rs. 300/- also. In the facts of this case this payment would not be an act of part performance. In our opinion, therefore, the High Court recorded an utterly unsustainable finding without minutely examining the relevant evidence coupled with the requirement of law and erred in holding that the payment of Rs. 1,000/- was in furtherance of the contract. We would also add that in the facts and circumstances of the case payment of Rs. 1,000/- was not such an act of part performance which would help defendant mortgagee in any manner.

34. Mr. Desai next contended that the mortgagee discharged a debt of Rs. 541/- which was included in the amount of Rupees 17,735/- retained by the mortgagee from the total consideration payable for discharging other debts and that this payment was in furtherance of the contract. This contention is being put forward for the first time in this Court and should be negatived on that account alone. Even apart from this there is no sufficient evidence to uphold this contention. In fact, the defendant mortgagee himself has to some extent prevaricated on the question of retention of Rs. 17,735/- out of the total consideration for the sale transaction agreed at Rs. 50,000/-. Consideration of Rs. 50,000/- was made up, *inter alia*, by retaining Rs. 17,735/- in discharge of debts owed by mortgagor to mortgagee by borrowing loans on different occasions for domestic expenses. It is so stated in Ex. D-1 which has been extracted earlier.

35. Mortgagee in his evidence gave a go by to this recital and deposed that the amount of Rs. 17,735/- from the total consideration payable by him was retained by the mortgagee for payment of other creditors of the mortgagor. Even apart from this he has not stated a word that out of the amount of Rs. 17,735/- he paid Rs. 541/- to any particular creditor. In his written statement he has stated that the amount of Rs. 17,735/- was kept in deposit for payment to other creditors of the mortgagor. One such creditor was to be paid a sum of Rs. 541/-. This creditor is none other than the mortgagee himself. This would mean that he himself was creditor to whom he

paid Rs. 541/-. Assuming that he could have reimbursed himself, there is nothing to show that he gave a discharge or that he gave credit in his books of accounts. Further, there is no statement in his evidence to that effect. That aspect was never canvassed before the trial Court as well as the High Court and we find no material evidence to substantiate this contention. The contention, has, therefore, to be negated.

36. The third act of part performance pleaded on behalf of the mortgagee is that the mortgagee agreed to discharge the mortgage subsisting on the property in his favour on settlement of accounts. The mortgage deed admittedly was not returned to the mortgagor even after the mortgagor executed Ext. D-1 the sale deed which was not ultimately registered. But that is not enough. The mortgagee admitted in his evidence that even after Ext. D-1 was executed he maintained the accounts of mortgage and in that account he debited Rs. 1,000/- paid to the mortgagor for purchase of stamps. Could it be said that he had discharged or agreed to discharge the mortgage subsisting on the property? There is however a piece of evidence which completely belies the claim and demonstrably establishes that mortgagee never claimed to regard himself as owner from Oct. 10, 1950 the date of contract but till a later date continued to regard himself as a mortgagee with subsisting mortgage. Mortgagee made an application on June 23, 1952 nearly two years after the contract of sale in the execution proceedings filed by Motilal seeking to bring mortgage property to court auction for realising his decretal amount, which decree he had obtained against the mortgagor. In this application dated June 23, 1952 mortgagee has stated that till that date Rs. 27792/2/3 were due under the mortgage from the mortgagor and that fact must be noted in the sale proclamation and thereafter property should be sold. Now if on Oct. 10, 1950 accounts were made, mortgage was satisfied and mortgage debt was discharged, how is it that on June 23, 1952 he retained the mortgage account, worked out the amount due and sought its mention in the sale proclamation. This conduct of mortgagee is sufficient to negative this contention. In any event mere oral agreement to discharge a mortgage could hardly be said to be an act of performance unless in fact such an act was done and that could have been only done by a discharged mortgage deed being returned to the mortgagor.

37. The next act of part performance pleaded by the mortgagee is that all dues owed by the mortgagor to the mortgagee have to be taken as cleared on completion of the contract. Now, even here his stand is equivocal. In the written statement it was stated that at the time of filing the written statement a sum of Rs. 29,000/- was found to be due from the mortgagor. If on Oct. 10, 1950, all accounts were made up, how could he continue a mortgage account which mortgage according to him came to be satisfied when he took the sale deed and continued in possession in part performance of the contract? Therefore, the submission is without merits.

38. The next act of part performance pleaded by the mortgagee is that the nature and character of possession changed as recited in the contract. Mortgagee was in possession as mortgagee. Now, according to him since the date of execution of the sale deed the nature of possession changed. For this he relies upon a statement in the sale deed Ext. D-1 wherein it is stated that he is being put in possession as owner. This mere recital is hardly indicative of the change in the nature of possession. There is no evidence to show that he moved the authorities that he would be liable to pay taxes as owner. There is no overt act on his part to so assert possession as owner. A mere recital in the disputed sale deed is of dubious evidentiary value and when it would be pointed out that he was never willing to perform his part of the contract which is a pre-requisite for claiming protection of the doctrine of part performance it will be shown that he believed himself to be a mortgagee and acted as such even at a date much later than Oct. 10, 1950, from which date he claims to be the owner.

39. Induction into possession of an immovable property for the first time subsequent to the contract touching the property, may be decisive of the plea of part performance. Mere possession ceases to be of assistance when as in this case the person claiming benefit of part performance is already in possession, prior to the contract and continues to retain possession. However a reference to a statement of law in Halsbury's Laws of England, 3rd Edition, Vol. 36, para 418 would be instructive. It reads as under:

"Where possession is given to a 'tenant' before a tenancy agreement has been concluded and the possession is retained after

the conclusion of the agreement, the possession, if unequivocally referable to the agreement, is a sufficient part performance but subject to this, acts done prior to, or preparatory to, the contract will not suffice".

If a person claiming benefit of part performance is inducted into possession for the first time pursuant to the contract it would be strong evidence of the contract and possession changing hands pursuant to the contract. In *Hodson v. Heuland*, (1896) 2 Ch 428, it was held that although the entry into possession was antecedent to the contract, yet the subsequent continuance in possession being, under the circumstances, unequivocally referable to the contract, constituted a part performance sufficient to take the case out of the Statute of Frauds.

40. In *Nathulal's case* (AIR 1970 SC 546) the fact that Nathulal parted with possession after receiving part payment of the sale consideration was held sufficient to constitute part performance. This Court observed that in part performance of contract Phoolchand has taken possession of the property and he had in pursuance thereof paid a part of the consideration and thereby the first three conditions for making good the defence of part performance had been satisfactorily shown to exist. But greater emphasis was laid on the decision of *Somnath Iyer, Acting C. J. in Babu Murlidhar v. Soudagar Mohammad Abdul Bashir*, AIR 1970 Mys 203. In that case an unregistered agreement of sale executed by the mortgagor in favour of the mortgagee in possession recited that after the date of the agreement the mortgagee who had been in possession as such would become the owner of the property and that he could get his name mutated into mutation register of the municipality and in implementation of this agreement of sale, the mortgagor himself made an application for mutation to the municipal authorities and the name of the mortgagee was mutated as owner of the property, it was held sufficient to clothe the mortgagee with the protection of S. 53-A in a suit for redemption of the mortgage and the mortgagor's suit was dismissed. The Court attached considerable importance to the provision in the unregistered agreement for mutation in favour of the mortgagee as owner and the subsequent conduct of the mortgagor in making an application for mutation was held to be the clearest indication which is essential for invoking the doctrine of part performance. The decision can be said to depend more or less on the facts of the case. However

in this connection a reference was also made to *Subba Rao v. Matapali Raju*, AIR 1950 FC 1 at p. 7. That decision is hardly of any importance because an extreme contention was advanced on behalf of the mortgagee resisting a suit for redemption that he is in possession and that he continued to be in possession in part performance of the agreement which argument was repelled by the Court on the observation that the mortgagee had never been in possession and the contention that he was always in constructive possession could hardly assist him. In *Jahangir Begum v. Gulan Ali Ahmed*, AIR 1955 Hyd 101, the Court after holding that the defendant was in possession and had put up a structure on it, came to the conclusion that he was not entitled to the benefit of doctrine of part performance because he was already in possession before the contract to transfer the property, relied upon by him, was entered into and, therefore, it was obligatory upon him to show that he had done some act in furtherance of the contract in order to constitute a part performance of the contract. In *Kukaji v. Basantilal*, AIR 1955 Madh Bha 93, the facts found were that A mortgaged with possession his house with B. Subsequently A sold the house to B in consideration of the mortgage debt and the amount spent by A on improvements and repairs of the house. The deed was not registered. Subsequently A sold the same property to C under a registered sale deed. C sued B for redemption. B relied on the equitable doctrine of part performance in defence. Negating the defence of part performance the Court held that as B was already in possession as a mortgagee, unless he shows that he did some act in furtherance of the contract, over and above being in possession, mere continuance in possession would not constitute part performance. The case is very near to the facts disclosed in the case under discussion. There is an understandable and noteworthy difference in the probative value of entering into possession for the first time and continuing in possession with a claim of change in character. Where person claiming benefit of part performance of a contract was already in possession prior to the contract, the Court would expect something independent of the mere retention of possession to evidence part performance. Therefore mere retention of possession, quite legal and valid, if mortgage with possession is not discharged, could hardly be said to be an act in part performance unequivocally referable to the contract of sale.

41. Section 53-A requires that the person claiming the benefit of part performance must always be shown to be ready and willing to perform his part of the contract. And if it is shown that he was not ready and willing to perform his part of the contract he will not qualify for the protection of the doctrine of part performance. Reverting to the consideration recited in Exhibit D-1 the sale deed, even according to the mortgagee it was agreed that he had retained an amount of Rs. 17,735/- out of the total consideration of Rs. 50,000/- for payment to the other creditors of the mortgagor. Barring a claim made in the written statement that he paid himself Rs. 541/- which was included in the amount of Rupees 17,735/- which allegation itself is unconvincing, there has not been the slightest attempt on his part to pay up any of the creditors of the mortgagor. There is nothing to show that he had the list of all the creditors of the mortgagor or that he made any attempt to procure the list or that he issued a public notice inviting the creditors of the mortgagor to claim payment from him to the extent of the consideration retained by him. Not a single creditor has been paid is an admitted position. But the more inequitable conduct of the mortgagee is that he had not made the slightest attempt to contact any of the creditors of the mortgagor or to pay even the smallest sum. There is no such statement in the written statement but even in his evidence at the trial he has not been able to show that he has paid any creditor or made any attempt to pay any of the creditors including those whose names were admittedly known to him such as Ramkaran Ghasilal, Kajodimal, Motilal Bhagirath and Kanhaiyalal Chagganlal. Further shifting stand of mortgagee to suit his convenience is discernible here. In Ext. D-1, the entry of Rs. 17,735/- is described as 'have been taken from you from time to time for domestic expenses'. In his evidence mortgagee states that this recital is incorrect and the correct position according to him is that the amount of Rs. 17,735/- from total consideration payable by him was retained to pay to other creditors of mortgagor. According to him the only amount due to him from mortgagor outside the mortgage transaction was a debt of Rs. 541/- only. Mortgagee neither paid himself nor other creditors and thereby did not perform his part of the contract. He even did not pay a small decretal amount of Rs. 500/- plus interest and costs to Motilal in 1952 but allowed the property to be sold. Coupled with this is the fact

that according to the recital in Ext. D-1 he had agreed to pay the balance of the consideration of Rs. 6,265/- to the mortgagor at the time of registration of the sale deed. Now, undoubtedly the mortgagor did not agree to get the sale deed registered because there was a dispute between the parties as to the nature of the transaction. But the defendant-mortgagee made unilateral attempt to get the sale deed registered by offering it for registration. Thus while attempting to complete his title both legally and ever in equity he was under an obligation to pay Rs. 6,265/- to the mortgagor. This liability is not disputed yet in this behalf he has not stated anything in his examination-in-chief that he made any attempt to pay that amount to the mortgagor. Add to this his failure to return the discharged mortgage deed and his further averment that he used to maintain the mortgage account even after Oct. 10, 1950. All this would conclusively show that the mortgagor himself was not willing to perform his part of the contract. In this view of the matter Mr. Desai's contention that failure to pay the amount agreed to be paid before the Registrar and/or not discharging debts agreed to be discharged as having been given credit in the consideration for the sale would not detract from part performance because they have to be evaluated in the facts and circumstances of the case cannot be upheld.

42. It was next contended on behalf of the mortgagee that the conduct of the 1st plaintiff-mortgagor in executing and registering a sale deed in respect of the mortgaged property in favour of 2nd plaintiff Gyarsilal and thereby frustrating the contract of sale in favour of the defendant-mortgagee evidences that the 1st plaintiff was aware of the contract in favour of the defendant-mortgagee and he was retaining possession in furtherance of the contract. The submission does not constitute any independent act on the part of mortgagee but it is merely another facet of the fact of permission being retained by the defendant-mortgagee. Retention of possession is of no consequence in this case because the mortgage was not discharged and was subsisting and the mortgage being a mortgage with possession the mortgagee was entitled to retain possession. The fact that immediately a sale deed was executed in favour of 2nd plaintiff by 1st plaintiff would show that he was unwilling to accept the contract as offered by the mortgagee. The subsequent purchaser Gyarsilal has taken a conditional sale and this reinforces the stand of the mortgagor. The existence of the dispute about the nature of the transaction,

namely, according to the mortgagor he wanted an absolute sale and this dispute between the parties as on Oct. 10, 1950, is not in dispute. Therefore the conduct of the mortgagor is consistent with this case.

43. It was next contended that defendant-mortgagee made all attempts to get the deed registered by approaching the Sub-Registrar, and that the defendant-mortgagee initiated criminal proceedings against the 1st plaintiff-mortgagor for misusing the stamp papers need not detain us, as they have no probative value.

44. Having, therefore, examined all the contentions canvassed on behalf of the mortgagee we unhesitatingly reach the conclusion that the mortgagee has failed to prove that he did any act in furtherance of the contract, continued retention of possession being a circumstance of neutral character in the facts and circumstances of the case and it being further established to our satisfaction that the mortgagee was not willing to perform his part of the contract, it is clear that the mortgagee is not entitled to the benefit of the equitable doctrine of part performance.

45. On the conclusions hereby indicated the appeal preferred by the plaintiffs (CA 1144/69) must be allowed and the judgment of the High Court has to be set aside and the one rendered by the trial Court is restored with costs throughout.

46. That takes us to the second appeal preferred by Motilal being CA 1145/69. First a synopsis of the facts relevant to the dispute raised by appellant Motilal. Motilal filed Civil Suit No. 243/47 on Nov. 3, 1947, for recovering his debt from mortgagor Govindrao Mahadik. In this suit he obtained attachment before judgment of the suit property on Nov. 6, 1947. The suit of Motilal ended in a decree in the amount of Rs. 2,500/- on March 5, 1951. On March 27, 1951, execution application No. 216 of 1951 was made by Motilal. On April 3, 1951, the executing Court made an order that as the suit property of the judgment-debtor has already been attached by an order of attachment before judgment, steps should be taken for drawing up a proclamation of sale under O. 21, R. 66, Civil P. C. The Court directed auction sale of the suit property to be held on Dec. 9, 1951. It appears that the auction sale was stayed. There was some default on the part of the judgment-debtor to comply with the conditional stay order and on his failure auction sale was directed to be held on March 23, 1952. After correcting the amount due on

the mortgage of mortgagee in the proclamation of sale, a fresh auction was held on Aug. 23, 1952. In the meantime, in the absence of any bidder at the auction Motilal the decree-holder himself obtained permission of the Court to bid at the auction and his bid in the amount of Rs. 300/- was accepted and the sale in favour of Motilal was confirmed on Sept. 23, 1952.

47. In the meantime mortgagor Govindrao Mahadik the judgment-debtor in Motilal's suit filed Regular Appeal No. 125/51 which was allowed by the Additional District Judge as per his judgment dated Mar. 27, 1953 and thereby the suit of Motilal was dismissed in entirety. Motilal preferred Second Appeal No. 78/53 in the High Court of Madhya Bharat and by its judgment dated Sept. 1, 1958 (sic) Motilal's appeal was allowed and a decree in his favour in the amount of Rs. 500/- with interest and proportionate costs was passed.

48. Motilal made an application on Apr. 2, 1962 purporting to be under O. 22, R. 10 of the Code of Civil Procedure alleging that he came to know about the suit filed by the mortgagor for redemption of the mortgage in Dec. 1961 and as the decision in the suit is likely to have an impact on his rights and that as he is the purchaser of the equity of redemption, the mortgagor and the subsequent purchaser from the mortgagor cannot now maintain the action for redemption of the suit property and he should be substituted in place of the plaintiffs and be permitted to prosecute the suit for redemption against mortgagee. This application was contested on behalf of the parties to the suit.

49. The High Court was not fully satisfied about the explanation of delay in making the application by Motilal and was not even inclined to accept the suggestion that he became aware of the suit in 1961 and that on the ground of gross delay the application was liable to be dismissed. The High Court ultimately made an order as under :

"Therefore, although ordinarily we might not be inclined to allow Motilal's request to be impleaded in this Court at the appellate stage, we are of opinion that it would be desirable to have a final decision about the various points of dispute between all the parties in order to avoid further unnecessary litigation. From this point of view only, we would allow Motilal to be impleaded in the present litigation by addition of his name, and not by allowing him to replace both the plaintiffs."

50. Having thus directed Motilal to be impleaded as a party respondent, the High

Court proceeded to ascertain, evaluate and adjudicate the right claimed by Motilal and ultimately held that in any event the auction-purchaser Motilal shall be entitled to recover the balance of his decretal amount and interest at the rate of 4% per annum from the date of his auction sale till the date of realisation or deposit as the case may be either from the appellant or from the mortgagor or subsequent purchaser, as the case may be, and that there shall be a charge on the suit property for the aforementioned amount which shall be enforceable at the instance of Motilal by a sale of the property. Motilal was held disentitled to costs on account of the delay in filing the application.

51. Mr. Ray, learned counsel for the 1st plaintiff-mortgagor contended that the High Court was in error in allowing the application of Motilal to be impleaded as a party because according to Mr. Ray Motilal could not be said to be claiming under the mortgagor and that, therefore, he could not maintain the application under O. 22, R. 10, Civil P. C.

52. Rule 10 of O. 22, provides for continuance by or against a person of any action who acquires any interest either by assignment, creation or devolution during the pendency of suit, with the leave of the Court. In ascertaining whether Motilal can maintain the application his averments in the application will have to be taken as the basis for invoking the Court's jurisdiction under O. 22, R. 10. The question that will have to be posed would be whether Motilal acquired any interest by assignment, creation or devolution during the pendency of the suit and would, therefore, be entitled to continue the suit. The suit is primarily a suit for redemption of mortgage. A suit for redemption of mortgage can be brought by a person holding the equity of redemption. Motilal contends that the suit property was sold at a court auction with subsisting mortgage thereon and the right, title and interest of the mortgagor was sold at the court auction and on the sale being confirmed and the sale certificate being issued he acquired the interest either by assignment or devolution of the original mortgagor. Now this assertion is controverted on behalf of the original mortgagor and the subsequent purchaser contending that much before the confirmation of the sale on Sept. 23, 1952, the subsequent purchaser had purchased the equity of redemption by the sale deed Exhibit P-1 dated Oct. 14, 1950, and that the original mortgagor had no subsisting right, title and interest in the suit property on

Aug. 23, 1952, being the date of the sale in favour of Motilal. This was countered on behalf of Motilal by his learned counsel Mr. G. L. Sanghi asserting that Motilal had obtained an attachment before judgment of the suit property by order dated Nov. 5, 1947, and that this was subsisting till Mar. 5, 1951, when the trial Court decreed the suit of Motilal against the mortgagor in the amount of Rs. 2,500/- and till the application for execution was filed on March 27, 1951, and no reattachment was necessary. These facts are incontrovertible but one aspect of law has to be examined as to what is the effect of the judgment of the appellate Court in the appeal filed by original mortgagor Govindrao Mahadik, the decree obtained by Motilal, to wit, the appeal was allowed and Motilal's suit was dismissed on March 27, 1953. Between March 27, 1953, till the High Court allowed the appeal of Motilal on Sept. 4, 1958 (sic), there was no subsisting attachment but it must be recalled that by Sept. 23, 1952, the sale was confirmed and the sale certificate was issued on March 25, 1953, that is two days before the appeal of mortgagor preferred against the decree obtained by Motilal was allowed on March 27, 1953.

53. The averments of Motilal in his own application would prima facie be sufficient to sustain an application under O. 22, R. 10. The question whether he has acquired an interest or not in the property either by assignment or devolution which is the subject-matter of dispute in this appeal would have to be answered on merits but the narration of chronological events as delineated hereinabove would clearly show that Motilal has more than a mere semblance of title which this Court will have to investigate. And even if *stricto sensu* the application would not fall under O. 22, R. 10, C. P. C., yet S. 146 of the Civil P. C. would certainly enable Motilal to maintain the application (See *Smt. Saila Bala Dassi v. Smt. Nirmala Sundari Dassi*, 1958 SCR 1287 at p. 1291 : (AIR 1958 SC 394 at pp. 396, 397), referred to with approval in *Shew Bux Mohata v. Bengal Breweries Ltd.*, (1961) 1 SCR 630 : (AIR 1961 SC 137). Undoubtedly the High Court was reluctant to overlook the gross delay in preferring the application but even after this reluctance the High Court having granted the application, we would consider it imprudent to reject the application on the ground of delay.

54. Once Motilal becomes a party, two contentions advanced on his behalf will have to (be) examined : (a) has he become, under

the sale certificate obtained by him, a purchaser of equity of redemption so as to disentitle the original mortgagor from bringing the present action; (b) what is the effect of the attachment before judgment secured by him on Nov. 6, 1947, on the sale of equity of redemption in favour of the subsequent purchaser under the sale deed Ext. P-1 dated Oct. 14, 1950?

55. Looking to the proclamation of sale it is crystal clear that the property was sold subject to subsisting mortgage in favour of Devi Sahai, mortgagee. At a Court auction what is sold is the right, title and interest of the judgment debtor. The judgment debtor in the decree obtained by Motilal was original mortgagor Sardar Govindrao Mahadik. Subject to other conditions, his right, title and interest would be one of a mortgagor, that is the right to redeem the mortgage styled as equity of redemption. According to Motilal this equity of redemption was sold at the Court auction and it was purchased by him. Subject to the decision on the second contention so as to the effect of attachment before judgment there is no substance in this contention because much before even the proclamation of sale was issued the equity of redemption held by the mortgagor was sold by him under sale deed Ext. P-1 dated October 14, 1950, in favour of 2nd plaintiff Gyarsilal. Therefore, even on the date of the decree as also on the date of filing of the execution application mortgagor had no subsisting interest in the property which could be sold at the court auction. On this short ground it can be held that Motilal did not acquire under the sale certificate equity of redemption of the mortgage.

56. But Mr. Sanghi, learned counsel for Motilal contended that the transfer in favour of subsequent purchaser under the sale deed Ext. P-1, dated October 14, 1950, by the mortgagor is void against Motilal because in the suit filed by Motilal he had obtained an order of attachment before judgment of the suit property and this attachment before judgment would cover the right, title and interest of the mortgagor defendant in that suit and that any private sale inter vivos of the attached property would under S. 64 of the Code of Civil Procedure be void against the attaching creditor. Proceeding further along this line it was contended that as a corollary if the sale in favour of subsequent purchaser is void against Motilal then the equity of redemption continued to remain vested in the original mortgagor and at the court auction the same was sold and purchased by Motilal. This necessitates examination of the effect of

an order of attachment before judgment in a suit.

57. Order 38, Rule 5, enables the Court to levy attachment before judgment at the instance of a plaintiff if the conditions therein prescribed are satisfied. What is the nature of attachment levied in this case is not made known save and except saying that the suit property was attached and the sale proclamation mentioned therein the subsisting mortgage. Taking the best view in favour of Motilal, one can say that what was attached was the equity of redemption. The attachment was levied and continued to subsist till the date of the decree. It would, therefore, not be necessary to reattach the property.

58. What is the effect of attachment before judgment? Attachment before judgment is levied where the Court on an application of the plaintiff is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree. The provision in S. 64 of the Civil P. C. provides that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is claimed enforceable is the claim for which the decree is made. Motilal's suit was for a money claim. It finally ended in a decree for Rs. 500/- by High Court and in between the 1st appellate Court had dismissed Motilal's suit in entirety. There is nothing to show that the attachment which would come to an end on the suit being dismissed would get revived if a second appeal is filed which ultimately succeeds. In fact, a dismissal of the suit may terminate the attachment and the same would not be revived even if the suit is restored and this becomes manifestly clear from the newly added provision in sub-rule (2) of R. 11-A of O. 23, C. P. C. which provides that attachment before judgment in a suit which is dismissed for default shall

not be revived merely because by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored. As a corollary it would appear that if attachment before judgment is obtained in a suit which ends in a decree but if in appeal the decree is set aside the attachment of necessity must fail. There should be no difficulty in reaching this conclusion.

59. The question, however, is what happens if at an intermediate stage pursuant to the decree of the trial Court the attached property is sold at a Court auction? How would the rights and obligations of the auction purchaser be adversely affected if the appeal is allowed and the suit is dismissed. Ordinarily where the appeal is preferred an attempt should be made to obtain stay of the execution of the decree of the trial Court. However, it is notorious that the appellate Court is loath or reluctant to grant stay of a money decree and the judgment debtor may not be in a position to deposit the decretal amount and in this situation more often the execution proceeds and before the appeal is disposed of an equity in favour of a third person as auction purchaser who purchases the property at a court auction may come into existence. If afterwards the appeal is allowed and the suit is dismissed, would the auction purchaser be adversely affected? The emerging situation in this case clearly demonstrates the dilemma.

60. Ordinarily, if the auction purchaser is an outsider or a stranger and if the execution of the decree was not stayed of which he may have assured himself by appropriate enquiry, the court auction held and sale confirmed and resultant sale certificate having been issued would protect him even if the decree in execution of which the auction sale has been held is set aside. This proceeds on the footing that the equity in favour of the stranger should be protected and the situation is occasionally reached on account of default on the part of the judgment debtor not obtaining stay of the execution of the decree during the pendency of the appeal.

61. But what happens if the auction-purchaser is the decree holder himself? In our opinion, the situation would materially alter and this decree holder — auction purchaser should not be entitled to any protection. At any rate, when he proceeds with the execution he is aware of the fact that an appeal against the original decree is pending. He is aware of the fact that the resultant situa-

tion may emerge where the appeal may be allowed and the decree which he seeks to execute may be set aside. He cannot force the pace by executing the decree taking advantage of the economic disability of a judgment debtor in a money decree and make the situation irreversible to the utter disadvantage of the judgment debtor who wins the battle and loses the war. Therefore, where the auction-purchaser is none other than the decree holder who by pointing out that there is no bidder at the auction, for a nominal sum purchases the property, to wit, in this case for a final decree for Rs. 500/-, Motilal purchased the property for Rs. 300/-, an atrocious situation, and yet by a technicality he wants to protect himself. To such an auction purchaser who is not a stranger and who is none other than the decree holder, the Court should not lend its assistance. The view which we are taking is not unknown and to some extent it will be borne out by the observations of this Court in *Janak Raj v. Gurdial Singh*, (1967) 2 SCR 77 at p. 86: (AIR 1967 SC 608 at p. 618). This Court made a pertinent observation which may be extracted:

"The policy of the legislature seems to be that unless a stranger auction purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified."

62. Viewed from this angle, the order of the High Court that the auction-purchaser decree holder Motilal would be entitled to recover the decretal amount of Rs. 500/- with interest at the rate of 4% per annum and proportionate costs could be styled as manifestly equitable. However the Court cannot overlook the conduct of the mortgagor Govindrao Mahadik, his subsequent purchaser Gyarsilal and even the original mortgagor Devi Sahai in not paying a small debt and allowing the property to be auctioned and forcing Motilal to the logical end of litigation and yet without the slightest recompense to go on investing into this bottomless pit of unending litigation. And at best his attachment before judgment is a security that his decree would be satisfied from the property attached and sale to the extent of recovery of decretal amount from attached property would be against attaching creditor, void. If we assure him payment of decretal amount and costs the sale in his favour is of no significance. The logical course for us would have been to leave Motilal to his own

remedy which we consider inequitable in the facts and circumstances of this case. The order made by the High Court would hardly provide him Rs. 1,500/- to recover which he must have spent at the inflated rate of litigation costs. In our opinion, while not granting the substantial relief claimed by Motilal and looking to the conduct of all the parties, we direct that Motilal should be paid Rs. 7,500/- inclusive of decretal amount, interest, proportionate costs and costs of the litigation till today, and for this amount there will be a charge on this property to be cleared by Govindrao Mahadik at the time of redemption of the property which amount will have to be paid by Gyarsilal's heirs in view of the sale-deed in favour of Gyarsilal.

63. Accordingly, Civil Appeal No. 1144/69 filed by Govindrao Mahadik is allowed and the judgment and decree of the High Court are set aside and those of the trial Court are restored with costs throughout.

64. Civil Appeal No. 1145/69 preferred by Motilal is disposed of in accordance with the direction hereinabove indicated with no order as to costs. CMP 9004/80 and CMP 10593/80 for substitution are allowed.

Order accordingly.

AIR 1982 SUPREME COURT 1008

Y. V. CHANDRACHUD, C. J.,
A. VARDARAJAN AND
AMARENDRA NATH
SEN, JJ.

Criminal Misc. Petns. Nos. 8774 of 1980 and 2581 of 1981, D/- 23-3-1982.

Anil Yadav and others, Petitioners v. (1) The State of Bihar, and (2) Bachcho Lal Das, Respondents.

Constitution of India, Arts. 32, 311 — Habeas Corpus petition by blinded prisoners — Jail Superintendent directed to file affidavit in the case — His suspension on very date direction was issued by Court — Miscellaneous petition by him challenging suspension on ground that its object is to defeat Court's direction, filed in the writ by blinded prisoners, held was maintainable.

Where the Superintendent of the Bhagalpur Central Jail, who was suspended by the Govt. of Bihar on the very day the Supreme Court in the Habeas Corpus petition filed by the blinded under-trials directed him (the Superintendent, Bhagalpur Jail) to file an affidavit, challenged

his suspension on ground that his suspension order was passed by the State mala fide with the object of preventing him from filing an affidavit in pursuance of the direction issued by the Supreme Court, by filing a Misc. Petition in the writ petition instituted by the blinded prisoners, the Supreme Court entertained the petition despite the law that an order of suspension cannot be challenged in an incidental proceeding, as at first blush the allegation in the Misc. petition seemed plausible. The Miscellaneous petition was however disallowed as on facts the suspension was not found to be mala fide. (Paras 7, 8, 11)

* Mr. B. L. Das, Petitioner (in Misc. Petition) in-person; Mr. K. G. Bhagat and Mr. D. Goburdhan, Advocates, for the Respondent (State) Mr. R. N. Poddar, Advocate, for Respondent (CBI).

ORDER :— These Misc. Petitions are an off-shoot of the blindings of undertrial prisoners at Bhagalpur in the State of Bihar. Truth has a strange habit of revealing itself and in spite of the veil of secrecy behind which the blindings of those prisoners lay concealed or suppressed, this Court and the country awoke one day to the incredible fact that, in Bhagalpur, undertrial prisoners were subjected to the most inhuman torture imaginable: their eyes were pierced with needles and acid poured into them. Whether these barbarous acts were committed by members of the public after the prisoners were caught or by the police after they were arrested, is not a matter directly in issue before us. The greater probability is that these acts may have been committed mostly by the police. But this much is certain, that six prisoners were thus blinded between Oct., 1979 and May 1980 and twelve between June 11 and July 25, 1980. The petitioner Bachcho Lal Das, who has filed these Misc. Petitions, had assumed charge as the Superintendent of the Bhagalpur Central Jail on April 19, 1979.

2. On Oct., 26, 1979 a prisoner by the name of Arjun Goswami was sent to the Bhagalpur Central Jail. On Nov., 20, 1979 he addressed an application to the Chief Judicial Magistrate, Bhagalpur, asking that an inquiry be held into the torture inflicted upon him, especially the blinding of his eyes. That application was forwarded by the petitioner to the Chief Judicial Magistrate. Later, eleven prisoners made similar complaints which

were forwarded by the petitioner to the learned Sessions Judge, Bhagalpur, on July 30, 1980. The complaints made by these prisoners unquestionably demanded the most prompt and careful attention. But, instead of directing a full and proper inquiry into the allegations made by the undertrial prisoners, the learned Sessions Judge on Aug. 5, 1980, sent a cold and indifferent reply to the petitioner's covering letter, saying that "there is no provision in the Cr. P. C. to provide a lawyer to any person for prosecuting a criminal case as a complaint" and that the petitions of the prisoners were forwarded to the Chief Judicial Magistrate, Bhagalpur, "for needful in accordance with law".

3. On Oct. 9, 1980, ten blinded prisoners filed a Habeas Corpus petition in this Court (Criminal Writ Petition No. 5352 of 1980) asking that: (1) they should be produced in the Court, (2) they should be examined by a Medical Board, (3) they should be paid compensation for the damage done to their eyes and that (4) the police officers guilty of committing atrocities upon them should be suitably punished. On Oct. 10, 1980 a Bench of this Court consisting of one of us, (the Chief Justice), and Justice A. D. Koshal passed the following order in that petition:

"We direct that the petitioners shall be examined by the Jail Doctor forthwith and a report shall be submitted to this Court expeditiously in regard to the allegation in the petition that their eyes have been damaged by certain police officers by putting acid therein. The report shall be submitted within four weeks from today. The w. p. be listed for hearing after the report is received."

By his letter dated Oct. 31, 1980 the petitioner, who is respondent 2 in the Habeas Corpus petition, forwarded to this Court the report of the Jail Doctor on the condition of the eyes of the prisoners. The remaining 2 prisoners were already released and could not therefore be examined. The report of the Jail Doctor in regard to one of the prisoners, Anil Yadav is representative of the condition of all the eight of them and may be extracted here:

"(1) Presence of old burn scar around both the eyelids of both the eyes and on left cheek

(2) Collapse of both the eye balls,

(3) Perception of light and projection of rays absent in both the eyes.

(4) Eye sight of both the eyes lost.

The cause is perforation of eye balls by burn with some corrosive substance and puncture by some sharp and pointed weapon.

From the records of Jail Hospital it is known that he was admitted in Jail Hospital on 8-7-1980 for acid burn injury of both the eyes."

4. On Dec. 1, 1980, the Court (the Chief Justice and Chinnappa Reddy, J.), while directing that the prisoners be brought to Delhi the following week and be examined at the Dr. Rajendra Prasad Ophthalmic Institute, New Delhi, passed the following order:

"The report of the doctor which we had called for by our Order dated October, 10, 1980 shows that eight out of the ten petitioners before us have lost their eye-sight totally or partially. The report submitted by Dr. K. S. Roy in each individual case shows that

(i) most of the petitioners are suffering from collapse of one or both of the eye-balls;

(ii) the sight of one or both of their eyes is lost;

(iii) there is perforation of their eye-balls by burn with a corrosive substance and that ;

(iv) their eyes have been punctured by some sharp and pointed weapon.

The remaining two petitioners have been released and therefore no report could be sent regarding them.

The report of the doctor will shock the conscience of mankind. There has been the most flagrant violation of the safeguards provided by Articles 19 and 21 of the Constitution. There is nothing that the Court can do to restore the physical damage, which seems irreparable. But the offenders must at all events be brought to book, at least in the hope that such brutal atrocities will not be committed again.

With that end in view, we direct the Superintendent of the Bhagalpur Central Jail to file an affidavit in this Court within two weeks from to-day stating:

(a) the names of convicts and undertrial prisoners in the jail whose eyes have been damaged or impaired before or after their lodgement in jail;

(b) the names of policemen, police officers and the members of the jail staff

who were in charge of those prisoners at the relevant time;

(c) the names of doctors who were in charge of the jail dispensary or hospital at the relevant time; and

(d) the name of doctors who have examined, from time to time, the petitioners and other prisoners whose eyes have been damaged or impaired after their lodgement in jail.

We direct that the Registrar of the Supreme Court and one other officer of the Court shall visit the Bhagalpur Central Jail during this week and obtain first-hand the version of the petitioners and other prisoners similarly situated as regards the impairment or blinding of their eyes. The two officers of the Court shall be granted every facility to meet the prisoners, to talk to them beyond the hearing of any jail officer or police officer and to record the statements of the prisoners. We direct the Jail Superintendent to ensure due and full compliance with these directions.

Issue notice to the State of Bihar asking it to show cause on the petition as also as to why the petitioners should not be released on bail on their personal recognition."

5. Shri R. Narasimhan, Registrar (Judicial) and Shri Y. Lal, Assistant Registrar of this Court visited the Bhagalpur Central Jail on Dec. 3 and 4, 1980 and recorded the statements of 17 prisoners who were blinded. These statements show that 15 out of the 17 prisoners were blinded by the police, and the remaining 2, whose names appear at Serial Nos. 14 and 15 of the report of the Registrar, were blinded by the members of the public. The method adopted for blinding the undertrial prisoners, as described by the prisoners themselves, was that a 'takwa' (a long needle used for stitching gunny bags) or a barber's nail-cutter or a cycle spoke was poked into their eyes and acid was poured into the eyes, sometimes with the help of a dropper, sometimes with a syringe and sometimes directly from a bottle. It is alleged that the prisoners were held firmly on the ground by policemen who either pulled the ropes tied to their feet or sat upon their feet.

6. The Registrar questioned the petitioner, Bachcho Lal Das, in Delhi. The petitioner stated to him that as many as 31 blinded prisoners were brought to the Jail under orders of remand issued by the Magistrate and that they were given

medical treatment by the Jail Doctor. According to the petitioner, he got a blinded prisoner Umesh Yadav examined by the Jail Doctor, since the report of the doctor was required by the learned District and Sessions Judge, Bhagalpur, in connection with a bail application filed by the prisoner. The petitioner disclosed to the Registrar that he had made inquiries from Umesh Yadav, who told him that V. K. Sharma, D. S. P., had thrust a long needle in both of his eyes and had poured acid into the eyes. The other blinded persons appear to have taken a cue from Umesh Yadav and submitted similar petitions for being forwarded to the District and Sessions Judge. The petitioner disclosed to the Registrar the names of the police officers who were involved by the prisoners as being responsible for their blindings.

7. It may be recalled that this Court by its order dated Dec. 2, 1980 had directed the petitioner, who was then the Superintendent of the Bhagalpur Central Jail, to file an affidavit within two weeks on Points (a) to (d) mentioned in that order. On that very day, the petitioner was suspended by the Government of Bihar on the ground that he was negligent in providing proper medical aid to the blinded undertrial prisoners inside the Jail and that he had failed to make proper entries in the Jail Register as regards the physical condition of the undertrial prisoners. On Dec. 10, 1980 the petitioner filed the main Misc. Petition in this Court in the Writ Petition filed by the blinded prisoners. He prays that the order of suspension dated Dec. 1, 1980 be quashed, since it was passed by the State of Bihar mala fide with the object of preventing him from filing an affidavit in pursuance of the direction issued by this Court on Dec. 1, 1980.

8. We would not have entertained a petition of this nature in the normal circumstances, because an order of suspension cannot be challenged in this manner in an incidental proceeding. We, however, decided to hear the Misc. Petitions filed by the petitioner for quashing the order of suspension, since he alleged which, at first blush, seemed plausible, that he was suspended in order to defeat the order passed by this Court on Dec. 1, 1980.

9. The petitioner appeared in person before us and argued his case at great length. We gave him all reasonable faci-

lities to substantiate his contention, which he did with the help of the voluminous record prepared by him. Having considered the submissions of the petitioner and those of Shri K. G. Bhagat, who appeared on behalf of the State of Bihar, we are of the opinion that there is no merit in the complaint of the petitioner that he was suspended on Dec. 1, 1980 in order to prevent him from complying with the order passed by this Court on that day and with the ulterior object of defeating that order.

10. Shri Ambika Prasad Poddar, Assistant Inspector General of Prisons, Bihar, has filed an affidavit in this Court, setting out the circumstances in which and the reasons for which the petitioner was suspended by the Government of Bihar. The case made out in that affidavit is that the petitioner failed to discharge his official functions enjoined upon him by R. 474 (1) of the Bihar Jail Manual, in that he did not scrutinise and sign the entries made in the Admission Register maintained at the Central Jail, in order to satisfy himself whether those entries were correct and whether the relevant rules in regard to the admission of the prisoners were complied with. It is stated in the affidavit that contrary to R. 474 (2) the petitioner failed to record any 'special order' regarding the medical treatment given or to be given to the blinded prisoners, with the result that they were not sent for examination to any eye specialist either in the Jail or at the Bhagalpur Medical College Hospital. Though the District Magistrate, Bhagalpur, had given his approval on Oct. 21, 1980 to the proposal for sending the blinded prisoners for specialised treatment at the Bhagalpur Medical College Hospital, the petitioner, it is alleged, neglected to discharge his duty and sent the prisoners for medical treatment to the Hospital ten days later on Oct. 31, 1980. According to Shri Ambika Prasad Poddar, the petitioner omitted to make a report on the blindings of prisoners lodged in the Jail which was under his charge, he did not hold a parade of the prisoners nor did he make the weekly inspection of the Jail, and on the top of it all, he supplied to newspapermen his own one-sided version of the blindings. The suspension order, according to Shri Poddar, was passed on the basis of the various rules and notifications governing the conditions of the petitioner's service and was not passed in order to frustrate

or defeat the order passed by this Court on Dec. 1, 1980.

11. On a careful consideration of the aforesaid affidavit and the arguments advanced before us by the parties, we find it difficult to accept the petitioner's contention that the order of suspension was passed by the Government of Bihar mala fide, that is to say, as a counterblast to the order passed by this Court on December 1, 1980 and to defeat it. The question for inquiry in these miscellaneous petitions is very narrow and limited. The question is not even whether the order of suspension is mala fide in a broad and general sense, covering the entire gamut of extraneousness. The question before us is whether the motive behind the order was to frustrate the purpose of our direction calling upon the petitioner to file an affidavit. That charge is not substantiated and is difficult to accept. It appears that officers of the State Government were enquiring into the blindings of the undertrial prisoners at least from November 27, 1980. There is a report dated Dec. 1, 1980 in the Government files, which was produced before us by Shri K. G. Bhagat, by which Shri L. V. Singh, Deputy I. G. P. (Prisons), recommended that for reasons of dereliction of duty the petitioner should be suspended. We find it quite difficult to accept the petitioner's contention that the report of Shri Singh was prepared later and was antedated in order to justify the order of suspension.

12. We are also unable to appreciate how the State Government could prevent the petitioner from filing an affidavit as directed by this Court, by placing him under suspension. The petitioner would be free to file his affidavit in spite of the order of suspension and in fact he has filed an affidavit in this Court after he was suspended. During the course of arguments before us, he produced photostat copies of quite a few documents, which also show that the order of suspension is not calculated to interfere with the direction given by this Court, asking the petitioner to file his affidavit. If we had found that by reason of the order of suspension the petitioner was prevented from filing his affidavit, we would not have hesitated to ask the Government of Bihar to supply copies of necessary documents to the petitioner in order to enable him to file a full and

complete affidavit in compliance with our order.

13. The Miscellaneous Petitions have therefore to be dismissed. We would, however, like to state that we are not called upon to consider in these incidental proceedings, and we have in fact not considered the question of the validity of the order of suspension dated December 1, 1980. The petitioner will be at liberty to challenge that order, if so advised, in a properly constituted proceedings, on such grounds as may be open to him including the ground that the order was passed mala fide. We have only dealt with the narrow question as to whether the order of suspension was passed with the object of preventing the petitioner from filing an affidavit in this Court and on that question we have rejected the petitioner's contention that the order of suspension was passed for that purpose. We have not inquired into the question whether the order of suspension is vitiated by mala fides for any other reason.

14. It is desirable and but proper that the State Government ought not to visit the petitioner with any penalty or punishment for approaching this Court or for having attempted to lay before this Court, what according to the petitioner, was the truth of the matter in regard to the bizarre blinding of the undertrial prisoners.

15. Order accordingly.

Petition dismissed.

AIR 1982 SUPREME COURT 1012

(From : Madhya Pradesh)*

V. D. TULZAPURKAR AND

AMARENDRA NATH SEN, JJ.

Civil Appeal No. 504 (N) of 1971,
D/- 23-3-1982.

Bhopal Sugar Industries Ltd., Appellant v. State of M. P. and others, Respondents.

(A) Madhya Pradesh Sugar-cane (Regulation of Supply and Purchase) Act (1 of 1959), S. 21 — Levy under — Though called "commission" it is really in the nature of a fee — Imposition of — Can be supported only on basis of quid pro quo in the shape of rendition of services

*Misc. Petn. No. 246 of 1967, D/- 24-4-1970 (Madh. Pra).

CZ/CZ/B261/82/VCD

to the factory in the matter of cane purchased. AIR 1966 SC 416, Rel. on.

(Para 4)

(B) Madhya Pradesh Sugar-cane (Regulation of Supply and Purchase) Act (1 of 1959), Ss. 21 (1), 15 — Levy of commission on purchase of cane — Purchases of cane made by factory from "non-reserved areas" — Cane Development Council is entitled to impose commission on such purchases.

S. 21 does not limit the imposition of commission (fee) to purchases of cane made by a factory from reserved area only; the imposition is on every maund of cane purchased by a factory irrespective of the area from where such purchases may have been made. Secondly, the functions and duties of the Council which are in the nature of rendering services in the matter of better cane production, distribution and supply thereof to the factory are not confined to the "reserved area" so declared for a factory under S. 15. It, therefore, cannot be said that in the matter of cane purchases made by the factory from non-reserved areas no services are rendered by the Council to the factory. The quid pro quo being here the imposition of commission (fee) on such purchases from non-reserved areas would be proper and justified.

(Para 5)

(C) Madhya Pradesh Sugar-cane (Regulation of Supply and Purchase) Act (1 of 1959), S. 21 (1) — Levy of commission on purchase of cane — Purchases of cane made by factory through Cane-growers' Co-operative Society — It cannot be said that there is no quid pro quo by the Society to the purchasing factory — Imposition of commission by Society on purchases made through it — Proper.

It cannot be said that in respect of purchases of cane made by the factory through the Cane-growers' Co-operative Society there is no element of quid pro quo in the shape of rendering of services by the Society to the purchasing factory. The Society is, therefore, entitled to impose commission on purchases of cane made through it.

(Para 7)

The Cane-growers' Co-operative Society is established to develop scientific methods of sugar-cane growing and calls on its members to introduce modern means or implements for cultivating sugar-cane which unquestionably makes for assured bulk supply of uniformly good quality cane through its members to the purchaser-factory. This function undertaken by

the Society is of a nature or kind similar to that undertaken by the council and therefore, it cannot be said that no services conferring special benefit on the factory in the matter of its purchases of cane are rendered by the Society to the factory. (Para 7)

Cases Referred : Chronological Paras
AIR 1980 SC 1008 : (1979) 3 SCR 1217 6
AIR 1966 SC 416 : (1966) 1 SCR 523 2, 4

Mr. R. P. Bhatt, Sr. Advocate, M/s. Ashok Mehta, J. B. Dadachanji and D. N. Misra, Advocates for J. B. D. & Co. with him, for Appellant. Mr. Gopal Subramaniam and Mr. S. A. Shroff, Advocates, for Respondents.

TULZAPURKAR, J.:— Two questions were raised for our determination in this appeal by a certificate :

(a) Whether the Sugar-cane Development Council, Sehore (respondent No. 2) can charge commission under S. 21 (1) of the Madhya Pradesh Sugar Cane (Regulation of Supply & Purchase) Act, 1958 on purchases of sugar-cane made by the appellant-company from outside the "reserved area"? and

(b) Whether the Sugar Cane-Growers Development Co-operative Union Ltd., Sehore (respondent No. 3: the concerned Cane Growers Cooperative Society) can charge commission under S. 21 (1) (a) of the Act in respect of the purchases of sugar-cane made by the appellant through the Union when there is no quid pro quo by way of rendering any services by Union to the appellant-company?

2. The short facts giving rise to the above questions may be stated: The appellant-company crushes sugar-cane in its factory at Sehore in Madhya Pradesh. For its business it purchases sugar-cane from "reserved area" as well as from outside both directly from the cane-growers as well as through respondent No. 3, a Cane-growers Co-operative Society, Sehore. S. 21 of the Act imposes an obligation upon the appellant-company to pay commission on all its purchases of cane at prescribed rates and it has to pay such commission in respect of purchases made through the Society to the Society and the Development Council and in respect of purchases made directly from the cane-growers to the Development Council. According to the appellant-company judicial decisions rendered by Madhya Pradesh High Court as well as this Court have settled the position that the commis-

sion chargeable under S. 21 of the Act is in the nature of a fee the imposition of which is supported on the basis of quid pro quo in the shape of services rendered by the Development Council to a factory (vide : Jaora Sugar Mills (P.) Ltd. v. State of Madhya Pradesh, (1966) 1 SCR 523 : (AIR 1966 SC 416)). It appears that during the seasons 1960-61 to 1964-65 the appellant-company purchased cane directly from the cultivators of "reserved area" as well as from the cultivators of "non-reserved area" and respondent No. 2 (Development Council, Sehore) made a demand of commission from the appellant-company in respect of such purchases both from "reserved area" as well as from "non-reserved area". Similarly, during the crushing seasons 1963-64 to 1966-67 the appellant-company made purchases of cane from or through respondent No. 3 (Co-operative Society) in respect whereof a demand of commission was made by respondent No. 3 from the appellant-company. By a writ petition (being Misc. Petition No. 246 of 1967) filed in the Madhya Pradesh High Court at Jabalpur the appellant-company challenged the validity of the demand made by respondent No. 2 insofar as it related to purchases made from non-reserved area on the ground that it (Council) was established for the reserved area of the appellant-company's factory and its functions were confined to that area and as such no commission (fee) could be recovered by it in respect of purchases made by appellant-company from non-reserved area; similarly, the demand made by respondent No. 3 (Co-operative Society) was challenged on the ground that no services of any kind whatsoever were rendered by it to the appellant-company, and the charge would be invalid in the absence of any quid pro quo. The High Court negatived both the contentions and dismissed the petition. It is this decision of the High Court that is challenged before us in the appeal and counsel for the appellant-company raised the two questions mentioned at the commencement of the judgment.

3. S. 21 which deals with commission on purchase of cane, runs thus :

"(1) There shall be paid by the occupier a commission for every one maund of cane purchased by the factory—

(a) where the purchase is made through a Cane-growers' Co-operative Society, the commission shall be payable to the

Cane-growers' Co-operative Society and the Council in such proportion as the State Government may declare; and

(b) where the purchase is made directly from the cane-grower, the commission shall be payable to the Council.

(2) The Commission payable under clauses (a) and (b) of sub-section (1) shall be at such rates as may be prescribed provided, however, that the rate fixed under clause (b) shall not exceed the rate at which the commission may be payable to the Council under clause (a)." Section 30 confers power on the State Government to make rules for the purpose of carrying into effect the provisions of the Act and under Cl. (3) of sub-s. (2) such Rules may provide for "the rate at which and the manner in which commission shall be paid to the Cane-growers' Co-operative Society on the supply of cane by them". Under the aforesaid provisions certain rules called the Madhya Pradesh Sugar-Cane (Regulation of Supply and Purchase) Rules, 1959 have been framed by the State Government. Rules 45 and 46 occurring in Chapter X of the Rules are material and they are as follows:—

"45. The occupier of factory shall pay a commission for the cane purchased at the following rates, namely:—

(i) Where the purchase is made through a Cane-growers' Co-operative Society, at the rate of 5 Naya Paise per maund out of which 2 Naya Paise shall be payable to the Society and 3 Naya Paise to the Council;

(ii) Where the purchase is made directly from the cane-growers, at the rate of 3 Naya Paise per maund, payable to the Council.

46. In determining the proportion to which payments out of commission shall be made to the Council and the Cane-growers' Co-operative Society of an area the State Government may take into consideration the financial resources and the working requirements of the Council and the Cane-growers' Co-operative Society."

4. It is thus clear from the aforesaid statutory provisions that every factory is under an obligation to pay commission on all its purchases of cane at the prescribed rates and it has to pay such commission at the rate of 2 Naya Paise per maund to the Society and 3 Naya Paise to the Council in respect of purchases made through a Cane-growers' Co-operative Society and at the rate of 3 Naya Paise

per maund to the Council where the purchases are made directly from the cultivators or cane-growers. It cannot be and was not disputed by Counsel on behalf of the respondents that the levy under S. 21 of the Act though called "commission" is really in the nature of a fee, the imposition of which is supportable only on the basis of quid pro quo in the shape of rendition of services to the factory in the matter of cane purchased by it and Counsel accepted this position as emerging from this Court's decision in Jaora Sugar Mills' case (AIR 1966 SC 416) (supra).

5. Now, turning to the first question raised before us Counsel for the appellant-company contended that respondent No. 2 Council has been established for the the "reserved area" of the appellant's factory so declared under S. 15 of the Act, that respondent No. 2 Council is required to discharge its statutory functions and duties under S. 6 of the Act confined to the "reserved area" meant for the appellant's factory and as such the demand for commission (fee) in respect of purchases of cane made by the appellant-factory from non-reserved areas (which it is entitled to make along with its purchases from the "reserved area") would be illegal and without any authority of law because in respect of such purchases there is no quid pro quo in the shape of rendering of services by respondent No. 2 to the appellant-factory. It is not possible to accept this contention for more than one reason. In the first place there are no qualifying words to be found in S. 21 of the Act which limit the imposition of commission (fee) to purchases of cane made by a factory from reserved area only; the imposition is on every maund of cane purchased by a factory irrespective of the area from where such purchases may have been made. Secondly, and this is important, if the relevant provisions of Ss. 5 and 6 of the Act are carefully examined it will appear that the functions and duties of the Development Council are not confined to the "reserved area" of a factory as urged by the Counsel for the appellant-company. Under S. 5 "there shall be established, by notification for the reserved area of a factory a Cane Development Council which shall be a body corporate provided that where the Cane Commissioner so directs, the Council may be established for a larger or smaller area than the reserved area of a factory" and sub-sec. (2) provides that "the area

for which a Council is established shall be called a Zone'. In other words, the Zone (area of operation) of a Council could be larger than the "reserved area" of a factory i. e. would include areas outside the reserved area of the factory. Further, the functions and duties of the Council are indicated seriatim in Cls. (a) to (g) of sub-sec. (1) of S. 6 and these include functions like considering and approving development programmes for the Zone, devising ways and means for execution of development plan in all its essentials such as cane varieties, cane-seed, sowing programme, fertilizers and manures, taking steps for the prevention of diseases and pests and rendering all help in soil extension work, etc. etc. and it will be noticed that some of these functions under clauses (b), (d) and (e) are of general character and not confined even to the Zone of the Council. In other words, the functions and duties of the Council which are in the nature of rendering services in the matter of better cane production, distribution and supply thereof to the factory are not confined to the "reserved area" so declared for a factory under S. 15 of the Act. If that be so it is difficult to accept the contention, that in the matter of cane purchases made by the appellant's factory from non-reserved areas no services are rendered by the respondent No. 2 Council to the appellant's factory. The quid pro quo being there the imposition of a fee on such purchases from non-reserved areas would be proper and justified.

6. As regards the demand and recovery of commission (fee) by respondent No. 3 under S. 21 (1) (a) in respect of purchases of sugar-cane made by the appellant's factory through it, the contention of Counsel for the appellant-company has been that respondent No. 3 is the concerned 'Cane-growers' Co-operative Society in the area, one of the objects of which is to sell cane grown by its members to the appellant's factory, that the said Society does not render any services to the appellant's factory under the Act or otherwise and hence is not entitled to recover any fee from the appellant-company. It is pointed out that respondent No. 3 is meant for helping its members and in fact renders various types of services to its cultivator-members so that they are not exploited. In fact in the matter of supplies of cane made through the respondent No. 3 it is the Society

which deals with its members who receive their price from the Society. Counsel pointed out that even in the return filed by respondent No. 3 to the writ petition, respondent No. 3 enumerated four types of services which it claimed was rendering to the appellant's factory, namely, (a) it made arrangements for lump sum cane supply on lump sum demand from the factory; apart from convenience this resulted in economy to the factory as it had to maintain less staff, (b) it undertook equitable distribution of quota and the factory had not to undertake this function; (c) it undertook the maintenance of the records of individual growers for cane supplies and the factory had not to undertake this function and (d) it made payment to the suppliers though the factory is required to make payments for supplies effected immediately and in actual practice mostly the factory made payments late at its convenience but the Society made payments to the suppliers regularly according to the programme drawn by it; the appellant's factory thus benefited by the existence of this Society. But according to Counsel for the appellant-Company none of these items referred to above really amounts to rendering any service to the appellant's factory by way of conferring on it some special benefit having a direct, close or reasonable correlation to its transactions of purchase of cane and, if at all these items referred to in the Return are really for the benefit of cultivator-members of the Society and in this behalf Counsel relied upon a decision of this Court in Kewal Krishan Puri's case (1979) 3 SCR 1217: (AIR 1980 SC 1008) where in the context of enhanced market fee levied under Punjab Agricultural Produce Market Act, 1961 this Court has observed that the quid pro quo by way of rendering services must result in the conferral of some special benefits to the persons charged which have a direct, close and reasonable correlation between such persons and their transactions and that any indirect or remote benefit to them would in no sense be such benefit. Counsel for the appellant-company, therefore, urged that since in everything that is being done by it respondent No. 3 is rendering services to its own members and no services resulting in any special benefit to the appellant's factory are rendered, no charge by way of any fee, would be legally recoverable by respondent No. 3 from the appellant's factory,

7. In our view having regard to the scheme of the Act and the activities which respondent No. 3 has been undertaking in the discharge of its normal functions, it will be difficult to accept the contention urged by Counsel for the appellant's factory that no services of any kind whatsoever resulting in conferral of special benefits on the appellant's factory in regard to its transactions of purchases of cane are rendered by respondent No. 3 to the appellant's factory. The scheme of the Act is that under Ss. 15 and 16 a declaration of reserved and assigned areas for purchase and supply of sugar-cane is made by the Cane Commissioner for every factory after consulting in the manner prescribed the occupier of the factory and the Cane-growers' Co-operative Society, if any, in that area and upon declaration of such areas an obligation is cast upon the occupier of the factory, in the case of "reserved area", to purchase all cane grown in such area which is offered for sale and in respect of "assigned area" to purchase such quantity of cane grown therein and offered for sale for the factory as may be determined by the Cane Commissioner. Further, under S. 19 the State Government can by order regulate the distribution, sale and purchase of cane within any "reserved and assigned area" as also from areas other than "reserved and assigned areas" and under cl. (b) of subsec. (2) such order made by the State Government may provide for the manner in which cane grown in the "reserved area" or the "assigned area" shall be purchased by the factory and the cane grown by a cane-grower shall not be purchased except through a Cane-growers' Co-operative Society. In other words the scheme of Act contemplates situations where the appellant's factory may have to purchase cane from within reserved or assigned areas only through the respondent No. 3 Society. Moreover in its Return the respondent No. 3 has averred that under its bye-laws the Society is established to develop scientific methods of sugar-cane growing and calls on its members to introduce modern means or implements for cultivating sugar-cane which unquestionably makes for assured bulk supply of uniformly good quality cane through its members to the appellant's factory. In other words this function undertaken by respondent No. 3 is of a nature or kind similar to that undertaken by the council and therefore it cannot be

said that no services conferring special benefit on the appellant's factory in the matter of its purchases of cane are rendered by respondent No. 3 to the appellant's factory. Having regard to the aforesaid position it is not possible to accept the contention that in respect of purchases of cane made through the respondent No. 3 Society there is no element of quid pro quo in the shape of rendering services by respondent No. 3 to the appellant's factory.

8. In the result both the questions are answered against the appellant-company and the appeal is dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 1016

S. MURTAZA FAZAL ALI AND

R. B. MISRA, JJ.

Writ Petns. Nos. 3846 of 1981; 6454-55 of 1980; 8924 and 8979 of 1981 etc., D/-16-3-1982.

P. P. Enterprises etc., etc., Petitioners v. Union of India and others etc., Respondents.

(A) Essential Commodities Act (10 of 1955), S. 3 (1) and (2) (c) — Sugar (Control) Order (1966), Cl. 5 — Central Govt. Order No. GSR-410-E/Ess. Comm./Sugar dated 14-7-1980 — Order is not ultra vires S. 3.

Sugar, which term includes Khandsari, is an essential commodity and over the years it has become a scarce commodity. In the public interest it became essential to pass the impugned order to secure its equitable distribution and availability at fair prices. To that end it became necessary to prevent hoarding and black-marketing. The expression "to secure their equitable distribution and availability at fair prices" in S. 3 (1) is wide enough to cover the impugned order i. e. the Central Govt. Order No. G. S. R.-410-E/Ess. Comm./Sugar dated 14-7-1980 as passed under Cl. 5 of the Sugar (Control) Order (1966). Likewise, the expression "storage and distribution" as used in S. 3 (2) (d) should be given a liberal construction to give effect to the legislative intent of public welfare. So construed the said Order is fully protected and is not ultra vires S. 3 of the E. C. Act.

(Para 6)

(B) Constitution of India, Art. 19 (1) (g) and (6) — Reasonable restriction —

CZ/CZ/B238/82/SSG

Meaning — Sugar (Control) Order (1966), Cl. 5 — Central Govt. Order No. G. S. R. 410-E/Ess. Comm./Sugar dated 14-7-1980 — Restrictions put by the Order is not unreasonable. ((i) Essential Commodities Act (1955), S. 3; (ii) Sugar (Control) Order (1966), Cl. 5).

A person has a right to carry on any occupation, trade or business and the only restriction on this unfettered right is the authority of the State to make a law imposing reasonable restrictions under cl. (6) of Art. 19. The expression "reasonable restrictions" signifies that the limitation imposed on a person in enjoyment of that right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. The Central Govt. Order No. G. S. R.-410-E/Ess. Comm./Sugar dt. 14-7-80 as passed under Cl. 5 of the Sugar (Control) Order (1966) has only put an embargo on the dealers on keeping sugar in excess of the quantity specified. It was passed only with a view to prevent hoarding and black-marketing, and to ensure equitable distribution and availability of sugar at fair prices in the open market. It only seeks to regulate the limit of storage of sugar and does not prohibit its storage. On an overall consideration of the various aspects of the matter, restrictions put by the said order can by no means be said to be unreasonable. It is only regulatory and not prohibitory. AIR 1967 SC 1189, Dist. AIR 1981 SC 873, Foll.

(Paras 8 to 10)

(C) Constitution of India, Art. 14 — Sugar (Control) Order (1966), Cl. 5 — Central Govt. Order No. G. S. R.-410-E/Ess. Comm./Sugar dated 14-7-1980 — Fixation of limits for storing sugar in Calcutta and other places — Not arbitrary but is based on reasonable classification. ((i) Essential Commodities Act (10 of 1955), S. 3 — (ii) Sugar (Control) Order (1966), Cl. 5). (Para 12)

(D) Constitution of India, Art. 14 — Sugar (Control) Order (1966), Cl. 5 — Central Govt. Order No. G. S. R. 410-E/Ess. Comm./Sugar dated 14-7-1980 — Order is not violative of Art. 14. ((i) Essential Commodities Act (1955), S. 3 — (ii) Sugar (Control) Order (1966), Cl. 5).

Over the years sugar has become a scarce commodity and people have to purchase it even at a prohibitive price. In the circumstances it cannot be expected that the dealers would not be able to sell the sugar in their stock. There is absolu-

tely no difficulty in selling the sugar at any time at the prevalent market price. If in a rare case there is difficulty on that score the concerned Government should allow a reasonable time within which the petitioners are permitted to dispose of the excess quantity of sugar, if any. In any case, in some given case there may be some hardship but it cannot be said on that account that the impugned order (i. e. the Central Govt. Order No. G. S. R.-410-E/Ess. Comm./Sugar dated 14-7-1980 as passed under Cl. 5 of the Sugar (Control) Order, 1966) is violative of Art. 14 of the Constitution. AIR 1982 SC 130 and AIR 1982 SC 33, Foll. (Para 15)

Cases Referred: Chronological Paras

AIR 1982 SC 33	13, 14
AIR 1982 SC 130	13, 14
AIR 1981 SC 873 : (1981) 2 SCC 600	10
AIR 1967 SC 1189 : (1967) 2 SCR 361	9

Mr. Shanti Bhushan, Mr. V. M. Tar-kunde, Mr. P. A. Francis and Mr. G. N. Dikshit, Sr. Advocates; Mr. R. K. Jain, Mr. P. K. Jain, Mr. Pankaj Kalra, Mr. S. Mitter, Mr. M. G. Gupta, Mr. B. R. Kapoor, Miss Bhajan Ram Rakhyani, Mr. S. R. Srivastava, Mr. B. V. Tawakley, Mrs. Shobha Dikshit, Mr. B. Dutta, Mr. B. D. Sharma, Miss A. Subhashini, Mr. N. N. Sharma, Mr. T. C. Sharma, Mr. A. Ghosh, Mr. S. V. Tambwekar and Girish Chandra, Advocates, for the appearing parties.

R. B. MISRA, J.:— In exercise of powers conferred by S. 3 of the Essential Commodities Act, 1955, Sugar Control Order 1966 was issued by the Government of India, Ministry of Agriculture. Cl. 5 of that Order empowered the Central Government to issue directions, inter alia, to recognised dealers regarding production, maintenance of stock, storage, sale, grading, packing making weightment, disposal, delivery and distribution of sugar.

2. By Order No. GSR-410-E/Ess. Com./Sugar dated the 14th of July, 1980 the Central Government issued the following directions:

"In exercise of the powers conferred by Cl. 5 of the Sugar (Control) Order, 1966, and in supersession of the order of the Government of India in the Ministry of Agriculture (Department of Food) No. GSR-60/(E)/Ess. Com./Sugar, dated the 26th February, 1980, the Central Government hereby directs that no recognis-

ed dealer shall keep in stock at any time,—

(1) vacuum pan sugar, in the places mentioned below, in excess of the quantities mentioned against each,—

(i) in Calcutta and extended area—

(a) recognised dealers who import sugar from outside West Bengal — 3,500 quintals;

(b) other recognised dealers — 250 quintals;

(ii) in other places—

(a) in cities and towns with a population of one lakh or more — 250 quintals;

(b) in other towns with a population of less than one lakh — 100 quintals.

(2) Khandsari (open pan sugar) in excess of 250 quintals.

Provided that no recognised dealer shall hold any stock of Vacuum pan sugar or khandsari (open pan sugar) for a period exceeding ten days from the date of receipt by him of such stock of sugar or khandsari.

Provided further that nothing in this Order shall apply to the holding of stocks of sugar—

(i) on Government account; or

(ii) by the recognised dealers nominated by a State Government or an officer authorised by it to hold such stock for distribution through fair price shops; or

(iii) by the Food Corporation of India.

Explanation.— For the purpose of this Order, "Calcutta and extended area" means the areas specified in the Schedule to the notification of the Government of West Bengal No. 7752 F. S./14-R-92/61, dated the 16th December, 1964."

3. The petitioners in this group of petitions, who are dealers in sugar, seek to challenge the constitutional validity of the said order on three grounds: (1) the impugned order is not covered by S. 3 of the Essential Commodities Act and is ultra vires; (2) the impugned order imposes unreasonable restrictions on the right of the petitioners to carry on their trade and so it is violative of Art. 19 (1) (g) of the Constitution; (3) the impugned order is also violative of Art. 14 of the Constitution for two reasons: (a) the petitioners have been singled out for hostile treatment from other dealers of sugar at Calcutta, (b) the impugned order is unreasonable and impracticable.

4. Shri Shanti Bhushan, senior counsel appearing in one of the petitions viz; Writ Petition No. 3846 of 1981, took up

the first point and urged that the impugned order is not covered by any of the clauses of S. 3 of the Essential Commodities Act.

5. Section 3 of the Essential Commodities Act, 1955, insofar as it is material for the purposes of this case, reads:

"3. (1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) With prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide—

(a) to (c)

(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity."

6. The language of S. 3 (1) coupled with cl. (d) of sub-s. (2) of S. 3 is wide enough to cover the impugned order. Section 3 (1) authorises the Central Government to pass an order for regulating or prohibiting the production, supply and distribution of an essential commodity and trade and commerce therein if it is of opinion that it is necessary or expedient to do for securing the equitable distribution and availability at a fair price of the essential commodity. The same power has been made more specific by cl. (d) of sub-s. (2) of S. 3, which provides for regulating by licences, permits or otherwise, the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity. Sugar, which term includes khandsari, is an essential commodity and over the years it has become a scarce commodity. In the public interest it became essential to pass the impugned order to secure its equitable distribution and availability at fair prices. To that end it became necessary to prevent hoarding and black-marketing. The expression "to secure their equitable distribution and availability at fair prices" is wide enough to cover the impugned order. Likewise, the expression "storage and distribution" used in cl. (b) of sub-s. (2) of S. 3 should be

given a liberal construction to give effect to the legislative intent of public welfare. So construed, the impugned order is fully protected and is not ultra vires S. 3 of the Essential Commodities Act, 1955.

7. This leads us to the second contention, namely, the impugned order being violative of Art. 19 (1) (g) of the Constitution inasmuch as it imposed unreasonable restriction on the right of the petitioners to carry on trade or business.

8. A person has a right to carry on any occupation, trade or business and the only restriction on this unfettered right is the authority of the State to make a law imposing reasonable restrictions under cl. (6). The expression 'reasonable restrictions' signifies that the limitation imposed on a person in enjoyment of that right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. No cut and dry test can be applied to each individual statute impugned, nor an abstract standard or general pattern of reasonableness can be laid down as applicable in all cases. The Court in each case has to strike a proper balance between the freedom guaranteed by Art. 19 (1) (g) and the social control permitted by cl. (6) of Article 19. By the impugned order the Central Government has only put an embargo on the dealers on keeping sugar in excess of the quantity specified. It was passed only with a view to prevent hoarding and black-marketing, and to ensure equitable distribution and availability of sugar at fair prices in the open market.

9. Reliance was placed by Shri Shanti Bhushan on *State of Mysore v. H. Sanjeeviah* (1967) 2 SCR 361 : (AIR 1967 SC 1189). In that case the State Government of Mysore had framed rules to regulate the transit of timber, firewood, charcoal and bamboos from all lands in exercise of powers conferred by S. 37 of the Mysore Forest Act 11 of 1900. By R. 2 framed on Oct. 13, 1952, it was provided that no person shall import forest produce into, export forest produce from, or move forest produce within, any of the areas specified in Sch. A unless such forest produce is accompanied by permit prescribed in R. 3. On April 15, 1959 the State of Mysore issued a notification adding a proviso to R. 2 which read as follows:

"Provided that no such permit shall authorise any person to transport forest

produce between sunset and sun-rise in any of the areas specified in Sch. A."

By another notification dated Sept. 14, 1960 the State Government introduced the second proviso to R. 2 which read:

"Provided further that permission may be granted to timber merchants on their request to transport timber up to 10 p. m. (22 hrs) under the following conditions:

(i) the party who wishes to avail of the concession should pay a cash deposit of Rs. 1000/- as security for the compliance with the timber transit rules as in force;

(ii) that the deposit may be forfeited to government for breach of any of the conditions of the timber transit rules."

The dealers in timber challenged the two provisos on the grounds inter alia that they were beyond the rule making authority conferred upon the State Government by S. 37 of the Mysore Forest Act 11 of 1900 and in any event the provisos imposed unauthorised restrictions on the freedom of trade, commerce and intercourse. The High Court held that the State Government while seeking to regulate the transport of timber stopped transport altogether. This Court upholding the order of the High Court observed (at page 1191 of AIR):

"Power to impose restrictions of the nature contemplated by the two provisos to R. 2 is not to be found in any of the clauses of sub-s. (2) of S. 37. By sub-s. (1) the State Government is invested with the power to regulate transport of forest produce "in transit by land or water." The power which the State Government may exercise is however, power to regulate transport of forest produce, and not the power to prohibit or restrict transport. Prima facie, a rule which totally prohibits the movement of forest produce during the period between sun-set and sun-rise is prohibitory or restrictive of the right to transport forest produce. A rule regulating transport in its essence permits transport, subject to certain conditions devised to promote transport."

This Court further observed:

"If the provisos are in truth restrictive of the right to transport the forest produce, however, good the grounds apparently may be for restricting the transport of forest produce, they cannot on that account transform the power conferred by the provisos into a power merely regulatory."

The facts of the present cases are materially different from the facts of *H. San-*

jeeviah's case (supra). In that case the impugned provisos to R. 2 completely prohibited the transport of the forest produce between sun-set and sun-rise. But in the cases in hand the direction enjoined a recognised dealer not to keep sugar in stock at any time in excess of the quantity specified therein. It only seeks to regulate the limit of storage of sugar and does not prohibit its storage. The case of H. Sanjeeviah, therefore, is not of much help to the petitioners herein.

10. In *M/s. Laxmi Khandsari v. State of U. P.*, (1981) 2 SCC 600 : (AIR 1981 SC 873) this Court made the following observations about reasonable restrictions on the right conferred by Art. 19 (1) (g) of the Constitution in the following terms:

"As to what are reasonable restrictions would naturally depend on the nature and circumstances of the case, the character of the statute, the object which it seeks to serve, the existing circumstances, the extent of the evil sought to be remedied as also the nature of restraint or restriction placed on the rights of the citizen. It is difficult to lay down any hard and fast rule of universal application but in imposing such restrictions the State must adopt an objective standard amounting to a social control by restricting the right of the citizens where the necessities of the situation demand. The restrictions must be in public interest and are imposed by striking a just balance between the deprivation of right and the danger or evil sought to be avoided. If the restrictions imposed appear to be consistent with the directive principles of State policy they would have to be upheld as the same would be in public interest and manifestly reasonable. Further, restrictions may be partial complete, permanent or temporary but they must bear a close nexus with the object in the interest of which they are imposed. Another important test is that restriction should not be excessive or arbitrary. The court must examine the direct and immediate import of the restrictions on the rights of the citizens and determine if the restrictions are in larger public interest while deciding the question that they contain the quality of reasonableness. In such cases a doctrinaire approach should not be made but care should be taken to see that the real purpose which is sought to be achieved by restricting the rights of the citizens is subserved. At the same time, the possibility of an alternative

scheme which might have been but has not been enforced would not expose the restrictions to challenge on the ground that they are not reasonable."

Judged in that light and on an overall consideration of the various aspects of the matter, restrictions put by the impugned order can by no means be said to be unreasonable. It is only regulatory and not prohibitory.

11. We now take up the last contention, namely, the impugned order being violative of Art. 14 of the Constitution. The learned counsel seeks to invoke Article 14 on two grounds: (1) the impugned order applies two standards, one for the dealers at Calcutta, who had been authorised to keep 3,500 quintals at one time, while the dealers at other places have been authorised to keep only 250 quintals in cities with a population of one lakh or more, and only 100 quintals in other towns with a population of less than one lakh.

12. The fixation of limits for storing sugar in Calcutta and other places is not arbitrary but is based on reasonable classification. The government is the best judge of the situation in a particular State and what quantity of sugar will meet the exigencies of the situation at a particular place is purely a governmental function. For one, Calcutta serves as a feeder line to meet the requirements of sugar to the eastern part of the country, and therefore, the stocks of sugar to be held by the dealers in Calcutta are not required for consumption in Calcutta alone. Besides, Calcutta being far away from the sugar manufacturing units in Bihar and Uttar Pradesh, from where bulk of supplies are obtained, sugar is transported by the wholesale dealers in railway wagons which take sometime unusually longer time in transit. These and various other factors have been taken into consideration by the Government while fixing the storage limits of sugar for the dealers in Calcutta.

13. His second ground for invoking Art. 14 of the Constitution is that the impugned order is unreasonable and impracticable in that no dealer can be sure of the sale of sugar on any particular day. If per chance a dealer is not able to dispose of the excess sugar on a particular day he would expose himself to punishment under the Act. No provision has been made in the order or in the rules for the purchase by the Govern-

ment of the excess sugar. For the State it was contended that similar orders with regard to wheat came up for consideration in this Court in *Suraj Mal Kailash Chand v. Union of India*, Writ Petns. Nos. 8334-43 of 1981 decided on 25-9-1981 : (AIR 1982 SC 130) and *Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh*, Writ Petns. Nos. 2907-2908 of 1981 and connected writ petitions (a group of 505 writ petitions) decided on 5-11-1981 : (AIR 1982 SC 33) when this Court upheld the validity of these orders. In view of the decision of this Court in those cases it is not open to Shri Shanti Bhushan to challenge the constitutional validity of the impugned order.

14. Shri Shanti Bhushan, however, refutes the argument and says that those decisions do not stand in the way of the petitioners. The situation with regard to wheat was quite different inasmuch as Cl. 25 of the impugned order in *Suraj Mal's* case (supra) provided that the State Government or the Collector or the Licensing Authority may issue directions to any dealer with regard to purchase, sale, disposal, storage or exhibition of the price and stock list of all or any of the trade articles. But there is no such provision in the impugned order in the instant case and, therefore, the dealers can expose themselves to punishment merely because at any particular point of time the stock was in excess of the prescribed limits. *Bishamber Dayal's* case (supra) also related to wheat. There was a scheme for the procurement of wheat by the State Government but there is no such scheme in respect of sugar. This fact distinguishes the present case from the facts of the aforesaid decision.

15. The argument though attractive cannot be accepted. Over the years sugar has become a scarce commodity and people have to purchase it even at a prohibitive price. In the circumstances it cannot be expected that the dealers would not be able to sell the sugar in their stock. There is absolutely no difficulty in selling the sugar at any time at the prevalent market price. If in a rare case there is difficulty on that score we hope and trust that the concerned Government would allow a reasonable time within which the petitioners are permitted to dispose of the excess quantity of sugar, if any. In any case, in some given case there may be some hardship but it cannot be said on that account that the im-

pugned order is violative of Art. 14 of the Constitution.

16. For the foregoing discussion the writ petitions must fail. They are accordingly dismissed. In the circumstances of the case there shall, however, be no order as to costs.

Petitions dismissed.

AIR 1982 SUPREME COURT 1021

(From: Madhya Pradesh)

S. MURTAZA FAZAL ALI AND

A. VARADARAJAN, JJ.

Criminal Appeal No. 79 of 1976, D/- 2-4-1981.

Kake Singh alias Surendra Singh, Appellant v. State of Madhya Pradesh, Respondent.

Penal Code (45 of 1860), S. 304, Part II — Conviction under, based solely on dying declaration — Declaration presenting suspicious features — Accused entitled to be acquitted. Judgment of Madh Pra High Court Reversed. (Evidence Act (1872), S. 32).

Where the accused was convicted under S. 304, Part II solely on the basis of a dying declaration alleged to have been made by the deceased who was burnt including a good part of his brain and in addition to the burns other injuries inflicted by Lathis were also found on his body and there was no specific statement by the doctor holding autopsy that the deceased after being burnt was conscious or could have made coherent statements, and still further despite enmity between the accused and the deceased according to the dying declaration the deceased readily agreed to take a round in the jeep along with the accused at late part of night; the accused would be entitled to acquittal as the only irresistible conclusion possible from the circumstances would be that the deceased was unconscious and never made any statement.

(Paras 2, 3)

JUDGMENT:— This appeal by certificate is directed against a judgment of the Madhya Pradesh High Court by which the appellant Kake Singh alias Surendra Singh was convicted under S. 304, Part II I. P. C. and sentenced to 10 years rigorous imprisonment. The trial Court had convicted the appellant under S. 302, I. P. C. and sentenced him to death.

LY/CZ/F660/81/YVG

2. The solitary evidence against the appellant consists of the dying declaration alleged to have been made by the deceased Tulsī Baba before Head Constable D. N. Verma (P. W. 8). We have gone through the dying declaration and we find that the dying declaration presents suspicious features. In the first place, Tulsī Baba had himself lodged a complaint before the police against the accused that there was some dispute about the house which Kake wanted Tulsī Baba to vacate and had given threats that he would come to serious harm if he does not vacate the house. Despite this threat, according to the dying declaration, the deceased readily agreed to take a round in the jeep along with Kake and two others. Indeed, in view of the enmity it is hard to believe that the deceased would trust the accused and go with him at a late part of the night and invite trouble for himself. Another important circumstance that throws doubt on the dying declaration is that Tulsī Baba was alleged to have been missing from Jan. 30, 1975, as would appear from the report made before the police station by P. W. 3. The doctor who held the autopsy of the deceased in his statement has not categorically stated that at the time when the deceased was burnt he was conscious or could give any coherent statement. The deceased was burnt and a good part of the brain was also burnt and therefore the possibility is that he must have become unconscious. This is intrinsically supported by another important factor. The doctor found not only burns on the body of the deceased but also other injuries which could have been inflicted on him by lathis which had caused lacerations and haematoma. In his statement the deceased makes no mention at all of any such injuries although one of the injuries caused to him resulted in fracture of sternum. There is no reference at all to the manner in which the deceased could have got the fracture of the sternum. The cumulative effect of these circumstances therefore leads to the irresistible conclusion that the deceased was unconscious and never made any such statement. Once the dying declaration is disbelieved, then there remains no legal evidence on the basis of which the appellant could be convicted.

3. The High Court had given the certificate mainly on the ground that having regard to the statement of the deceased, the only offence that could have been made out would be one under S. 326 and

not that under S. 304, Part II, I. P. C. if the charge under S. 302 failed. It is not necessary for us to go into this question because in view of the fact that the dying declaration cannot be accepted, the appellant is entitled to an acquittal.

4. The appeal is accordingly allowed, the judgment of the High Court is set aside and the appellant is acquitted of the charges framed against him. The appellant is discharged from his bail-bonds and need not surrender.

Appeal allowed.

AIR 1982 SUPREME COURT 1022

(From : Gujarat)*

A. D. KOSHAL AND BAHARUL

ISLAM, JJ.

Criminal Appeal No. 468 of 1977, D/- 18-3-1981.

Chandubhai Shanabhai Parmar, Appellant v. The State of Gujarat, Respondent.

Penal Code (45 of 1860), Ss. 302, 34, 326 — Conviction of appellant under — Appellant tried for murder along with 10 others — Ocular evidence unreliable — Benefit of doubt given to all except appellant — Case of appellant not distinguishable from others — Benefit cannot be refused to appellant — His conviction under S. 302 read with S. 34 set aside, however, that under S. 326 confirmed — Judgment of High Court D/- 21-10-1976 (Guj), Partly Reversed. (Para 4)

KOSHAL, J.:— This appeal by special leave is directed against the judgment dated 21st Oct. 1976 of the High Court of Gujarat affirming the conviction of the appellant in respect of an offence under S. 302 read with S. 34 of the I. P. C. as also of one under S. 326 of that Code and upholding the sentence of imprisonment for life on the first count and of rigorous imprisonment for a year coupled with a fine of Rs. 300 on the second.

2. The appellant was tried along with 10 others on the murder charge. It was the case for the prosecution that all the 11 accused had intentionally caused the death of one Bawaji in prosecution of their common object, or, in the alternative in furtherance of their common in-

*From judgment of High Court, D/- 21-10-1976 (Guj).

KY/CZ/F402/81/VVG

tention. The charge under S. 326 of the I.P.C. arises out of an injury suffered by Shakrabhai Bavabhai (P. W. 7), according to whom it had been inflicted by the appellant.

3. The occurrence is said to have consisted of two incidents, which took place in village Khandhali on the third February, 1975 one at the Irrigation Store and the other at the house of the deceased. In the first incident the culprits were said to be accused Nos. 1 to 3 (accused No. 2 being the appellant before us). In the other incident all the 11 accused were said to have participated and that is the incident which, according to the case of the prosecution, resulted in the death of the victim.

The ocular evidence consisted of the testimony of Bai Mani (P. W. 1), Bai Laxmiben (P. W. 5) and Bai Shantaben (P. W. 6), who are the widow, the daughter and the brother's wife respectively of the deceased. Both the courts found that this testimony was unreliable in numerous particulars and it was on that account that the co-accused of the appellant were acquitted in two stages.

4. We do not find that we can really distinguish the case of the appellant from that of accused Nos. 1 and 3 in so far as the unreliability of the ocular evidence is concerned. We have gone through the judgment of both the courts below and are of the opinion that although Bai Mani (P. W. 1) may well be held to have witnessed the occurrence at the house of the deceased it is not safe to act on her word in respect of the participation of any particular accused or of the part attributed to him or her. In this connection it is noteworthy that in the statement (Ex. 17) which Bai Mani (P. W. 1) made to Police Sub-Inspector Ranchhbhai Bhailalbhai (P. W. 13) the stand taken was that the appellant was armed with a stick during the incident which took place at the house of the deceased. At the trial, however, all the three eye-witnesses stated unanimously that he was armed with a Dharia and this improvement was obviously resorted to so that the appellant could be held responsible for the fatal injury. Be that as it may, we cannot persuade ourselves to hold that although the ocular evidence was not trustworthy enough for a conviction of accused Nos. 1 to 10, implicit reliance can be placed on it in the case of the appellant who, in our opinion, must be given the benefit of the same

doubt which made it imperative for the two courts below to acquit his co-accused. The reasonable possibility of the appellant having been roped in falsely in so far as the second incident is concerned can itself not be ruled out. Accordingly, we acquit him of the charge under S. 302 read with S. 34 of the I. P. C. and accept the appeal to that extent. His conviction of an offence under S. 326 of the Code and the sentence imposed upon him in consequence are, however confirmed.

Order accordingly.

AIR 1982 SUPREME COURT 1023

D. A. DESAI AND BAHARUL ISLAM, JJ.
Writ Petn. (Criminal) No. 9516 of 1981,
D/- 17-3-1982.

Vijay Kumar, Petitioner v. State of J. & K. and others, Respondents.

(A) J. and K. Public Safety Act (6 of 1978), S. 8 — Detention — Non-application of mind by District Magistrate — Detenu already arrested and in jail on suspicion that he had committed offences under Enemy Agents Ordinance — Order for detention without showing its awareness is invalid, (i) National Security Act (65 of 1980), Ss. 3 and 8; (ii) Constitution of India, Art. 22 (5) .

Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. May be, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. There was nothing in the order in question to indicate the awareness of the detaining authority that detenu was already in jail and yet the impugned order was required to be made. This clearly exhibits non-application of mind and would result in invalidation of the order.

(Para 9)

CZ/CZ/B237/82/MVJ

Section 8 of the Act prescribes grounds for detention, one such ground being to prevent any person from 'acting in any manner prejudicial to the security of the State.' The impugned order of detention recites that the detenu is detained with a view to preventing him from 'acting in any manner prejudicial to the security of the State.' The expression 'acting in any manner prejudicial to the security of the State' has been defined in S. 8 (3) of the Act to mean making preparations for using, or attempting to use, or using or instigating, inciting, provoking or otherwise abetting the use of force, to overthrow or overawe the Government established by the law in the State. (Para 6)

(B) J. and K. Public Safety Act (6 of 1978), S. 13 — Detention — Communication of grounds and consideration of detenu's representation — Govt. must be prompt in complying with provisions. (i) National Security Act (65 of 1980). S. 8; (ii) Constitution of India, Art. 22 (5)).

The provision contained in S. 13 (1) of the Act is on par with constitutional protection conferred by Art. 22 (5) of Constitution. When power to detain without trial, is exercised, the authority exercising the power must afford an opportunity to the detenu to convince the Government/detaining authority that the power was not justifiably exercised or no occasion arose for exercise of the power. In a punitive detention which is the end product of a trial in which the convict participates and has full opportunity to present his side of the case while preventive detention ordinarily described as jurisdiction based on suspicion does not afford any opportunity to the detenu to explain his side of the matter before he is deprived of the liberty and, therefore, as soon after the detenu is deprived of his personal liberty the statute makes it obligatory on the authorities concerned to afford him an earliest opportunity to represent his side of the case and which inheres the corresponding obligation on the authority to consider the same. The word 'earliest' which qualifies the opportunity must equally qualify the corresponding obligation of the State to deal with the representation, if and when made, as expeditiously as possible. The opportu-

nity contemplated by the section is the opportunity to make a representation against the detention order to the Government and therefore ex hypothesi soon after the person is deprived of his personal liberty he must be afforded the earliest opportunity to make a representation. Any slackness in this behalf not properly explained would be denial of the protection conferred by the statute and would result in invalidation of the order. (Para 11)

In the instant case the delay apart from being inordinate was not explained on any convincing grounds. AIR 1975 SC 550, Foll. (Para 12)

Cases Referred: Chronological Paras 1982 Cri. LJ NOC 54: 1981 Kash

LJ 71

AIR 1975 SC 550 : (1975) 2 SCC

81 : 1975 Cri LJ 446

M/s. Bhim Singh, P. D. Sharma and Subash Sharma, Advocates, for Petitioner.

Mr. M. N. Phadke, Sr. Advocate, Mr. Altaf Ahmed, Advocate, with him, for Respondents.

DESAI, J.:— On Feb. 9, 1982 we made an order quashing the detention order dated July 11, 1981 made by the District Magistrate, Jammu in exercise of the power conferred by Sec. 8 of the Jammu and Kashmir Public Safety Act, 1978 ('Act' for short) and we announced that the reasons would follow. Here are the reasons.

2. The detenu Vijay Kumar was arrested on June 26, 1981. A petition was moved on his behalf before the Chief Judicial Magistrate, Jammu praying for releasing the detenu on bail. This petition for bail appears to have come up before the learned Magistrate on July 4, 1981 when the following order was made:

"I have heard the advocate for the applicant and perused the C. D. File. Put up for orders on 6-7-81."

2A. When the matter again came up on July 6, 1981, the learned Magistrate made the following order:

"Although there was nothing in the C. D. File about his (Petitioner) involvement in E. A. O. (Enemy Agents Ordinance) on 4-7-81, but today a detailed report has been presented in which one of the offences of which he is charged is u/s 3, E. A. O. which this court is not competent to try. Hence this applica-

tion is returned to the applicant for presentation to the proper court along with report."

3. The detenu thereupon moved an application for releasing him on bail before the learned Additional Sessions Judge, Jammu, who, we are informed, was competent to try the accused charged with an offence under Enemy Agents Ordinance. His petition for bail came up before the learned Additional Sessions Judge on July 11, 1981 when the following order was made:

"This application pertains to Vijay Kumar accused who is involved for an offence under the Enemy Agents Ordinance which is being investigated by the Counter Intelligence Police, Jammu. The learned Chief Prosecuting Officer and the learned counsel for the accused have been heard.

During the course of arguments an order has been shown to me by the police that said Vijay Kumar accused has now been ordered to be detained under the Public Safety Act.

In view of this order, this bail application has become infructuous which is disposed of accordingly."

4. The detenu was served with the detention order dated July 11, 1981 on the same day in jail because he was already in jail from June 25, 1981. The grounds for detention were served on him on July 15, 1981. The detenu submitted his representation dated July 29, 1981, addressed to the Secretary to the Government, Home Department, to the Superintendent, Central Jail, Jammu where the detenu was detained. One Shri K. D. Sharma, In charge Superintendent, Central Jail, Jammu has stated in his affidavit dated Feb. 6, 1982 that the representation of the detenu dated July 29, 1981 was forwarded to the Government at Srinagar vide Office letter No. 2595 dated July 29, 1981 and simultaneously a wireless message No. 2596 on the same day was also sent to the Government intimating that the representation of the detenu had been forwarded to the Government for appropriate action. Mr. K. S. Salathia, Deputy Secretary to the Government of Jammu and Kashmir, Home Department, Jammu, in his affidavit dated Feb. 9, 1982 has stated that the representation of the detenu was received

from the Superintendent, Central Jail, Jammu in the office of the Home Department at Srinagar on Aug. 12, 1981. The department also received the comments of S. P., C. I. D. Counter Intelligence, Jammu and thereafter the case was processed on Aug. 24, 1981 in the office of the Home Department at Srinagar and the file was placed before the Home Secretary on Aug. 25, 1981, who recommended the same for approval on Aug. 28, 1981 to the Chief Minister (Home). From the same affidavit, it further transpires that the Chief Minister rejected the representation on Aug. 31, 1981 and the same was communicated to the detenu on Sept. 1, 1981. In the meantime, the case of the detenu was referred to the Advisory Board on Aug. 3, 1981. The Advisory Board submitted its report to the Government on Sept. 4, 1981.

5. One Rattanlal, the brother of the detenu moved Petition No. 31 of 1981 for writ of habeas corpus in the High Court of Jammu and Kashmir at Jammu. The petition came up for hearing before the learned single Judge who by his judgment dated Dec. 7, 1981 rejected the same. Thereafter the detenu by the present writ petition, moved this Court under Art. 32 of the Constitution for a writ of Habeas Corpus.

6. Section 8 of the Act prescribes grounds for detention, one such ground being to prevent any person from 'acting in any manner prejudicial to the security of the State.' The impugned order of detention recites that the detenu is detained with a view to preventing him from 'acting in any manner prejudicial to the security of the State.' The expression 'acting in any manner prejudicial to the security of the State' has been defined in S. 8 (3) of the Act to mean making preparations for using, or attempting to use, or using or instigating, inciting, provoking or otherwise abetting the use of force, to overthrow or overawe the Government established by the law in the State. The detenu contended before the High Court that accepting all the activities attributed to the detenu in the grounds of detention at their face value, the alleged prejudicial activity would not fall within the ambit of the expression 'acting in any

manner prejudicial to the security of the State.' The definition of the expression as hereinbefore extracted indicates that the person accused of 'acting in any manner prejudicial to the security of the State' must be shown to be making preparations for using, or attempting to use, or using or instigating, inciting or provoking or otherwise abetting the use of force, and the intention or motive for the activity must be to overthrow or overawe the Government established by law in the State. The learned Judge of the High Court following an earlier Division Bench judgment of the same High Court in *Kharati Lal v. State* 1961 Kash L. J. 71 : (1982 Cri. L. J. NOC 54), negatived this contention observing that where the Government accusation against the detenu is that he had been indulging in supplying information for Pakistan Army Intelligence and was passing on vital information pertaining to the Army deployment etc. to that Agency, such activities were likely to assist Pakistan in any armed aggression against the State and were a threat to the security of the State. This view needs examination but as the argument was not pressed before us, we refrain from examining the same.

7. Number of contentions were advanced at the hearing of this petition but we propose to deal with only two of them which in our opinion go to the root of the matter and which, when accepted, in our opinion, would result in invalidation of the order.

8. The first contention is that the order of the District Magistrate suffers from non-application of mind inasmuch as the date on which he passed the impugned order of detention dated July 11, 1981, the detenu was long before arrested and locked up in jail on the allegation that he was suspected to have committed some offence under the Enemy Agents Ordinance 8 of Samvat Year 2005, and, therefore, there was no present apprehension that the detenu, if not detained, was likely to act in any prejudicial to the security of the State. The District Magistrate passed the impugned order of detention on being satisfied that with a view to preventing the detenu from acting in a manner prejudicial to the security of the State it was necessary to detain him. The order ex facie does not show that the

detaining authority was aware that the detenu was already arrested and kept in jail. If the detaining authority was conscious of the fact that the detenu was already arrested and confined in jail, the order ex facie would have shown that even though the detenu was in jail, with a view to preventing him from acting in a manner prejudicial to the security of the State it was necessary to detain him. There is a footnote in the order that the order was forwarded to the S. P., C. I. D., Counter Intelligence, Jammu, for execution of the order under S. 3 of the Act. The further direction was that notice of the order shall be given to Vijay Kumar s/o Anant Ram, r/o H. No. 609, Peer Mitha, Jammu, by reading over and explaining the same to him in language he understands. The detention order does not give the slightest indication that the detaining authority was aware that the detenu was already in jail and yet on the material placed before him he was satisfied that a detention order ought to be made. There is nothing in the order to show that to the knowledge of the detaining authority the detenu was already in jail for a period of more than 16 days before the date on which he passed the order and that such detention in the opinion of the detaining authority was not sufficient to prevent the detenu from acting in a manner prejudicial to the security of the State, and therefore power under S. 8 of the Act is required to be exercised.

9. The detenu in para 3 of his petition before this Court has specifically averred that he was arrested on June 26, 1981, the correct date being June 25, 1981 under a false and fabricated charge Shri K. S. Salathia, Deputy Secretary to Government of Jammu & Kashmir, Home Department, who has filed the counter affidavit has with reference to the averments made in para 3 of the petition, made a very very ambiguous statement that for the purpose of J & K Public Safety Act the petitioner was arrested on July 11, 1981, pursuant to the detention order. It is nowhere suggested that the detaining authority was aware of the fact that the detenu was already in jail and that keeping in view the fact that the detenu was already locked up in jail yet it was considered necessary for preventing him

from acting in a manner prejudicial to the security of the State to pass the detention order. It may further be pointed out that Shri A. Sahasranaman, the District Magistrate of Jammu who has made the impugned detention order, filed an affidavit on Feb. 7, 1982. Of course, in fairness to him it must be stated that this affidavit was for the limited purpose of pointing out as to how he dealt with the case of Hans Raj, another detenu whose detention was quashed by this Court subsequent to the order of this Court. It may be noticed in passing that Hans Raj and the detenu were involved jointly in the activity, which led to the detention of the detenu. Even though this affidavit was filed for the limited purpose, it came on record after the case was taken up for hearing by this Court and the affidavit at least does not throw any light on the vexed question whether the detaining authority was aware of the fact that the detenu on being suspected of having committed a serious offence, was already in jail for a period of more than a fortnight before the date of the impugned detention order. Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. Maybe, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. There is nothing to indicate the awareness of the detaining authority that detenu was already in jail and yet the impugned order is required to be made. This, in our opinion, clearly exhibits non-application of mind and would result in invalidation of the order. We, however, do not base our order on this ground.

10. The second contention which in our opinion goes to the root of the matter is that there has been a violation of S. 13 of the Act. S. 13 provides as under:

"13. Grounds of order of detention to be disclosed to persons affected by

the order:— (1) When a person is detained in pursuance of a detention order, the authority making the order shall as soon as may be, but not later than five days from the date of detention, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the Government."

xx xx xx xx

11. The provision contained in Section 13 (1) is on par with the constitutional protection conferred by Article 22 (5) of the Constitution of India. The contention is that the obligation on the detaining authority to afford to the detenu the earliest opportunity of making a representation against the order of detention, in order not to render it illusory simultaneously obliges the authority to whom the representation is made to consider the same expeditiously. Submission is that a statutory right conferred on the detenu enabling him to make a representation which of necessity must be giving an opportunity to point out to the Government as to why the detention order was not justified and that it must be revoked and the personal liberty deprived under the detention order must be restored, is to convince the Government to take into consideration the facts and contentions set out in the representation, which must imply that the Government must consider the same. The earliest opportunity to be afforded for making representation inheres the corresponding duty of the Government to consider the representation so received expeditiously. The reason behind enacting this provision is manifest. When power to detain without trial is exercised, the authority exercising the power must afford an opportunity to the detenu to convince the Government/detaining authority that the power was not justifiably exercised or no occasion arose for exercise of the power. In a punitive detention which is the end product of a trial in which the convict participates and has full opportunity to present his side of the case while preventive detention ordinarily described as jurisdiction based on suspicion does not afford any opportunity to the detenu to explain his side of the matter before he is deprived of

the liberty and, therefore, so soon after the detenu is deprived of his personal liberty the statute makes it obligatory on the authorities concerned to afford him an earliest opportunity to represent his side of the case and which inheres the corresponding obligation on the authority to consider the same. The word 'earliest' which qualifies the opportunity must equally qualify the corresponding obligation of the State to deal with the representation, if and when made, as expeditiously as possible. The opportunity contemplated by the section is the opportunity to make a representation against the detention order to the Government and therefore ex hypothesi soon after the person is deprived of his personal liberty he must be afforded the earliest opportunity to make a representation. The representation is to be made to the Government. Therefore the detenu who has already been served with the detention order and thus deprived of his liberty would ordinarily be in a position to send his representation through the jail authorities. The jail authority is merely a communicating channel because the representation has to reach the Government which enjoys the power of revoking the detention order. The intermediary authorities who are communicating authorities has also to move with an amount of promptitude so that the statutory guarantee of affording earliest opportunity of making the representation and the same reaching the Government is translated into action. The corresponding obligation of the State to consider the representation cannot be whittled down by merely saying that much time was lost in the transit. If the Government enacts a law like the present Act empowering certain authorities to make the detention order and also simultaneously makes a statutory provision of affording the earliest opportunity to the detenu to make his representation against his detention, to the Government and not the detaining authority, of necessity the State Government must gear up its own machinery to see that in these cases the representation reaches the Government as quickly as possible and it is considered by the authorities with equal promptitude. Any slackness in this behalf not properly explained would be denial of the protection conferred by

the statute and would result in invalidation of the order.

12. Reverting to the facts of this case, the detenu who was in jail from June 25, 1981, was served with a detention order on July 11, 1981, the very day on which the detention order was made. The grounds of detention were served upon him on July 15, 1981. Admittedly the detenu submitted his representation to the Superintendent of Jail on July 29, 1981. One K. D. Sharma, Medical Officer, Central Jail, Jammu, in charge Central Jail, Jammu who has filed his affidavit dated Feb. 6, 1982, has admitted that the detenu submitted his representation addressed to the Secretary to the Government, Home Department, on July 29, 1981. He proceeds to assert that the said representation in original was forwarded by post to the Government in Srinagar vide his office Number 2595 dated July 29, 1981. He further adds that a wireless message number 2596 dated July 29, 1981, was also sent to the Government to intimate that the representation of the detenu had been forwarded to the Government for appropriate action. Postal communication from Jammu to Srinagar hardly takes two days unless it is pointed out that there was some break down of communication. Nothing to that effect was brought to our notice. Now Shri Salathia has stated in his counter affidavit that as no representation was received a wireless message was sent on August 6, 1981, making reference to the wireless communication from the Superintendent of Jail that the representation referred to in the wireless message of the Jail Superintendent has still not been received at Srinagar. He requested the Superintendent to send a duplicate copy of the same by air consignment, and gave a further direction that in future all such communications should be sent through air consignment. Be that as it may, he says that the representation was received in the office on August 12-1981. The comments from S. P. C. I. D., Counter Intelligence were called for on August 14, 1981. He does not state the date on which they were received but he says that the case was examined and processed on Aug. 24, 1981 in the office and the file was placed before the Home Secretary on Aug. 25, 1981 who recommended the same for approval on

August 28, 1981, and the Chief Minister (Home) rejected the representation on August 31, 1981, and the fact of rejection of the representation was communicated to the detenu on September 1, 1981. There are two time-lags which may be noticed. Representation admittedly handed in to the Superintendent of Jail on July 29, 1981, at Jammu reached Srinagar, the summer capital of the State on August 12, 1981, which shows a time lag of 14 days. The second time lag is, from our point of view, more glaring. Even though the concerned office was made aware of the fact by the wireless message of the Superintendent of Jail, Jammu, dated July 29, 1981, that a representation of the detenu has been sent by post, the first query about its non-receipt came as per the wireless message dated August 6, 1981. That can be overlooked, but it has one important message. The concerned office was aware of the fact that a representation has already been made and a duplicate was sent for. With the background of this knowledge trace the movement of the representation from the date of its admitted receipt being August 12, 1981. If the representation was received on August 12, 1981, and the same office disposed it of on August 31, 1981, there has been a time lag of 19 days and the explanation in that behalf in the affidavit of Shri Salathia is far from convincing. In our opinion, in the facts of this case this delay, apart from being inordinate, is not explained on any convincing grounds.

13. In *Khudi Ram Das v. State of West Bengal*, (1975) 2 SCC 81: (AIR 1975 SC 550), this Court held that one of the basic requirements of Cl. (5) of Art. 22 is that the authority making the order of detention must afford the detenu the earliest opportunity of making a representation against the order of detention and this requirement would become illusory unless there is a corresponding obligation on the detaining authority to consider the representation of the detenu as early as possible. Thus, in the facts of this case we are not satisfied that the representation was dealt with as early as possible or as expeditiously as possible, and, therefore, there would be contravention of Section 13 of the Act which would result in the invalidation of the order.

14. These are the reasons which had prompted us to quash and set aside the detention order.

Order accordingly.

AIR 1982 SUPREME COURT 1029

= 1982 Cri. L. 799

D. A. DESAI, A. P. SEN AND BAHARUL ISLAM, JJ.

Writ Petns. Nos. 8070 of 1981 with 23 and 29 of 1982, D/- 29-3-1982.

Devji Vallabhbhai Tandel, Petitioner v. The Administrator of Goa, Daman & Diu and another, Respondents

With

Narsinh Vallabhbhai Tandel, Petitioner v. The Administrator of Goa, Daman & Diu and another, Respondents.

And

Lallubhai Govanbhai Tandel, Petitioner v. The Administrator of Goa, Daman & Diu and another, Respondents.

(A) Government of Union Territories Act (20 of 1963), S. 44 — Scope — Administrator of Union Territories — Not purely constitutional functionary like President or Governor — Not bound to act on advice of Council of Ministers in all matters — He is competent to pass order of detention. (Constitution of India, Arts. 74, 162, 239; Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), Ss. 2 (f), 3).

The Administrator of the Union Territory appointed under Art. 239 is not purely a constitutional functionary and is not bound to act on the advice of the Council of Ministers. He is not in the same position as the Governor of a State or the President of India in the matter of discharge of executive functions conferred upon him. Therefore it cannot be said that the order of detention has to be made only by the Chief Minister and in the name of the Administrator and not by the Administrator, though it can be made in the name of the Administrator. The Administrator is competent to pass an order of detention and to dispose of the representation of the detenu.

(Para 6)

Comparison of the language of Arts. 74 and 163 with the language of S. 44 of the Act reveals the difference between the position of the President and the Governor on the one hand and the Administrator of the Union Territory on the other.

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The first difference is that he is similarly situated with the Governor but not with the President when he is to act in his discretion under the Act. Further, the Administrator has to act on his own unaided by the Council of Ministers when he is to exercise any judicial or quasi judicial functions. The Administrator even in matters where he is not required to act in his discretion under the Act or where he is not exercising any judicial or quasi judicial functions, is not bound to act according to the advice of the Council of Ministers. This becomes manifest from the proviso to S. 44 (1). In the event of a difference of opinion between the Council of Ministers of the Union territory and the Administrator, the right to decide would vest in the Union Government and the Council of Ministers of the Union territory would be bound by the view taken by the Union Government. Further, the Administrator enjoys still some more power to act in derogation of the advice of the Council of Ministers. (Para 6)

Secondly, on difference of opinion if the matter is referred to the President, then the Administrator can, during the interregnum, completely override the advice of the Council of Ministers and act according to his light. Neither the Governor nor the President enjoys any such power. Thus the basic functional difference in the powers and position enjoyed by the Governor and the President on the one hand and the Administrator on the other is glaring. (Para 6)

(B) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 (1) — Right of representation — Copy of detention order in English served on detenu not knowing English — Copy of grounds of detention, however, served in language understood by detenu — Specific mention in grounds that detention was to preventing him from smuggling goods — No handicap to him in submitting representation — No violation of Art. 22 (1) on ground that order of detention was in English. (Constitution of India, Art. 22 (5).) AIR 1951 SC 157 and AIR 1980 SC 2129, Disting.

(Para 8)

(C) Constitution of India, Arts. 22 (5). 21 — Right of representation — Scope — Detenu not entitled to be heard personally nor through lawyer — Need not be produced before Magistrate within 24 hours of detention — Nor entitled to consult or be defended by lawyer of his choice. (Conservation of Foreign Ex-

change and Prevention of Smuggling Activities Act (52 of 1974), Ss. 3, 5, 8).

A detenu does not have any right to be heard in person by the detaining authority. Nor can he be permitted cross examination of rebuttal evidence. The detenu has no right to appear before the detaining authority or before the Advisory Board by a legal practitioner. A 'friend' or an 'agent' who, in truth and substance, are friends of the detenu may appear for the detenu but if such a 'friend' or 'agent' also happens to be a legal practitioner, he cannot, as of right, appear before the Advisory Board on behalf of the detenu. Further if such a 'friend' or an 'agent' of the detenu is essentially a comrade in the profession of the detenu for which he is detained, then such a 'friend' or 'agent' will also be barred from appearance on behalf of the detenu. (Paras 12, 13, 14, 16)

Any law providing for preventive detention would not be unconstitutional even if it contravenes Art. 22 (1) and (2). A person detained under a law providing for preventive detention cannot claim as a matter of constitutional right to consult and be defended by a lawyer of his choice. Nor can he insist upon being produced before a magistrate within 24 hours of his arrest. (Para 13)

It is implicit in Sub-Art. (5) of Art. 22 that the representation has to be a written representation communicated through the jail authorities or through any other mode which the detenu thinks fit of adopting but the detaining authority is under no obligation to grant any oral hearing at the time of considering the representation. If the representation has to be a written representation, there is no question of hearing any one much less a lawyer. Case law discussed.

(Para 14)

Cases Referred: Chronological Paras

AIR 1982 SC 8 : (1981) 3 Scale 1657 :	
1982 Cri LJ 150	11
AIR 1982 SC 710 : (1982) 1 SCC 271 :	
1982 Cri LJ 340	11, 16
AIR 1981 SC 746 : (1981) 2 SCR 516 :	
1981 Cri LJ 306	14
AIR 1980 SC 2129 : (1980) 4 SCC 427	9
AIR 1974 SC 2192 : (1975) 1 SCR 814 :	
1974 Lab IC 1380	6
AIR 1971 SC 1093 : (1971) 3 SCR 483	6
AIR 1969 SC 1153 : (1969) 3 SCR 574 :	
1969 Cri LJ 1555	14
AIR 1951 SC 157 : 1951 SCR 167 : 52	
Cri LJ 373	9

BAHARUL ISLAM, J.:— These three writ petitions under Art. 32 of the Constitution of India involve common questions of facts and law. This common order of ours, therefore, will dispose of all of them. It will be sufficient if we refer to the facts only of Writ Petition No. 8070 of 1981. This petition is directed against the order dated 11th September, 1981 made under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (the COFEPOSA) by the Administrator of Goa, Daman and Diu (hereinafter 'the Administrator'), detaining the petitioner "with a view to preventing him from smuggling goods".

2. The material facts in a nutshell as alleged in the grounds of detention in Writ Petition No. 8070 of 1981 are that the petitioner along with Lallu Govan Tandel alias Lallu Malbari, Narsingh Vallabhbhai Tandel (the petitioners in the other two writ petitions) and Narsinghbhai Daulabhbhai (detenu since released) indulged in smuggling of foreign goods such as fabrics, speakers, cassettes, video cassettes, wrist watches, refrigerators silver etc. The goods in 36 packages were recovered from House No. 12/134 of Daman Municipal Area. These goods were kept there by two persons, namely; Tulsibhai Ranchhodhbhai Tandel and Mangalbhahi Bhulabhai Tandel engaged by the aforesaid four detenus for lifting the said 36 packages from a vessel grounded in sea off Ghati Sheri, Nani Daman. The contraband goods recovered were worth Rs. 5,30,281.50. The aforesaid Tulsidas and Mangalbhahi made certain statements on 2nd July, 1981 implicating the aforesaid four persons including the petitioner. When the Customs squad was keeping a watch on Nani Daman coast, a vessel was found in the sea and goods were being unloaded. In the process Tulsibhai Ranchhodhbhai and Mangalbhahi Bhulabhai were accosted and each had a package with him and on being led by them the customs squad reached the house bearing municipal No. 12/134. On being questioned, the aforementioned two labourers Tulsibhai and Mangalbhahi stated that they were engaged as labourers for transporting packages of contraband goods from a vessel grounded in sea on Ghatisheri to the said house bearing No. 12/134. Tulsibhai and Mangalbhahi, in the course of interrogation, admitted that they were engaged by detenu Devji Vallabhbhai Tandel and Lallu Govan for unloading

the packages containing contraband goods.

3. The impugned order of detention dated 11th September, 1981 (Annexure 'A') together with the grounds of detention (Annexure 'B') were served on the petitioner on June 30, 1981, which was the date of apprehension.

4. The first submission of Mr. Ram Jethmalani, learned counsel for the petitioner, is that under the Government of Union Territories Act, 1963, (hereinafter the Act), the order of detention can be made only by the Chief Minister and in the name of the Administrator and not by the Administrator, though it can be made in the name of the Administrator. In the instant case, the order of detention was made, and the representation dated 10th October, 1981 of the petitioner was disposed of, by the Administrator, which, it is submitted, is not permissible in law.

The argument sought to be made seems to be that the status of the Administrator is similar to that of the Governor of a State and as such the Administrator had to act with the aid and advice of the Council of Ministers. Admittedly, there is an elected Assembly with a Council of Ministers in the Union Territory of Goa, Daman and Diu. Therefore, the argument proceeds, the Administrator on his own cannot make an order of detention. The order can be made by the Chief Minister or any other person authorised under Section 3 of the COFEPOSA in the name of the Administrator.

On the other hand in Paragraph 7 of the counter-affidavit, it has been stated by the respondent, "that the respondent has full authority to make the order of detention under COFEPOSA in exercise of the powers conferred under the statute. In case of the Union Territories the power of detention is specifically conferred on the Administrator by virtue of the definition of the "State Government" under Section 2 (f) of the COFEPOSA Act, 1974 and as such the Administrator as the detaining authority, has to form his own opinion and is not bound to act on the aid and advice of his Council of Ministers..... Even, then the Administrator has considered the advice of the Chief Minister, who is the Minister incharge of the department dealing with COFEPOSA matters".

5. Mr. Eduardo Faleiro, learned counsel appearing for Respondent No. 1 (the Administrator) has placed the entire records before us. On a perusal of the rel-

evant papers, we find that the matter was routed through the Chief Minister who considered the case and sent it to the Administrator, who, thereafter, passed the order of detention. There is thus a substantial compliance of S. 3 of the COFEPOSA Act. Even so, the legal submission of learned counsel has to be answered, as he urged it with vehemence.

6. Section 2 (f) of the COFEPOSA Act provides:

"In this Act, unless the context otherwise requires,—

(f) "State Government", in relation to a Union Territory, means the administrator thereof".

In the Union Territories Act, 1963 (hereinafter the 'Act'), under clause (a) of sub-section (1) of Section 2, 'Administrator' has been defined as:

"'Administrator' means the administrator of a Union Territory appointed by the President under Article 239".

Under clause (h) of sub-section (1) of Section 2, "Union Territory" has been defined as:

"'Union Territory' means any of the Union Territories of Goa, Daman and Diu.....". (Material portion only) Sub-section (1) of Section 3 of the COFEPOSA Act provides:

"The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from—

- (i) smuggling goods, or
 - (ii) abetting the smuggling of goods, or
 - (iii) engaging in transporting or concealing or keeping smuggled goods, or
 - (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
 - (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,
- it is necessary so to do, make an order directing that such person be detained."

The fasciculus of Ss. 44 to 46 in Part IV of the Act provides for setting up a Council of Ministers. S. 44 reads as under:

"44. Council of Ministers — (1) There shall be a Council of Ministers in each Union Territory with the Chief Minister at the head to aid and advise the Administrator in the exercise of his functions in relation to matters with respect to which the Legislative Assembly of the Union Territory has power to make laws except in so far as he is required by or under this Act to act in his discretion or by or under any law to exercise any judicial or quasi-judicial functions:

Provided that in case of difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer it to the President for decision and act according to the decision given thereon by the President, and pending such decision it shall be competent for the Administrator in any case where the matter is in his opinion so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary".

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Section 46 confers power on the President to make rules: (a) for the allocation of business to the Ministers; and (b) for the more convenient transaction of business with the Ministers including the procedure to be adopted in the case of difference of opinion between the Administrator and the Council of Ministers or a Minister. Sub-sec. (2) provides that save as otherwise provided in the Act, all executive action of the Administrator, whether taken on the advice of his Ministers or otherwise, shall be expressed to be taken in the name of the Administrator. The contention is that the Administrator of the Union Territory appointed under Art. 239 of the Constitution by the President is in the same position as the Governor of a State or the President of India in the matter of discharge of executive functions conferred upon him and he must act on the advice of the Council of Ministers. It was accordingly further submitted that the Administrator cannot act on his own and in this case it is claimed on behalf of the Administrator in the affidavit that he can act on his own as stated above. Reliance was placed on *Shamsher Singh v. State of Punjab*, (1975) 1 SCR 814 : (AIR 1974 SC 2192), wherein it was held that the President or the Governor acts on the aid and advice of the Council of Ministers

with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of a State in all matters which vest in the executive whether those functions are executive or legislative in character. It was further held that neither the President nor the Governor is to exercise the executive functions personally. It is not possible to accept this submission.

Article 74 provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. The proviso to the Article is not material. Similarly, Art. 163 provides that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. Once we compare the language of Arts. 74 and 163 with the language of S. 44 of the Act, the difference between the position of the President and the Governor on the one hand and the Administrator of the Union territory on the other becomes manifest. The first difference is that he is similarly situated with the Governor but not with the President when he is to act in his discretion under the Act. Further, the Administrator has to act on his own unaided by the Council of Ministers when he is to exercise any judicial or quasi-judicial functions. The nearest analogy to this provision is one to be found in Art. 217 (3) when the President has to determine the age of a Judge of the High Court. It has been held that while exercising the power conferred by Art. 217 (3), the President discharges a judicial function and is not required to act on the advice of the Council of Ministers his only obligation being to decide the question about the age of the Judge after consulting the Chief Justice of India (see *Union of India v. J. P. Mitter*, (1971) 3 SCR 483 (at p. 504-505) : (AIR 1971 SC 1093 at pp. 1105, 1106)). But there the analogy ends. The Administrator even in matters where he is not required to act in his discretion under the Act or where he is not exercising any judicial or quasi-judicial functions, is not bound to act according to the advice of the Council of Ministers. This becomes manifest from the proviso to S. 44 (1). It transpires from the proviso that in the event of a

difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer the matter to the President for decision and act according to the decision given thereon by the President. If the President in a given situation agrees with what the Administrator opines contrary to the advice of the Council of Ministers, the Administrator would be able to override the advice of the Council of Ministers and on a reference to the President under the proviso, obviously the President would not according to the advice of the Council of Ministers given under Art. 74. Virtually, therefore, in the event of a difference of opinion between the Council of Ministers of the Union territory and the Administrator, the right to decide would vest in the Union Government and the Council of Ministers of the Union territory would be bound by the view taken by the Union Government. Further, the Administrator enjoys still some more power to act in derogation of the advice of the Council of Ministers.

The second limb of the proviso to Section 44 (1) enables the Administrator that in the event of a difference of opinion between him and the Council of Ministers not only he can refer the matter to the President but during the interregnum where the matter is in his opinion so urgent that it is necessary for him to take immediate action, he has the power to take such action or to give such directions in the matter as he deems necessary. In other words, during the interregnum he can completely override the advice of the Council of Ministers and act according to his light. Neither the Governor nor the President enjoys any such power. This basic functional difference in the powers and position enjoyed by the Governor and the President on the one hand and the Administrator on the other is so glaring that it is not possible to hold on the analogy of the decision in *Shamsher Singh's* case that the Administrator is purely a constitutional functionary bound to act on the advice of the Council of Ministers and cannot act on his own. Therefore, for this additional reason also the submission of Mr. Jethmalani must be rejected.

7. The second submission of learned counsel was to the effect that the statements of labourers Tulsibhai and Mangal-bhai of 30th June, 1981, being the earlier statements of the two labourers were not supplied to the detenu but only the two

statements of 1st July, 1981, were supplied and, therefore, the detenu was prevented from making an effective representation by which he wanted to controvert the statements of Tulsibhai and Mangalbai. The submission was that, in their statements recorded on 1st July, 1981, they did not state that during the earlier interrogation on the night of 30th June, 1981, they informed the Customs Authorities that they were employed as labourers by the detenu and Lalubhai Govan. Consequently, it was contended, the detaining authority had no material from which to infer that on being first accosted by the customs squad the two labourers gave out that they were engaged in this unlawful activity as wage earners by the detenu and Lallu Govan. The submission has no merit because there are two statements, one of Customs Inspector, Mr. Patel, and the other of Customs Officer, Mr. Fitter both of which show that on being interrogated during the night of 30th June, 1981, the aforementioned two labourers gave out that they were engaged for unloading packages containing contraband goods from the grounded vessel to a house in Nani Daman by the detenu and Lallu Govan; and there is no dispute that the statements of Mr. Patel and Mr. Fitter were given to the detenu. Further, the grievance made by the detenu is not warranted by the materials on record. For, in the penultimate paragraph of the grounds of detention, it was stated, "copies of the statements and other documents which have been taken into consideration by the detaining authority are also enclosed as per the index attached" (underline mine). Thereafter, no grievance appears to have been made by the detenu in his representation. Even from the grounds in the Writ Petition, it does not appear which documents, if any, were not supplied to the detenu. The records show that there was great tension on the date at the place of apprehension and as such no statements could be and were recorded on the date of apprehension, but subsequently recorded on 2nd July, 1981. The submission therefore has no substance.

8. The third submission of learned counsel is, "that the order of detention was not properly served". The submission is that the Gujarati translation of the order was not supplied to the detenu. According to the learned counsel, "the petitioner does not know and cannot speak or write in a language other than Gujarati,

and that Annexure 'A' ought to have been translated into Gujarati. The petitioner was thereby deprived of an opportunity of making an effective representation against his detention". The submission is not wholly correct on facts. Annexure 'A' is the 'ORDER' expressed in terms of Section 3 (1) of the COFEPOSA. It is in English and reads:

"SECRET

No. 14/3/80/HD(G)
Administrator of Goa,
Daman & Diu,
Cabo Raj Niwas,
Caranzalem (P. O.)
Goa.

ORDER

WHEREAS, I, Jagmohan, Administrator of Goa, Daman and Diu, am satisfied with respect to the person known as Shri Devji Vallabhbhai Tandel alias Devji Boss son of Shri Vallabhbhai Tandel residing at H. No. 1/255, Fenta Sheri, Vadi Falia, Nani Daman, that with a view to preventing him from smuggling goods, it is necessary to make the following order:

Now, therefore, in exercise of the powers conferred by Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

I, Jagmohan, Administrator of Goa, Daman and Diu direct that the said Shri Devji Vallabhbhai Tandel be detained at the Central Jail, Aguada, and the enclosed grounds of detention be served on him.

SEAL

Place:— Cabo Raj Niwas

Date:— 11-9-81

Encl: As above

Sd/-

(Jagmohan)

Administrator of Goa, Daman
and Diu.

To

Shri Devji Vallabhbhai Tandel
alias Devji Boss,
H. No. 1/255, Fenta Sheri,
Vadi Falia, Nani Daman."

Admittedly, this 'ORDER' as per Annexure 'A' was in English but the enclosure, Annexure 'B' which contains the grounds of detention together with the materials on which the grounds were based was in Gujarati. In paragraph 8 of the counter-affidavit filed on behalf of the Administrator, it has been stated:

"As regards Ground D it is denied that the detaining authority has not furnished

Gujarati version of the order of detention as alleged by the petitioner The petitioner by his own admission knows Gujarati and accordingly the grounds of detention have been communicated to the petitioner in Gujarati language. The allegation is, therefore, untenable".

The above statement of the respondent is supported by the internal evidence of Annexure 'B' itself. For, in the penultimate paragraph of the "grounds" it has been stated:

"The Gujarati version of the grounds of detention is enclosed to enable you to understand the grounds for which detention order is passed against you".

This shows that the Gujarati version of the grounds as per Annexure 'B' was sent to the detenu along with the ORDER as per Annexure 'A'. Admittedly, the detenu is a Gujarati speaking person.

So far as the non-supply of the Gujarati version of the ORDER as per Annexure 'A' is concerned, in our opinion, there has been no violation of Article 22 (5) or any other law. The ORDER as per Annexure 'A' was a mere formal recital of S. 3 (1) of the COFEPOSA, showing the provision of law under which the order of detention has been made. Although, the section of the COFEPOSA has not been mentioned in the last but two paragraphs of the "grounds", it has been stated that the detenu engaged himself "in smuggling goods and that there is sufficient cause to pass detention order against you with a view to preventing you from smuggling goods", which was in Gujarati. It cannot, therefore, be said that the detenu was in any way handicapped in submitting his representation, or there has been any violation of Article 22 (5) of the Constitution.

9. The learned counsel, in support of his third submission, cited before us the decision of this Court in the case of State of Bombay v. Atma Ram Sridhar Vaidya, reported in 1951 SCR 167 : (AIR 1951 SC 157). The decision is beside the point and need not be referred to.

Learned Counsel for the petitioner also cited another decision of this Court reported in (1980) 4 SCC 427 : (AIR 1980 SC 2129). In that case, it has been held that failure to supply the grounds of detention in the language understood by the detenu violates Art. 22 (5) of the Constitution. In the instant case, as we have found above, the Gujarati transla-

tion of the grounds was supplied to the detenu. The decision cited has not held that the ORDER expressed in terms of S. 3 (1) of the COFEPOSA must also be in the language understood by the detenu. S. 3 (1) as stated above merely gives power of detention to the detaining authority. This submission also has no substance.

10. The fourth submission of learned counsel was that by a telegram dated 1st October, 1981, the detenu requested for an immediate hearing through his lawyer but this request was denied. There was a delay of six days in deciding the matter. This was contrary to law. That apart, the "respondent misled the detenu by indicating to him that the only way by which the Administrator could be persuaded would be a representation through the jail". The factual part of the submission is not correct. On 1st October, 1981, one Shri Thaku Ajwani, Advocate for the petitioner, sent a telegram to the Administrator. It was in the following terms:

"Jagmohan,
Administrator of Goa
Daman & Diu
Cabo Raj Niwas
Caranzalem Goa

Ordinary

Detenus Devji Vallabhbhai Tandel and Narsinbhai Durlabhbhai Tandel Detained under COFEPOSA Orders D/- 11th September, 1981 have instructed me to appear before you and represent their case for revoking detention orders (stop) kindly intimate forthwith date time and place.

Thaku Ajwani Advocate 22
Panchshila C Road Churchgate
Bombay 400 020

....."

There was a reply telegram by the Chief Secretary of the Union Territory in question. The post copy of the reply telegram reads thus : (material portions only) :

"State	Telegram	Express
Advocate Shri Thaku Ajwani		
Chambers C/o Ram Jethmalani		
Advocate Supreme Court		
22 Panchasheela C Road,		
Churchgate, Bombay-400 020		

..... No. 14/3/80/HD (G) (.) Reference your letter dated 1st October, 1981 regarding detention of Sarvashri Devji Vallabhbhai Tandel and Narsinbhai Durlabhbhai Tandel detained under COFE-

POSA Act received in the Office of the Administrator on 5/10/1981 (.) "Your Telegram dated 1st October, 1981 referred therein had been replied under this department's telegram of even number dated 6th October, 1981 and its copies have also been sent to the concerned detenus at Central Jail Aguada (.) contents of the said telegram are reproduced below (.) quote (.) your telegram dated 1st October, 1981 addressed to the Administrator, Goa, Daman and Diu regarding detention of Sarvashri Devji Vallabbhbai Tandel and Narsinhbhai Durlabbhai Tandel detained under COFEPOSA Act (.) your request for appearance before the Administrator and represent the case of the aforesaid detenus has been carefully considered by the Administrator and he has decided that the detenus can make representation to the Administrator through Central Jail Aguada where they are detained (.) the representation of the aforesaid detenus will receive his due consideration as and when they are received (.) unquote (.)

..... Chief Sec....."

It has been stated in paragraph 9 of the counter-affidavit as follows:—

"....., it is admitted that the telegram dated 1st October, 1981, purported to have been made by the Advocate on behalf of petitioner requesting the Administrator for grant of personal appearance before him for revocation of detention order was received in the office of the Administrator on 3rd October, 1981. The request was duly examined and it was felt that under the law, the detenu is not entitled to be represented by an Advocate and the Detaining Authority is not legally bound to grant the prayer made on behalf of the detenu. The Advocate of the petitioner was telegraphically informed on 6th October, 1981 that the request had been duly considered by the Administrator who had decided that the detenu could make a representation to the Administrator through the Superintendent, Central Jail, Aguada, where he was detained and that the same would receive his due consideration as and when it was received. A copy of the said telegram sent to the Advocate was also endorsed to the detenu and the same was received by him on 7th October, 1981. A letter in confirmation of the Advocate's telegram was received from the Advocate of the petitioner in the office of the Administrator on 5-10-1981 and the same was replied to telegraphically on 7th October,

1981, reiterating the earlier position as conveyed in the said telegram of 6th October.

The allegation that 10 days were taken by the respondent in only deciding the representation and in coming to the conclusion that he would not permit a lawyer to plead for revocation of the order of detention is, therefore, not correct. To give further details, the telegram of the petitioner's Advocate was received in the Administrator's office on 3rd October, 1981, and was sent to the Joint Secretary (Home) the same day. It was referred to the Law Department on 3rd October, 1981 itself and through usual channels reached the Law Secretary on 5th October, 1981, the 4th of October being a Sunday. The Law Secretary gave his opinion and referred the telegram to the Home Department on the same day i. e. 5th October, 1981. In the Home Department it was sent by the Under Secretary (Home) to the Chief Secretary and by the latter to the Chief Minister the same day. On 6th October, 1981, it was examined by the Lt. Governor and the reply was sent to the petitioner on the same day. The reply was received by the petitioner/detenu on 7th October, 1981".

In addition to the above explanation of respondent in para 9 of the counter-affidavit, we perused the file and we are satisfied that there was no delay in disposal. On the contrary, it may be said to the credit of the administration that it was dealing with the matter with utmost promptitude.

11. Now to examine the second part of the fourth contention of learned counsel. His submission is that the Administrator committed an illegality not only by refusing the detenu to be heard through a lawyer, but, in addition, by misleading the detenu by his telegram. The detenu's counsel, Mr. Ajwani, informed the Administrator that the detenu had instructed him to represent his case before the Administrator. He made a request to the Administrator to let him know the date, time and place of his appearance before the Administrator. The reply telegram quoted above has stated that his request has been "carefully considered by the Administrator" who, by implication, rejected the request. Besides, it was further stated in the telegram that the Administrator "has decided that the detenu can make representation to the Administrator through the jailor and that

the representation so sent would be duly considered by the Administrator to which exception has been taken. In these circumstances, the following questions arise :

(1) whether the detenu has a right to appear before the detaining authority through a lawyer;

(2) whether the last sentence in the telegram has misled the detenu.

Mr. Jethmalani submits that Article 22 (3) enables the legislature to take away the common law right of acting through an agent generally or through a particular class of agents. The statute does not deal with the general but with a particular class, namely, the legal practitioners. The statute confines this legal disability to the matter connected with reference to the Advisory Board. So he submits that lawyers are not completely sought to be excluded. Under Art. 22, counsel submits, there are two distinct and independent rights : (1) to persuade the detaining authority to revoke the order of detention and (2) to persuade the Advisory Board to disapprove the detention. It is only in the second process that the agent called lawyer is excluded. The learned counsel further submits that every person has a common law right to employ an agent and do an act through him. The detenu could, therefore, send an 'agent' or a 'friend' who might have been his lawyer.

Let us first examine whether the detenu has a right to appear through a lawyer. This examination need not detain us long.

Section 8 (e) of the COFEPOSA reads : (material portion only)

"For the purposes of sub-clause (a) of clause (4) and sub-clause (c) of clause (7), of Article 22 of the Constitution, — (e) — a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board,....." (emphasis added).

Clause (e) in express terms disentitles the detenu to appear through a legal practitioner in any matter connected with the reference to the Advisory Board. It is indisputable that a detention matter which is pending before the Administrator is undoubtedly a matter connected with the reference to the Advisory Board. The detenu, therefore, has no right to ap-

pear before the detaining authority or before the Advisory Board by a legal practitioner.

This Court in the case of Smt. Hemlata Kantilal Shah v. The State of Maharashtra reported in (1981) 3 Scale 1657 : (AIR 1982 SC 8 at p. 11) have held:

"Section 8 (e) has not barred representation of a detenu by a lawyer. It only lays down that the detenu cannot claim representation by a lawyer as of right. It has given the Board a discretion to permit or not to permit representation of the detenu by counsel according to the necessity in a particular case".

In the case of A. K. Roy v. Union of India reported in (1982) 1 SCC 271 : (AIR 1982 SC 710) relied on by Mr. Jethmalani, a Constitution Bench of this Court has held :

"First and foremost, we must consider whether and to what extent the detenu is entitled to exercise the trinity of rights before the Advisory Board; (i) the right of legal representation; (ii) the right of cross-examination and (iii) the right to present his evidence in rebuttal. These rights undoubtedly constitute the core of just process because without them, it would be difficult for any person to disprove the allegations made against him and to establish the truth. But there are two considerations of primary importance which must be borne in mind in this regard. There is no prescribed standard of reasonableness and therefore, what kind of processual rights should be made available to a person in any proceeding depends upon the nature of the proceedings in relation to which the rights are claimed. The kind of issues involved in the proceeding determine the kind of rights available to the persons who are parties to that proceeding. Secondly, the question as to the availability of rights has to be decided not generally but on the basis of the statutory provisions which govern the proceeding, provided of course that those provisions are valid " (para 85)

"Turning first to the right of legal representation which is claimed by the petitioners, the relevant Article of the Constitution to consider is Article 22 which bears the marginal note "protection against arrest and detention in certain cases". That article provides by Cl. (1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the

grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Clause (2) requires that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest and that no person shall be detained in custody beyond the said period without the authority of a Magistrate. Clause (3) provides that nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention. It may be recalled that clause (4) (a) of Article 22 provides that no law of preventive detention shall authorise the detention of a person for a period longer than three months unless the Advisory Board has reported before the expiry of the said period of three months that there is in its opinion sufficient cause for such detention. By clause (7) (c) of Article 22, the Parliament is given the power to prescribe by law the procedure to be followed by the Advisory Board in an inquiry under clause (4) (a)". (para 86).

"On a combined reading of clauses (1) and (3) (b) of Art. 22, it is clear that the right to consult and to be defended by a legal practitioner of one's choice, which is conferred by clause (1), is denied by clause 3 (b) to a person who is detained under any law providing for preventive detention. Thus, according to the express intentment of the Constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him. In view of this, it seems to us difficult to hold, by the application of abstract, general principles or on a priori considerations that the detenu has the right of being represented by a legal practitioner in the proceedings before the Advisory Board It is indeed true to say, after the decision in the Bank Nationalisation case, that though the subject of preventive detention is specifically dealt with in Art. 22, the requirements of Art. 21 have nevertheless to be satisfied. It is therefore necessary that the procedure prescribed by law for the proceedings before the Advisory Boards must be fair, just and reasonable. But

then, the Constitution itself has provided a yardstick for the application of that standard, through the medium of the provisions contained in Art. 22 (3) (b). Howsoever much we would have liked to hold otherwise, we experience serious difficulty in taking the view that the procedure of the Advisory Boards in which the detenu is denied the right of legal representation is unfair, unjust or unreasonable. If Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to hold that the detenu cannot be denied the right of legal representation in the proceedings before the Advisory Boards. It is unfortunate that Courts have been deprived of that choice by the express language of Art. 22 (3) (b) read with Article 22 (1)". (para 87).

"To read the right of legal representation in Art. 22 (5) is straining the language of that Article. Clause (5) confers upon the detenu the right to be informed of the grounds of detention and the right to be afforded the earliest opportunity of making a representation against the order of detention. That right has undoubtedly to be effective, but it does not carry with it the right to be represented by a legal practitioner before the Advisory Board merely because, by Section 10 of the National Security Act, the representation made by the detenu is required to be forwarded to the Advisory Board for its consideration. If anything, the effect of S. 11 (4) of the Act, which conforms to Art. 22 (3) (b), is that the detenu cannot appear before the Advisory Board through a legal practitioner. The written representation of the detenu does not have to be expatiated upon by a legal practitioner". (para 88)

"We must therefore hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Art. 22 (3) (b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party." (para 93) (underlines added)

What has been said above about appearance through lawyer before the Advisory Board under the National Security

Act equally apply to appearance by lawyer before the Advisory Board under COFEPOSA.

With regard to appearance through a 'friend', the Court observed :

"Another aspect of this matter which needs to be mentioned is that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend." (para 94) (emphasis added). But the Court observed :

"The appearance of the legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner". (emphasis added).

In other words, a 'friend' who, in truth and substance, is a friend of the detenu may appear for the detenu but if such a 'friend' also happens to be a legal practitioner, he cannot, as of right, appear before the Advisory Board on behalf of the detenu.

12. The same reasoning will apply to appearance by an 'agent'. In other words, if an 'agent' is in 'truth and substance' an agent, the detenu may appear through him. But if the 'agent' is a legal practitioner, appearance by him as of right will be barred. But a 'friend' or an 'agent' of the detenu who is essentially a comrade in the profession of the detenu for which he is detained, such a 'friend' or 'agent' will also be barred from appearance on behalf of the detenu.

In passing it must be stated that a man has a right to appoint an agent. One may call it a common law right. But there is no obligation on the other side to deal with the agent. The other side has an equal right to refuse to deal with an agent. In any view of the matter, in the absence of any right to give an oral hearing in the form of making a representation under Art. 22 (5), the question of hearing a legal practitioner on behalf of the detenu does not arise. It cannot, therefore, be said that refusal to hear Mr. Ajwani, advocate engaged by the detenu, by the Administrator has resulted in

denial of constitutional right to make a representation.

That apart, in this case, the telegram in express terms has described the sender. Thaku Ajwani, as an advocate, who in clear terms stated that he had been instructed by the detenu to appear before the detaining authority to represent the case of the detenu. In other words, Mr. Ajwani clearly told the Administrator that the detenu was his client and that he himself was his counsel and that he desired to represent the case of the detenu in his capacity as a legal practitioner. The telegram was not sent by Mr. Ajwani telling the Administrator that he wanted to appear before the Administrator as a 'friend' or an 'agent' of the detenu in order to represent his case. It, therefore, cannot be said that the Administrator refused a 'friend' or an 'agent' of the detenu to appear before him to assist the detenu.

13. Article 22 (1) and (2) confer fundamental right of protection against arrest and detention in certain cases. Sub-Article (1) enjoins a duty on the person arresting any person to inform the person arrested, as soon as may be, of the grounds for such arrest before detaining him in custody and such detained person shall not be denied the right to consult and to be defended by a legal practitioner, of his choice. Sub-Article (2) enjoins a duty on the person arresting and detaining any one to produce him before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate. These two fundamental rights, namely, right to be informed of the grounds of detention at the time of arrest and the right to consult and be defended by a lawyer of his choice, and any detention beyond the period of 24 hours plus the time taken in the journey, unless authorised by a Magistrate to be illegal would have also been available to any one detained under the preventive detention laws but for Sub-Article (3). Sub-Article (3) provides that nothing in clauses (1) and (2) shall apply— (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention. As a

necessary corollary, any law providing for preventive detention would not be unconstitutional even if it contravenes Art. 22 (1) (2). In other words, a person detained under a law providing for preventive detention cannot claim as a matter of constitutional right to consult and be defended by a lawyer of his choice. Nor can he insist upon being produced before a Magistrate within 24 hours of his arrest.

14. Section 8 of the COFEPOSA shows as noticed above that a person against whom an order of detention has been made under the Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board. Assuming that the right to make a representation and the corresponding obligation cast on the detaining authority to consider the representation expeditiously is not a matter connected with the reference to the Advisory Board and that both are independent stages, it cannot be said that the refusal of the Administrator to hear the advocate of the detenu while considering the representation would be denial of common law right of the detenu to be represented by an agent. Art. 22 (5) which has provided a safeguard in the matter of preventive detention confers the right on the detenu and simultaneously casts an obligation on the detaining authority, as soon as may be, after the arrest to communicate to the detenu the grounds on which the order has been made and to afford the earliest opportunity of making a representation against the order. Representation is to be made by the detenu. Detenu is a person who is already deprived of his liberty. Giving the ordinary connotation to the expression 'earliest opportunity of making a representation' as set out in sub-Article (5) would only imply that the person can send his written representation through the jail authorities. It would be open to him to send it by any other communicating media but the opportunity to make a representation does not comprehend an oral hearing. If it does, the detenu will have to be taken from the jail where he is detained to the detaining authority which in a given situation may not even be feasible and the delay in transit may be counterproductive to the earliest opportunity to be afforded to make a representation. It is, therefore, implicit in Sub-Article (5) of Article 22 that the representation has to

be a written representation communicated through the jail authorities or through any other mode which the detenu thinks fit of adopting but the detaining authority is under no obligation to grant any oral hearing at the time of considering the representation. Now, if the representation has to be a written representation, there is no question of hearing any one much less a lawyer. Reliance was, however, placed on *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 2 SCR 516 : (AIR 1981 SC 746). In that case the detenu challenged the validity of clause 3 (b) (i) and (ii) of the Condition of Detention laid down by the jail administration under an order dated 23rd August, 1975, issued in exercise of the powers conferred under Section 5 of the COFEPOSA. The relevant condition was as under :

"3. The conditions of detention in respect of classification and interviews shall be as under :

(b) Interviews: Subject to the direction issued by the Administrator from time to time, permission for the grant of interviews with a detenu shall be granted by the District Magistrate, Delhi as under :

(i) Interview with legal adviser :

Interview with legal adviser in connection with defence of a detenu in a criminal case or in regard to writ petitions and the like, may be allowed by prior appointment, in the presence of an officer of Customs/Central Excise/Enforcement to be nominated by the local collector of Customs/Central Excise or Deputy Director of Enforcement who sponsors the case for detention.

(ii) Interview with family members :

A monthly interview may be permitted for members of the family consisting of wife, children or parents of the detenu

The contention was that the condition in clause 3 (b) (ii) which restricts the interview to only one in a month in case of a detenu is unreasonable and arbitrary when contrasted with an undertrial prisoner who was entitled to the facility of interviews with friends and relatives twice in a week and even though a detenu stands on a higher pedestal than an undertrial prisoner or a convict, the limitation of interview to one in a month is utterly arbitrary. This contention found favour with the Court on the ground that restrictions placed on a detenu must, consistent with the effectiveness of detention,

be minimal (see *Sampat Prakash v. State of Jammu & Kashmir*, (1969) 3 SCR 574: (AIR 1969 SC 1153)). Proceeding further, this Court held that sub-clause (i) of clause 3 (b) which prescribes that the detenu can have an interview with a legal adviser of his choice with prior permission of the District Magistrate and the interview has to take place in the presence of a Customs/Central Excise/Enforcement Officer nominated by the local Collector of Customs/Central Excise/Deputy Director of Enforcement, was unreasonable and hence invalid. Now, this judgment is not an authority for the proposition that a detenu as a matter of right is entitled to make his representation by an oral hearing before the detaining authority under Article 22 (5). The right to consult a lawyer was granted by the conditions of detention prescribed under Section 5. This right was not spelt out as an incident of Article 21 and what has been found invalid is the presence of officers at the interview and the number of interviews. Therefore, *Francis Coralie Mullin's* case is not an authority for the proposition and frankly, cannot be one for the purpose of spelling out a right to be represented by a lawyer while making representation before the detaining authority. Even though there are some observations which may imply such a right, they would be completely obiter for the obvious reason that a right was conferred by the Conditions of Detention and not for the first time a right was being spelt out by the expanded horizons of right to life and liberty as enshrined in Article 21. The attempt to read or imply something in Article 21, which is positively reflected by Article 22 (5) would be contrary to any canon of construction because it is well settled that what is expressly reflected cannot be brought in by the back door of implication. It was not necessary to spell out these rights in the facts of that case for the obvious reason that the right was conferred by the conditions of detention. One need not go in search of some such right implicit in Article 21 by a process of interpretation when it was expressly granted in the Conditions of Detention under the Act. Therefore, with respect, the decision in *Mullin's* case cannot help the petitioner to spell out a right to be represented by a lawyer before the detaining authority.

15. Now the other aspect of the submission, namely, whether the respondent misled the detenu by his telegram. Objection has been taken to the following sentence of the telegram :

"He (administrator) has decided that the detenus can make representation to the administrator through Central Jail, Aguada, where they are detained".

It may be remembered that the telegram was sent to the detenus' advocate, Mr. Ajwani, and not to the detenus. The above sentence conveying an advice, albeit gratuitous, could hardly mislead a lawyer who is supposed to know how a representation of a detenu is to be sent to the detaining authority. The submission of Mr. Jethmalani was that the sentence gave the impression that the representation if sent through the jail only, and in no other way, would be considered. The submission was hypothetical. The detenu was in jail. The representation, of necessity, had to be sent through the Superintendent of the jail where he was detained with the former's necessary endorsement and seal. It would be difficult for the detaining authority to immediately ascertain whether the representation sent otherwise than through the jailor was genuine. Even so the Administrator did not say that the detenu's representation, unless sent through the jail would be considered. There is no merit in the submission.

16. The sixth point raised by learned counsel for the petitioner is that illegalities were committed in dealing with the representation of the detenu in that :

"(a) the detenu was not heard.

(b) his advocate was not heard.

(c) he was not told that he could be represented by a friend.

(d) he was not permitted cross-examination of rebuttal evidence."

The submission of learned counsel has no substance.

(a) A perusal of the record shows that the detenu was heard in person, was questioned by the Board on several points in Gujarati which was the language of the detenu, and necessary answers elicited. He does not have any right to be heard in person by the detaining authority.

(b) It is true that the advocate of the detenu was not heard but the former's right to be heard either by the detaining authority or by the Advisory Board has been answered above.

(c) The contention has been dealt with above.

(d) This Court in A. K. Roy's case (AIR 1982 SC 710) (supra) dealt with the detenu's plea of cross-examination, and has held : (at p. 749)

"..... It seems to us difficult to hold that a detenu can claim the right of cross-examination in the proceeding before the Advisory Board. First and foremost, cross-examination of whom? The principle that witnesses must be confronted and offered for cross-examination applies generally to proceedings in which witnesses are examined or documents are adduced in evidence in order to prove a point. Cross-examination then becomes a powerful weapon for showing the untruthfulness of that evidence. In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on facts proved either by applying the test of preponderance of probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects. The proceeding of the Advisory Board has therefore to be structured differently from the proceeding of judicial or quasi-judicial tribunals, before which there is a lis to adjudicate upon."

Finally, the Court observed (at p. 751)

"We are therefore of the opinion, that, in the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority."

17. Faced, with the difficulty created by the above decision, learned counsel submits that he has not used the word 'cross-examination' in the technical sense but used it loosely in the sense that the detenu would have examined as his witnesses the persons on whose statements the order of the detention has been based, to establish his innocence particularly before the judicially trained minds of the Members of the Advisory Board. Even if the word 'cross-examination' is taken in the loose sense as submitted by the learned counsel, the Advisory Board cannot

be blamed; for, there was no request by the detenu for the production of these persons before the Advisory Board to examine them as his defence witnesses. The sixth-submission also has no substance.

18. The seventh point formulated by learned counsel was "that the Advisory Board was required to decide two issues :

(i) whether the detention was justified when made;

(ii) whether it was justified on the date of the Advisory Board's report".

Mr. Jethmalani did not press before us sub-point (i). But he submitted that the Board ought to have found whether or not the order of detention was justified on the date of its report. We have perused the report of the Advisory Board and find that the report covers both sub-points (i) and (ii) enumerated above.

19. The eighth point raised by learned counsel for the petitioner is that the procedure before the Advisory Board was 'totally unjust and discriminatory'. His submission was that although the detaining authority was not present in person before the Advisory Board, his representatives were present to assist the Advisory Board on issues of law and fact in support of the order of detention while there was none to assist the detenu. The submission has been based on suspicion or guess, and is not borne out by records. The record shows that the detenu was produced before the Advisory Board and necessary questions were put to him and answers elicited by the Chairman and the Member of the Advisory Board and there was none present on behalf of the detaining authority. This submission also has no substance.

20. The last point raised by Mr. Jethmalani was that the cases of the four detenues connected with the same incident were reviewed by the Board; after having released one co-detenu, namely; Narasinghbhai Durlabhbhai, in pursuance of the Advisory Board's order, it was incumbent on the detaining authority to review the order of detention of the petitioners before us, namely; Devji Vallabhbhai Tandel, (Petitioner in Writ Petition No. 8070 of 1981), Narsinh Vallabhbhai Tandel, (Petitioner in Writ Petition No. 22 of 1982) and Lallubhai Govanbhai Tandel (Petitioner in Writ Petition No. 29 of 1982). As on a perusal of the report of the Advisory Board, it was found that Narsinh Vallabhbhai Tandel was advised to be released on the ground of tender

age, learned counsel did not press the submission.

21. These petitions have no merits and are dismissed.

Petitions dismissed.

AIR 1982 SUPREME COURT 1043

(From: (1978) 2 Rent LR 601 (Punj & Har))

R. S. PATHAK AND AMARENDRA
NATH SEN, JJ.

Civil Appeal No. 1830 of 1978, D/- 7-4-1982.

Mahabir Prasad Verma, Appellant v. Dr. Surinder Kaur, Respondent.

(A) Evidence Act (1 of 1872), S. 63 — Tape-recorded conversation — Credibility — Can be relied on only as corroborative evidence. (Tape-recorded conversation — Credibility).

Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon. (Para 22)

(B) East Punjab Rent Restriction Act (3 of 1949), S. 13 (2) (ii) (a) — Sub-letting — Tenant inducing sub-tenant with written permission of landlord — Expiry of tenant's contractual tenancy — Sub-tenant continuing in possession — Tenant not liable to eviction under S. 13 (2) (ii) (a) on that ground. (1978) 2 Rent LR 601 (Punj & Har.), Reversed.

A subletting by the tenant with the consent in writing of the landlord does not become unlawful on the expiry of the contractual tenancy of the tenant, unless there is any fresh sub-letting by the tenant without the written consent of the landlord. Mere continuance in possession of a sub-tenant lawfully inducted does not amount to any fresh or further sub-letting. Thus on expiry of the contractual tenancy the landlord cannot evict the tenant on the ground of sub-letting within the meaning of S. 13 (2) (ii) (a). (1978) 2 Rent LR 601 (Punj & Har.), Reversed.

(Para 26)

Section 13 (2) (ii) (a) lays down that if a tenant after the commencement of the Act has without written consent of the landlord transferred his right under the lease or sublet the entire building or any portion thereof, the tenant shall be liable to be evicted on the ground of such sub-letting. Therefore, if after the commence-

ment of the Act, the tenant has sublet with the written consent of the landlord, such subletting will not furnish any ground or cause of action for the eviction of the tenant by the landlord. As a tenant in spite of the determination of his tenancy continues the right to remain in possession as a statutory tenant and enjoys the protection against eviction by virtue of the provisions contained in the statute, a sub-tenant who is lawfully inducted, is also recognised by the statute to be a "tenant" within the meaning of the Act and he must necessarily enjoy the protection against eviction afforded to a tenant by the Act. A lawful subletting on the basis of the provisions of the Act does not become unlawful merely because the contractual tenancy of the tenant comes to an end. A tenant incurs the liability to be evicted, if the tenant after the commencement of the Act sublets without the written consent of the landlord; and the tenant who has lawfully sublet with the written consent of the landlord must necessarily enjoy immunity from the process of eviction on that ground. Subletting lawfully done with the written consent of the landlord does not become unlawful merely on the ground that the contractual tenancy has come to an end. Subletting to constitute a valid ground for eviction must be without the consent in writing of the landlord at the time when the tenant sublets any portion to the sub-tenant.

(Paras 25, 26)

Cases Referred: Chronological Paras

AIR 1979 SC 1745: (1980) 1 SCR 334 14
AIR 1976 SC 2229: (1976) Suppl. SCR 645 14, 19

AIR 1974 Punj 34: 75 Pun LR 824 11, 17
1974 Ren CJ (SN) 1: (1978) 2 Rent LR 421 (Punj) 17
(1969) 71 Pun LR 186: 1969 Cur LJ 156 17

AIR 1965 SC 414: (1964) 4 SCR 892 19
AIR 1964 SC 72: (1964) 4 SCR 733 15

AMARENDRA NATH SEN, J.:—

Whether on a proper construction of the terms of tenancy and the provisions of the East Punjab Rent Restriction Act, 1949, the appellant is liable to be evicted from the premises in his occupation as tenant, on the ground of wrongful subletting of the premises, is the question which falls for consideration in this appeal by special leave granted by this Court.

2. The appellant came into occupation of the shop-cum-flat No. 48, Sector 3-C, Chandigarh on and from 1st of April,

1974 as a tenant under the respondent who happens to be the owner of the said premises on terms and conditions contained in the rent-note dated 2-4-1974. For the sake of convenience we shall describe the appellant as the tenant and the respondent as the landlady of the premises.

3. The landlady filed her present petition (R. A. No. 163 of 1977) in the Court of Rent Controller, Chandigarh, under S. 13 of the East Punjab Urban Rent Restriction Act, 1949 (hereinafter referred to as the Act) for the eviction of the tenant on two grounds, namely, non-payment of rent and subletting of the flat portion and Barsati portion of the premises. On the said petition of the landlady, the Rent Controller, Chandigarh passed an order of eviction of the tenant on 17-11-1977 only on the ground of subletting. The other ground, namely, non-payment of rent by the tenant, did not succeed.

4. Against the order of Rent Controller, the tenant filed an appeal under Section 15 of the Act before the Appellate Authority. The Appellate Authority by its judgment dated 9-8-1978 dismissed the appeal of the tenant and upheld the order of eviction passed by the Rent Controller.

5. Against the judgment and order of the appellate authority, the tenant filed a revision petition under S. 15 of the Act before the High Court of Punjab and Haryana at Chandigarh. The High Court by its judgment dated 19-9-1978 dismissed the said petition. Aggrieved by the judgment and order of the High Court, the tenant has filed this appeal with special leave granted by this Court, challenging the correctness of the decision ordering the eviction of the tenant from the said premises on the ground of subletting.

6. Before we proceed to consider the arguments advanced from the Bar, it will be convenient to set out the terms of tenancy contained in the rent note dated 2-4-1974 and also the relevant provisions of the Act.

7. The relevant terms contained in the rent note read as follows:—

"1. That the period of tenancy shall be one month commencing from the 1-4-1974 to 30-4-1974.

2. That rent hereby fixed shall be Rupees 450 p.m.

4. That the possession of the said premises has already been received by the tenant from the owner.

8. That the tenant has a right to sublet the flat portion and Barsati portion of this said SCF abovementioned.

14. At the expiry of the tenancy the tenant shall redeliver the vacant possession of the said premises to the owner in the original condition failing which he shall be liable to pay the mesne profits."

8. The relevant provisions of the Act are contained in S. 13 of the Act, the material provisions of which may be noted:

"13. (1) A tenant in possession of building or rented land shall not be evicted therefrom in execution of a decree passed before or after the commencement of this Act or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section, or in pursuance of an order made under Section 13 of the Punjab Urban Rent Restriction Act, 1947, as subsequently amended.

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied—

(i) that the tenant has not paid or tendered the rent due by him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable:

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent within the time aforesaid,

(ii) that the tenant has after the commencement of this Act without the written consent of the landlord—

(a) transferred his right under the lease or sublet the entire building or rented land or any portion thereof; or

9. In the instant case, there is no dispute that the tenant had sublet the first floor and Barsati portions of said pre-

mises to sub-tenants. There is, however, a dispute as to when the sub-tenants were inducted by the tenant. As no clear finding had been recorded in the judgment of the Rent Controller or of the Appellate Authority or the High Court as to when the sub-tenants were inducted, and as there is no finding as to whether the tenant had sublet any portion after the month of April, 1974, this Court passed an order on the 24th of November, 1981 remitting the following issue to the Rent Controller, Chandigarh for a finding:—

"Whether any one or more of the sub-tenancies alleged by the landlady-respondent were created by the tenant-appellant during the month of April, 1974 or it was only thereafter that the subletting took place?"

This Court while passing the said order, further directed that the Rent Controller would permit the parties to lead evidence on the point and would render his findings after taking into consideration the evidence already on record and any additional evidence that might be led.

10. Pursuant to the said order passed by this Court, the Rent Controller after taking further evidence had recorded his finding on this issue. The finding of the Rent Controller is that there was subletting of a small bed-room in the flat portion and also of the Barsati portion by the tenant also in the month of May. This finding of the Rent Controller has been disputed before us by the tenant.

11. Mr. Tarkunde, learned counsel appearing on behalf of the tenant has submitted that in view of the express authority given to the tenant as contained in Cl. 8 of the rent note to sublet the flat portion and the Barsati portion which portions had, in fact, been sublet by the tenant, there can be no question of wrongful and illegal subletting by the tenant of the said portions, as the subletting is with the written consent of the landlady; and the provisions contained in S. 13 (2) (ii) (a) can have no application and there can be no ground or cause of action for eviction of the tenant on the ground of subletting within the meaning of the said provision. Mr. Tarkunde has argued that the Act was made applicable to Chandigarh from 4-11-1972 and the tenancy was created in April, 1974 long after the Act had come into operation in Chandigarh and had become applicable to the premises in question. It is Mr. Tarkunde's argument that in view of the prohibition on subletting without the

consent of the landlord in writing contained in the Act, the landlady in the instant case has in writing expressly authorised the tenant to sublet the flat portion and the Barsati portion of the said premises, so that the tenant does not come within the mischief of the said provision. Mr. Tarkunde contends that it is not in dispute that the tenant had sublet the flat portion and the Barsati portion of the premises in terms of the authority given to the tenant in writing and as the subletting has been done by the tenant with the written consent of the landlady after the commencement of the Act and of the portions the tenant was authorised to sublet, there can be no violation of the provisions of S. 13 (2) (ii) (a) of the Act. It is the contention of Mr. Tarkunde that as the subletting was done by the tenant in terms of the written authority given by the landlady to the tenant, the subletting can constitute no ground for eviction of the tenant within the meaning of the said section of the Act and there can be no order of eviction of the tenant on the ground of subletting by the tenant. Mr. Tarkunde has submitted that the High Court has proceeded on the basis that the sub-tenants had continued in occupation after the month of April, 1974, and as the terms of contractual tenancy ended on the expiry of the month of April, 1974, the continuance of sub-tenants inducted with the written consent of the landlady after the month of April, became unauthorised and illegal and resulted in subletting without the written consent of the landlady and as such the provision contained in S. 13 (2) (ii) (a) became applicable and the tenant became liable to eviction on the ground of wrongful subletting within the meaning of the said provision. Mr. Tarkunde, in this connection, has commented that the view taken by the Punjab and Haryana High Court is that if the sub-tenants though lawfully inducted continue to be in possession after the expiry of the lease of the tenants, such subletting becomes unlawful and furnishes a ground for eviction of the tenant. In this connection, Mr. Tarkunde has referred to the following observations of the learned Judge in this case:—

"In *Kartar Singh v. Tarlok Singh*, (1973) 75 Pun LR 824: (AIR 1974 Punj 34) P. C. Pandit J. held that the permission given by the landlord to the tenant to have sub-tenants during the currency of the lease is of no avail after the termination of the tenancy and if the sub-tenants

continue on the property even after the expiry of the lease, the tenant was guilty of subletting without the written permission of the landlord."

Mr. Tarkunde has submitted that this view of the High Court on the basis of which the order for eviction has been upheld is clearly erroneous. Drawing our attention to the relevant provisions contained in S. 13 (2) (ii) (a) of the Act, Mr. Tarkunde has submitted that the statute only forbids subletting without the written consent of the landlord after the commencement of the Act and by necessary implication the statute permits subletting by the tenant with the written consent of the landlord. Mr. Tarkunde contends that if the sub-tenants are inducted by the tenant with the written consent of the landlord, the subletting is authorised and legal and the continuance of the sub-tenants thereafter cannot be considered to be unlawful or illegal on the ground that the tenancy of the tenant had come to end, as the sub-tenants continue to enjoy possession in their own right as sub-tenant and the tenant who has inducted the sub-tenants cannot and does not enjoy any power or authority of evicting the sub-tenant except in due process of law. In this connection Mr. Tarkunde has drawn our attention to the definition of 'landlord' and also of 'tenant' as given in S. 2 (c) and (i) of the Act.

12. The definition of the landlord as given in S. 2 (c) is as follows:—

"'landlord' means any person for the time being entitled to receive rent in respect of any building or rented land whether on his own account or on behalf, or for the benefit, of any other person, or administrator for any other person, and includes a tenant who sublets any building or rented land in the manner hereinafter authorised, and, every person from time to time deriving title under a landlord".

13. The definition of tenant as mentioned in S. 2 (i) reads:—

"'tenant' means any person by whom or on whose account rent is payable for a building or rented land and includes a tenant continuing in possession after the termination of the tenancy in his favour, but does not include a person placed in occupation of a building or rented land by its tenant, unless with the consent in writing of the landlord, or a person to whom the collection of rent or fees in a public market, car-stand or slaughter-house or of rents for shops has been

farmed out or leased by a municipal town or notified area committee."

Mr. Tarkunde argues that the definition of landlord clearly indicated that a 'landlord' within the meaning of the Act includes a tenant who sublets with lawful authority and the definition of 'tenant' within the meaning of the Act also includes a sub-tenant who has been lawfully inducted. Referring to these definitions Mr. Tarkunde has submitted that as soon as the tenant has lawfully sublet the portions to the sub-tenants the tenant in the instant case becomes a 'landlord' within the meaning of the Act and the sub-tenant lawfully inducted becomes a 'tenant' under him within the meaning of this Act and the provisions of the Act are applicable to them. Mr. Tarkunde argues that by virtue of the aforesaid definitions, a tenant continues to be in possession after the termination of the tenancy in his favour, remains a tenant within the meaning of the Act and continues to enjoy all the benefits of the Act. It is the argument of Mr. Tarkunde that the sub-tenants lawfully inducted must, therefore, be considered to be in lawful possession under the tenant as the landlord and the sub-tenant must also be held to be entitled to remain in possession after the expiry of the term and the termination of the tenancy, whether of the tenant or of the sub-tenant, by virtue of the provisions of the Act.

14. Mr. Tarkunde has next contended that though in the instant case the tenancy was granted for the month of April, the tenant on the expiry of the said period is entitled to continue to remain in possession and enjoyment of the premises by virtue of the provisions contained in the Act. It is the contention of Mr. Tarkunde, that even on the expiry of the contractual period of tenancy, the tenancy continues under the provisions of the Act and the tenancy continues on the same terms and conditions. In support of this contention Mr. Tarkunde has relied on the decision of this Court in the case of *V. Dhanapal Chettiar v. Yesodai Ammal*, (1980) 1 SCR 334: (AIR 1979 SC 1745) and has placed particular reliance on the following observations at pp. 351-352 (of SCR): (at p. 1754 of AIR):—

"This is exactly the reason why we have thought it fit to review all the decisions and lay down a uniform law for all the States. Section 10 (1) of the Andhra Pradesh Act provided that "A tenant shall not be evicted whether in execution

of a decree or otherwise except in accordance with the provisions of this section or Sections 12 and 13." A special provision in the Andhra Act was contained in Section 10 (7) which says:—

"Where an application under sub-section (2) or sub-section (3) for evicting a tenant has been rejected by the Controller, the tenancy shall, subject to the provisions of this Act, be deemed to continue on the same terms and conditions as before and shall not be terminable by the landlord except on one or more of the grounds mentioned in sub-section (2) or sub-section (3)."

This special provision is provided by way of abundant precaution only. Even without this a tenant continuing in possession after the termination of the contractual tenancy and until an eviction order is passed against him continues on the same terms and conditions as before and he cannot be evicted unless a ground is made out for the eviction according to the State Rent Act."

Relying on the aforesaid observations, Mr. Tarkunde has argued that even on the expiry of the contractual tenancy in the month of April, the tenant continues to be a tenant under the statute on the same terms and conditions as a statutory tenant and he continues to enjoy the authority of subletting the flat portion and the barsati portion of the said premises in terms of the agreement originally entered into by and between the tenant and the landlady. It is the argument of Mr. Tarkunde that contractual tenancy in the instant case is determined by efflux of time but the tenant is protected against his eviction by statute and as a statutory tenant, the tenant continues to enjoy the same right of subletting which he had as contractual tenant and the said right of the tenant is not lost on the determination of the contractual tenancy. In this connection, Mr. Tarkunde has referred to the decision of this Court in the case of *Damadilal v. Parashram*, (1976) Supp SCR 645: (AIR 1976 SC 2229), and he has relied on the following observations at pp. 653-654 (of SCR): (at pp. 2234-35 of AIR):—

"We find it difficult to appreciate how in this country we can proceed on the basis that a tenant whose contractual tenancy has determined but who is protected against eviction by the statute, has no right of property but only a personal right to remain in occupation, without ascertaining what his rights are under the statute. The concept of a statutory tenant having no estate or property in the pre-

mises which he occupies is derived from the provisions of the English Rent Acts. But it is not clear how it can be assumed that the position is the same in this country without any reference to the provisions of the relevant statute. Tenancy has its origin in contract. There is no dispute that a contractual tenant has an estate or property in the subject matter of the tenancy, and heritability is an incident of the tenancy. It cannot be assumed, however, that with the determination of the tenancy the estate must necessarily disappear and the statute can only preserve his status of irremovability and not the estate he had in the premises in his occupation. It is not possible to claim that the 'sanctity' of contract cannot be touched by legislation. It is, therefore, necessary to examine the provisions of the Madhya Pradesh Accommodation Control Act, 1961 to find out whether the respondents' predecessors-in-interest retained a heritable interest in the disputed premises even after the termination of their tenancy.

Section 2 (i) of the Madhya Pradesh Accommodation Control Act, 1961 defines 'tenant' to mean, unless the context otherwise requires:

'a person by whom or on whose account or behalf the rent of any accommodation is, or, but for a contract express or implied, would be payable for any accommodation and includes any person occupying the accommodation as a sub-tenant and also any person continuing in possession after the termination of his tenancy whether before or after the commencement of this Act; but shall not include any person against whom any order or decree for eviction has been made.'

The definition makes a person continuing in possession after the determination of his tenancy a tenant unless a decree or order for eviction has been made against him, thus putting him on par with a person whose contractual tenancy still subsists. The incidents of such tenancy and a contractual tenancy must therefore be the same unless any provision of the Act conveyed a contrary intention. That under the Act such a tenant retains an interest in the premises and not merely a personal right of occupation, will also appear from Section 14 which contains provisions restricting the tenant's power of subletting. Section 14 is in these terms:

'Sec. 14. Restriction on subletting.—

(1) No tenant shall, without the previous consent in writing of the landlord—

(a) sublet the whole or any part of the accommodation held by him as a tenant; or

(b) transfer or assign his rights in the tenancy or in any part thereof.

(2) No landlord shall claim or receive the payment of any sum as premium or puggree or claim or receive any consideration whatsoever in cash or in kind for giving his consent to the subletting of the whole or any part of the accommodation held by the tenant."

There is nothing to suggest that this section does not apply to all tenants as defined in Section 2 (i). A contractual tenant has an estate or interest in premises from which he carves out what he gives to the sub-tenant. Section 14 read with Section 2 (i) makes it clear that the so-called statutory tenant has the right to sublet in common with a contractual tenant and this is because he also has an interest in the premises occupied by him."

15. Mr. Tarkunde has further submitted that in the instant case the question of any subletting by the tenant on the expiry of the term of tenancy does not really arise, as the tenant had sublet the flat portion and also the barsati portion in the month of April in terms of the written consent of the landlady, while the contractual tenancy was subsisting and in force. It is his submission that the finding of the Rent Controller that the tenant had sublet one bed room in the flat portion and also the barsati portion in the month of May, in answering the issue remitted to him by this Court, is clearly erroneous and not borne out by the evidence on record. Mr. Tarkunde has argued that the Rent Controller in arriving at this finding has mainly relied on the tape-recorded conversation between the tenant and landlady's husband who also happens to hold the power of attorney of the landlady. He has argued that rendering of the tape-recorded conversation can be legal evidence by way of corroborating the statement of a person who deposes that the other speaker and he carried on that conversation or even of the statement of a person who deposes that he overheard the conversation between the two persons and what they actually stated, had been tape-recorded. It is his argument that tape-recorded conversation may be used only as a corroborative evidence of such conversation deposed to by any of the parties to the conversation and in the instant case in the absence of any such evidence, the tape-recorded conversation is indeed no

evidence and cannot be relied upon. Mr. Tarkunde, in support of this argument, has relied on the decision of this Court in the case of *S. Pratap Singh v. State of Punjab*, (1964) 4 SCR 733: (AIR 1964 SC 72), Mr. Tarkunde has further argued that even if reliance is to be placed on the tape-recorded conversation, it must then be held on the basis of the evidence recorded therein that the contractual tenancy had continued beyond the period of the month of April. According to Mr. Tarkunde, in the present case, the landlady had not merely accepted the rent which the landlady had in fact done, on the expiry of the contractual period of tenancy, but the tape-recorded conversation clearly indicates that the tenancy was treated as continuing between the parties, notwithstanding the expiry of the period and the tenant was recognised as tenant with lawful authority to sublet even after the expiry of the month of April, 1974.

16. Mr. Tarkunde on the basis of the aforesaid contention has submitted that the order of eviction against the tenant on the ground of subletting in the instant case is erroneous and should be set aside.

17. Mr. Mehta, learned counsel appearing on behalf of the landlady, has submitted that the tenancy, in the instant case was created only for the month of April, 1974. He submits that on the expiry of April, 1974, the tenancy by efflux of time stands determined and the agreement between the parties comes to an end. He has argued that though under the terms of tenancy, the tenant had been given the necessary permission and authority to sublet, such consent or authority would remain valid only for the month of April and there could lawfully be any sub-tenants only for the month of April. He contends that on the expiry of the month of April when the contractual tenancy comes to an end, the possession of any sub-tenants of any portion of the said premises would be unauthorised and illegal. It is his contention that it is not open to the tenant to create by way of sub-tenancy or otherwise any interest in any other person larger than the interest which the tenant himself enjoys. According to Mr. Mehta, the tenant on the terms and conditions of the tenancy enjoyed the right of a tenant only for the month of April and the tenant could only, therefore, induct any sub-tenant on the basis of the terms and conditions of the tenancy only for the month of April; and the enjoyment or possession of any portion of the said premises by any sub-ten-

ant after the month of April would necessarily be a case of wrongful and illegal subletting without any written consent as the consent must necessarily be considered to have stood revoked on the expiry of the month of April. Mr. Mehta has drawn our attention to clauses 1 and 14 of the rent note and has argued that the said clauses clearly indicate that the contract of tenancy was valid only for the month of April and the authority of subletting was also only valid for the said month and on the expiry of the said month the tenant was to make over vacant possession to the owner of the premises in the original condition. It is his argument that the contract of tenancy clearly contemplates that there will be no sub-tenants in the premises on the expiry of the month of April. Mr. Mehta submits that existence of any sub-tenants in the premises after the month of April, whether sub-tenants were inducted in the month of April or thereafter, brings the case within the mischief of S. 13 (2) (ii) (a) and renders the tenant liable to eviction on the ground of illegal subletting. It is his submission that if there be any sub-tenants in occupation or possession of any portion of the said premises after the contractual tenancy had come to an end, the subletting must be held to be without the written consent of the landlord and as such wrongful and illegal to enable the landlord to evict the tenant on the ground of such subletting. Mr. Mehta has submitted that this view which has been consistently held by the High Court of Punjab and Haryana, has also been followed by the High Court in the instant case. In support of this submission Mr. Mehta has referred to the decision in the case of Kartar Singh v. Tarlok Singh, (1973) 75 Pun LR 825 : (AIR 1974 Punj 34) which has been referred to by the learned Judge in the judgment under appeal. Mr. Mehta has also relied on the decisions of the Punjab and Haryana High Court in the case of Kidar Nath v. Smt. Kartar Kaur, (1969) 71 Pun LR 186, and also in the case of Gurdas Ram v. Hans Raj, 1974 Ren CJ (SN) 1. According to Mr. Mehta this view has held the field in Punjab and Haryana all these years and this is the settled law in the State. Mr. Mehta further submits that as sub-tenants have continued to remain in possession after the month of April, the subletting must be held to be without any written consent and illegal to furnish a valid ground for the eviction of the tenant and all the courts including the High

Court have properly ordered the eviction of the tenant.

18. Mr. Mehta has next contended that in the instant case subletting of a bedroom in the flat portion and also of the barsati portion had been done by the tenant in the month of May, 1974 as found by the Rent Controller after the remand of the issue by this Court to the Rent Controller. Mr. Mehta submits that the Rent Controller had correctly come to the conclusion on the evidence on record after allowing the parties opportunity of adducing further evidence. Mr. Mehta has argued that as the tenant had sublet in the month of May after the expiry of the period of tenancy, the subletting must be held to be illegal and wrongful as the consent in writing by the landlady contained in the rent note was only for the month of April.

19. Mr. Mehta argues that on the expiry of the month of April when the contractual tenancy comes to an end and the tenant continues to remain in possession by virtue of the provisions of the Act, the tenant does not enjoy any power or authority to sublet, even if such authority had been granted to the tenant to sublet during the period of contractual tenancy. It is the argument of Mr. Mehta that on the expiry of the contractual tenancy, the terms and conditions on the basis of which the tenancy had been created, come to an end and the statutory tenant who may enjoy protection against eviction by virtue of the statute does not have any authority to induct any sub-tenant. In support of this contention Mr. Mehta has referred to the decision of this Court in the case of Anand Nivas (P.) Ltd. v. Anandji Kalyanji Pedhi, (1964) 4 SCR 892 : (AIR 1965 SC 414) and he has relied on the following observations at p. 917 (of SCR) : (at p. 426 of AIR):—

“A statutory tenant is, as we have already observed, a person who on determination of his contractual right, is permitted to remain in occupation so long as he observes and performs the conditions of the tenancy and pays the standard rent and permitted increases. His personal right of occupation is incapable of being transferred or assigned, and he having no interest in the property there is no estate on which subletting may operate.”

Mr. Mehta has commented that this decision of this Court was not considered by this Court in the case of Damadi Lal v. Parasram (AIR 1976 SC 2229) (supra).

20. Mr. Mehta has further argued that it is well-settled that mere acceptance of rent on the determination of the contractual tenancy by efflux of time or otherwise does not in the absence of something more have the effect of creating a fresh tenancy or continuing the contractual tenancy already determined; and it is his argument that it cannot be said that a fresh tenancy was created or the tenancy was allowed to continue on the expiry of the month of April merely because the landlady had accepted the rent from the tenant on the expiry of the period of the tenancy after the month of April.

21. Mr. Mehta, therefore, submits that in the instant case the order for eviction has been rightly passed and this appeal should be dismissed.

22. Before we proceed to consider the main question involved in this appeal, namely, whether the existence of sub-tenants in the premises after the expiry of the term of contractual tenancy, necessarily renders the subletting illegal and furnishes a ground for eviction within the meaning of S. 13 (2) (ii) (a) of the Act, we propose to dispose of the other question as to whether there was any subletting by the tenant in the month of May. On a careful consideration of the report of the Rent Controller on the issue remitted to him by this Court, we are of the opinion that the finding of the Rent Controller that the tenant had sublet one bedroom in the flat portion and the barsati portion in the month of May, 1974 is not justified, as there was no proper evidence or the material before the Rent Controller to come to the said finding. This finding of the Rent Controller is based essentially on the tape-recorded conversation between the tenant and the husband of the landlady. Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon. In the instant case, there was no evidence of any such conversation between the tenant and the husband of the landlady; and in the absence of any such conversation, the tape-recorded conversation could be no proper evidence. We may further add that the tape-recorded conversation, even if the same could be relied upon, would be of no particular help to the landlady, as the tape-recorded conversation clearly indicates that the landlady on the expiry of the term of tenancy had not merely

accepted the rent but had manifested the intention of continuing the tenancy, notwithstanding the expiry of the term; and the tape-recorded conversation goes to show that the husband of the landlady was asking the tenant to induct suitable persons as sub-tenants under him.

23. As there is no proper evidence to show that any sub-tenant was inducted after the expiry of the contractual period of tenancy, it does not become necessary for us to consider whether the tenant who, on the determination of the contractual tenancy, continues to remain in possession by virtue of the provisions of the statute as statutory tenant, is entitled to sublet and he continues to remain in possession on the same terms and conditions on which he became a tenant.

24. The crux of the question, therefore, is whether the subletting by the tenant with the written consent of landlord during the currency of the tenancy becomes unlawful and illegal on the determination of the tenancy and furnishes a ground for eviction within the meaning of S. 13 (2) (ii) (a) of the Act.

25. Section 13 (2) (ii) (a) which we have earlier set out lays down that if a tenant after the commencement of the Act has without written consent of the landlord transferred his right under the lease or sublet the entire building or any portion thereof, the tenant shall be liable to be evicted on the ground of such subletting. The requirement of the section, therefore, is that after the commencement of the Act there has to be subletting by the tenant without the written consent of the landlord to enable the landlord to recover possession of the premises on the ground of subletting. It, therefore, necessarily follows that if after the commencement of the Act, the tenant has sublet with the written consent of the landlord, such subletting will not furnish any ground or cause of action for the eviction of the tenant by the landlord. It is to be noted that after the tenant has lawfully sublet with the written consent of the landlord the sub-tenant becomes a lawful sub-tenant; and as such he becomes a 'tenant' within the meaning of the Act under the tenant as his 'landlord' and continues to enjoy all the protection available to a 'tenant' under the Act and the tenant who inducts such sub-tenant is not entitled to evict him as landlord of the sub-tenant except in accordance with the provisions of the Act. As the tenant enjoys protection against eviction in

terms of the provisions of the Act and is not liable to be evicted except in accordance with the provisions of the Act notwithstanding determination of his tenancy by the landlord, the sub-tenant lawfully inducted equally enjoys the same protection against eviction afforded to a tenant by the Act; and the sub-tenant can only be evicted in accordance with the provisions of the Act in the same way as a tenant can be evicted. In spite of the sub-tenancy being determined by the tenant as his landlord, the sub-tenant by virtue of the protection against eviction afforded to him by the Act is entitled to continue in possession of the portion let out to him by the tenant as his landlord; and it is just not possible for the tenant as landlord to get rid of any sub-tenant at his will.

26. In the instant case, the tenant had the authority to sublet and the written consent, as required by the statute, had been given by the landlady. In terms of the authority granted to the tenant and with the consent in writing of the landlady, the tenant had inducted sub-tenants in the month of April, when the contractual tenancy was admittedly subsisting. The subletting by the tenant in the instant case could, therefore, afford no ground to the landlady or furnish any cause of action for her to evict the tenant on the ground of subletting on the basis of the provisions contained in S. 13 (2) (ii) (a) of the Act. The sub-tenants lawfully inducted came to be in lawful possession of the portions let out to them by the tenant with the authority and consent in writing of the landlady, and such subletting afforded a complete safeguard to the tenant against eviction and would not come within the mischief of Sec. 13 (2) (ii) (a) of the Act. We have already held that the creation of any sub-tenancy in the month of May is not borne out by any proper evidence on record. The case of the landlady that there was any subletting on the expiry of the month of April without the written consent of the landlady has not been established. In the instant case, the tenant has sublet with the written consent of the landlady in the month of April and has not sublet any portion on the expiry of the month of April. The argument of the learned counsel for landlady that on the expiry of the month of April, the consent of the landlady in writing stands withdrawn is of no consequences. In the instant case, the tenant has sublet in the month of April, 1974, when admittedly the writ-

ten consent of the landlady was there. The continuance in possession of such sub-tenants in the portions lawfully let out to them on the expiry of the month of April does not amount to or have the effect of any fresh subletting by the tenant on the expiry of the month of April; and, it cannot be said that the tenant "has sublet" afresh on the expiry of the month of April. The right of possession that the sub-tenants enjoy on the basis of lawful induction as sub-tenants is assured to the sub-tenants as a "tenant" within the meaning of the Act. As a tenant in spite of the determination of his tenancy continues the right to remain in possession as a statutory tenant and enjoys the protection against eviction by virtue of the provisions contained in statute, a sub-tenant who is lawfully inducted, is also recognised by the statute to be a "tenant" within the meaning of the Act and he must necessarily enjoy the protection against eviction afforded to a tenant by the Act. A lawful subletting on the basis of the provisions of the Act does not become unlawful merely because the contractual tenancy of the tenant comes to an end. A tenant incurs the liability to be evicted, if the tenant after the commencement of the Act sublets without the written consent of the landlord; and the tenant who has lawfully sublet with the written consent of the landlord must necessarily enjoy immunity from the process of eviction on that ground. Subletting lawfully done with the written consent of the landlord does not become unlawful merely on the ground that the contractual tenancy has come to an end. Subletting to constitute a valid ground for eviction must be without the consent in writing of the landlord at the time when the tenant sublets any portion to the sub-tenant.

A subletting by the tenant with the consent in writing of the landlord does not become unlawful on the expiry of the contractual tenancy of the tenant, unless there is any fresh subletting by the tenant without the written consent of the landlord. Mere continuance in possession of a sub-tenant lawfully inducted does not amount to any fresh or further subletting. We are, therefore, satisfied that in the instant case the tenant has not sublet any portion without the written consent of the landlady after the commencement of the Act. As the tenant has not sublet any portion after the commencement of the Act without the written consent of the landlady, the landlady does

not have any proper ground for the eviction of the tenant on the ground of subletting within the meaning of S. 13 (2) (ii) (a). Mere continuance of possession by the sub-tenants lawfully inducted by the tenant with the written consent of the landlady contained in rent note does not afford any ground to the landlady for eviction of the tenant on the ground of subletting, as the tenant has not sublet after the commencement of the Act any portion without the consent in writing of the landlady.

27. The appeal, therefore, succeeds. The judgment of the High Court affirming the decision of the lower courts and the order of eviction, are hereby set aside. The appeal is, therefore, allowed with costs.

Appeal allowed.

AIR 1982 SUPREME COURT 1052

(From: Punjab & Haryana)

O. CHINNAPPA REDDY AND
R. B. MISRA, JJ.

Criminal Appeal No. 45 of 1982 with
Spl. Leave Petn. (CR) No. 2948 of 1981,
D/- 5-4-1982.

Hanumant Dass, Appellant v. Vinay
Kumar and others, Respondents.

With

State of Himachal Pradesh, Petitioner
v. Vinay Kumar and another, Respondents.

(A) Criminal P. C. (2 of 1974), Ss. 385 and 432 (7) — Expression "Appropriate Government" in S. 432 (7) — Means Government wherein conviction takes place.

According to S. 432 (7) the appropriate Government is the Government of the State of conviction and not the Government of the State where the offence was committed. (Para 10)

Where the case was transferred from a court within the territorial jurisdiction of the High Court of Himachal Pradesh to a court within the territorial jurisdiction of the High Court of Punjab, there was sufficient compliance of law when the High Court gave notice of the appeal to the Public Prosecutor viz., the Advocate-General of Punjab. (Para 11)

(B) Criminal P. C. (2 of 1974), Ss. 385 (2), Proviso and 465 — Appeal against conviction — Non-summoning of record

— Accused claiming to be entitled to acquittal on basis of findings of Sessions Court — Neither complainant nor Advocate-General raising any objection — Non-summoning of record is not fatal.

Where the appellant-accused himself said to the court that the appeal could be allowed on the findings recorded by the Sessions Judge, the non-summoning of the record, if it was at all so, would not be fatal especially when the complainant was present with his counsel and the State Advocate-General was also present, and none raised any objection. Their non-objection on this point is also an indicator that the record was there or in any case, the summoning of the record was not thought to be necessary by the parties. Further, assuming that there were certain irregularities in the procedure the judgment of the High Court could not be set aside unless it was shown by the appellant that there has been failure of justice. (Para 15)

The rigour of sub-sec. (2) of S. 385, which provides that "the Appellate Court shall then send for the record of the case....." has been taken away by the proviso in a certain situation. (Para 15)

(C) Penal Code (45 of 1860), S. 300 — Charge of murder — Allegation of setting fire to deceased — No eye-witness — None of the three dying declarations implicating accused — Acquittal of accused, held, proper. (Para 18)

Cases Referred: Chronological Paras
1976 Cr. LJ 1192; 1976 Supp SCR 552:
AIR 1976 SC 1552 14

MISRA, J.:— The appeal as well as the special leave petition are directed against the judgment of the High Court of Punjab and Haryana at Chandigarh dated 9th July, 1981. Criminal appeal has been filed by the complainant while the special leave petition has been filed by the State of Himachal Pradesh. Vinay Kumar and his mother Chhano Devi were convicted for the murder of Asha, the wife of Vinay Kumar by burning her alive and sentenced to life imprisonment by the learned Sessions Judge, Gurdaspur. On appeal by the accused, the High Court acquitted them by the impugned judgment.

2. The prosecution case set up at the trial was that the deceased Asha was married with Vinay Kumar in July, 1972. The marriage was an arranged marriage. It did not prove to be a success, the apparent cause for the failure of marriage was that Asha was only a matriculate and not cultured enough to move about in the society with the husband. To make

up this deficiency the deceased again resumed her studies and started attending college at Nagrota Bhagwan. While prosecuting her studies she was rebuked and abused and sometimes even thrashed, whenever she visited the house of her in-laws. She, however, kept on suffering in the vain hope that in due course of time things might improve. There was, however, no improvement and she was fed up with the maltreatment and cruelty meted out to her in the in-laws' house. She left the matrimonial home and started living with her parents sometime in the year 1975 or early 1976.

3. In 1977 Vinay Kumar filed a petition in the court of the District Judge, Kangra at Dharamshala under S. 13 of the Hindu Marriage Act for the dissolution of his marriage with the deceased on various grounds including one of desertion. The District Judge in the first instance tried for reconciliation between the spouses and as an interim arrangement Asha returned to her in-laws' house in June 1978 on trial basis, while divorce petition was kept pending and adjourned to July 29, 1978. As the parties did not appear in the Court on the date fixed, it was presumed that they were living happily and the proceedings were, therefore, consigned to the record.

4. On 5th of August, 1978 at about 11 a.m. Kanwal Nain P.W. 4, Bil Bhandur P.W. 14, employee of the Post Office, which was just in front of the house of the accused at a distance of 10-12 feet, and a number of other persons saw smoke coming out of the window of the house of the accused. When Bil Bhandur and others went to the house, they found the outer door locked. There was no other means of ingress to the house. After a short while one Raj brought the key from Chhano Devi accused with which the lock was opened and entry gained into the house. Asha was found burning and after extinguishing the fire, she was removed to the local hospital.

5. Dr. O. P. Dutta attended her and sent an intimation of the incident to the incharge local Police Post. He recorded the statement of Asha on the out-patient register Ex. PL. Meanwhile Kesar Singh, Assistant Sub-Inspector, arrived there and after getting a certificate from Dr. Dutta, he also recorded her statement Ex. PU. From Civil Hospital, Kangra Asha was removed in a truck to a Civil Hospital in Dharamshala (H.P.) where she breathed her last.

6. In her statement recorded by Dr. Dutta and Kesar Singh, the deceased disclosed that her clothes caught fire, while she was preparing tea. The police suspected no foul play and did not register any case. The father of the deceased Hanumant Dass, however, made a report on 7th Aug., 1978 and a case was registered on that basis. The accused were sent up for trial. When the case was pending in the Court of Sessions Judge, Dharamshala in Himachal Pradesh, the complainant moved an application to the Supreme Court for transfer of the case from Himachal Pradesh to some other province. The case was transferred to a Court of competent jurisdiction at Gurdaspur in Punjab. The Sessions Judge, Gurdaspur convicted both the accused under S. 302 read with S. 34 of the I.P.C. and sentenced them to life imprisonment. The conviction was based only on the circumstantial evidence. Accused went up in appeal to the High Court. The High Court in its turn set aside the order of conviction and acquitted the accused of the charge.

7. The complainant has filed the present appeal. Shri Kohli appearing for the complainant has strenuously contended that the appeal before the High Court has been allowed in the absence of the State of Himachal Pradesh and without any notice to that State and as such the impugned judgment of the High Court is a nullity and should be set aside on that ground alone. The accused had impleaded only the State of Punjab as a party and the High Court has issued notice to the Advocate-General of Punjab. As a second limb to this argument it has been contended by Shri Kohli that the appeal was filed in the High Court on 15th June, 1981 and while considering the application for bail on 22nd of June, 1981, posted the appeal for hearing on 6th of July, 1981 after service of notice on the Advocate-General of Punjab and the appeal was decided on 9th July, 1981 without even summoning the record. Thus the High Court was in a hot haste to dispose of the appeal even without reasonable opportunity being afforded to the counsel for the State and without impleading the appropriate State as a party to the appeal and without notice to the counsel for the State of Himachal Pradesh.

8. We may first deal with the criticism of the learned counsel about the undue haste in the disposal of the appeal by the High Court. It appears that Shri M. R.

Mahajan, counsel for the appellants while moving the application for bail made a statement before the High Court and it is on his statement that the case was posted for hearing at the earliest possible date. This will be apparent from the order dated 22-6-1981 passed by the High Court while disposing of the application for bail. The order insofar as it is material for consideration of the point reads:

"..... Mr. Mahajan, Advocate states that on the findings of fact recorded by the learned trial Judge, the conviction of the appellants cannot be sustained. Notice for 6-7-81, to the Advocate-General Punjab. Copy of the grounds of appeal and the judgment rendered by the learned trial Judge be delivered in the office of the A. G. Punjab within two days. The case is likely to be disposed of on that date....."

Therefore, the charge levelled against the High Court that it was in a hot haste to decide the appeal at the earliest possible appears to be uncalled for.

9. This leads us to the main contention raised by Shri Kohli that the transfer of the case from Dharamshala lying within the territorial jurisdiction of the High Court of Himachal Pradesh to Gurdaspur lying within the jurisdiction of the Punjab and Haryana High Court, does not change the parties and the parties remain the same even after the transfer of the case from Dharamshala to Gurdaspur. In this view of the legal position, the State of Himachal Pradesh where the offence was committed was a necessary party and should have been impleaded in appeal. In the absence of the State of Himachal Pradesh as a party and in the absence of notice to the counsel for the State of Himachal Pradesh, the High Court was not justified in disposing of the appeal and its judgment is only a nullity.

10. This contention is based on S. 385 of the Criminal P. C. Insofar as it is material for the purpose of the case it reads:

"385 (1). If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given—

- (i) to the appellant or the pleader;
- (ii) to such officer as the State Government may appoint in this behalf;
- (iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;
- (iv) if the appeal is under Sec. 377 or

S. 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties:

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3)"

There is no denying the fact that S. 385 of the Code is a mandatory provision and the requirement of the section must be satisfied. In the appeal before the High Court, State of Punjab was made a party and notice of the appeal was also given to the Advocate-General of Punjab. According to Shri Kohli this does not satisfy the requirement of law.

11. It would be appropriate at this stage to refer to other relevant provisions of the Code:

Section 225 provides that— "In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor."

Section 2 (u) defines public prosecutor— "Public Prosecutor means any person appointed under Section 24, and includes any person acting under the directions of a public prosecutor."

Section 24 deals with "Public Prosecutors in the High Court":

"24. Public Prosecutors:—(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be, ..."

Section 378 talks of an appeal in case of acquittal. Insofar as it is material it reads thus:

"378. (1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court, (or an order of acquittal passed by the Court of Session in revision).

(2) If such an order of acquittal is passed in any case in which the offence

has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-sec. (3), to the High Court from the order of acquittal....."

Section 432 authorises the appropriate Government to suspend or remit sentences:

"432. (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion....."

(3) (4) (5)"

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means—

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

From the various provisions extracted above it is evident that there shall be a Public Prosecutor for conducting any prosecution, appeal or other proceeding on behalf of the Central Government or State Government in the High Court. If notice has been given to the Public Pro-

secutor viz. the Advocate-General of Punjab the requirement of law to our mind has been fulfilled.

12. Shri Kohli, however, contends that occurrence in the instant case took place within the territorial limits of Himachal Pradesh. That State, therefore, will continue to be a necessary party in the appeal irrespective of the fact that the appeal was filed in the Punjab High Court.

13. Section 432 (7) extracted above defines "appropriate Government". "Appropriate Government" means— (a) in cases where the sentence is for an offence against, or the order referred to in sub-sec. (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government; (b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

14. According to this section the appropriate Government is the Government of the State of conviction and not the Government of the State where the offence was committed. A somewhat similar question came up for consideration in the State of Madhya Pradesh v. Ratan Singh, 1976 Supp SCR 552: (1976 Cri LJ 1192), where the respondent was convicted and sentenced to imprisonment for life by a court in the State of Madhya Pradesh. At his request he was transferred to a jail in the State of Punjab, to which State he belonged. He applied to the Government of Punjab that under the Punjab Jail Manual he is entitled to be released since he had completed more than 20 years of imprisonment. The application was sent to the Government of Madhya Pradesh, which rejected it. In a writ petition filed by him the High Court of Punjab and Haryana held that the State of Punjab was the appropriate authority to release him and directed the State of Punjab to consider the matter. This Court in appeal observed "a perusal of this provision clearly reveals that the test to determine the appropriate Government is to locate the State where the accused was convicted and sentenced and the Government of that State would be the appropriate Government within the meaning of Sec. 401 of the Code of Criminal Procedure. Thus since the prisoner in the instant case was tried, convicted and sentenced in the State of Madhya Pradesh, the State of Madhya Pradesh would be the appropriate Government to

exercise the discretion for remission of the sentence under Sec. 401 (1) of the Code of Criminal Procedure....." That was a case based on S. 401 of the old Criminal P. C., but the Code of Criminal Procedure, 1973 has put the matter completely beyond any controversy and reiterated the provisions of S. 402 (3) in sub-section (7) of S. 432.

15. Lastly it was contended that the appeal was disposed of by the High Court even without summoning the record. There is no warrant for this assumption. No specific allegation has been made in the special leave petition that the record was not summoned. We have perused the judgment of the High Court and the tenor of the judgment indicates that the record must have been there before the court. There is copious reference to the materials on the record which could be possible only when the record was there before the court. Besides, the counsel for the appellant made a statement before the court that on the finding of fact recorded by the High Court he was entitled to an acquittal and in this view of the matter even if the record had not been summoned (for which there is no basis) that would not be fatal. Proviso to sub-sec. (2) of S. 385 itself provides ".....the court may dispose of the appeal without sending for the record" in a certain situation. The rigour of sub-sec. (2) of S. 385, which provides that "the Appellate Court shall then send for the record of the case" has been taken away by the proviso in a certain situation. If the appellant himself says that the appeal can be allowed on the findings recorded by the Sessions Judge, the non-summoning of the record, if it was at all so, would not to our mind be fatal. The complainant was present with his counsel, the State Advocate-General was also present. If they had any grievance about the record, they would have raised an objection. Their non-objection on this point is also an indicator that the record was there or in any case, the summoning of the record was not thought to be necessary by the parties.

16. Assuming for the sake of argument, that there were certain irregularities in the procedure the judgment of the High Court could not be set aside unless it was shown by the appellant that there has been failure of justice, as will be evident from S. 465 of the Criminal Procedure Code which reads:

"465. Finding or sentence when reversible by reason of error, omission or irregularity—

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

17. We have perused the judgment of the High Court which was placed before us in full. It shows that each and every aspect of the matter has been thoroughly discussed and the High Court has also referred to the error committed by the Sessions Judge in the approach of the case and also in making unwarranted assumptions.

18. On merits we fully agree with the appraisal of the evidence made by the High Court. It is not necessary to repeat the same over again. There is no eye-witness. The fate of the case hinges upon the circumstantial evidence. The High Court has dealt with the two dying declarations, one recorded by the Doctor and the other by the Assistant Sub-Inspector. The High Court also took into consideration the oral dying declaration on which the prosecution strongly relied. But even that declaration does not implicate the accused. The reason given by the High Court for acquittal in our opinion is cogent and plausible.

19. For the foregoing discussion, the criminal appeal and the special leave petition must fail and they are accordingly dismissed.

Appeal and Special
Leave Petition dismissed.

AIR 1982 SUPREME COURT 1057

(From: 1976 Raj L. W. 240)

S. MURTAZA FAZAL ALI,**D. A. DESAI AND****A. VARADARAJAN, JJ.****Criminal Appeal No. 439 of 1976, D/-
2-4-1982.****Umesh Chandra, Appellant v. State
of Rajasthan, Respondent.**

(A) Evidence Act (1 of 1872), Ss. 35, 73, 74 — Public document — Admissibility — Two documents of two different public schools showing same age of child — Documents would be admissible under Sec. 35 — Secs. 73 and 74 would be irrelevant. 1976 Raj LW 240: 1977 Cri LJ NOC 143, Reversed. (Rajasthan Children Act (16 of 1970), Secs. 3, 26).

Where there were two documents of the two different public schools showing the age of the delinquent child who had committed an offence under Ss. 364, 302 I.P.C. as 22-6-57 and both those documents had been signed by his father and were in existence ante litem motam, there could be no ground to doubt the genuineness of those documents. (Para 19)

Further, it could not be said that the admission forms as also the school's register both of which were, according to the evidence, maintained in due course of business were not admissible in evidence because they were not kept or made by any public officer, under S. 35, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. Therefore those documents would be admissible under S. 35 and Ss. 73 and 74 would be irrelevant. AIR 1964 SC 1625 and AIR 1963 Ker 18 Rel. on.

(Paras 10, 11)

Furthermore, the explanation given by the father of the child for changing the date of birth from 22-6-57 to 22-9-1956 in order to enable his son to appear in the High School Secondary Examination would be acceptable because the offence was committed seven years after changing the date of birth.

DY/DY/B569/82/PGS/DVT-H

1982 S. C. 67 VI-G-1

1976 Raj LW 240: 1977 Cri LJ NOC 143: Reversed. (Paras 21, 22).

(B) Rajasthan Children Act (16 of 1970), Secs. 3, 26 — Pendency of proceedings against child at time of commencement of Act — Court should proceed with case but is debarred from passing sentence — Date of applicability of Act is date on which offence takes place and not date of trial. 1976 Raj LW 240: 1977 Cri LJ NOC 143 Reversed.

Where proceedings in respect of a child were pending in any court in any area on the date on which the Act came into force, Sec. 26 in terms lays down that the court should proceed with the case but after having found that the child has committed the offence it is debarred from passing any sentence but would forward the child to the children's court for passing order in accordance with the Act. (Para 27)

Further, the relevant date for the applicability of the Act is the date on which the offence takes place. Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea as in the case of an adult. This being the intentment of the Act, a clear finding has to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child. Therefore, Ss. 3 and 26 became necessary. Both the sections clearly point in the direction of the relevant date for the applicability of the Act as the date of occurrence. Therefore, the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial. 1976 Raj LW 240: 1977 Cri LJ NOC 143 Reversed. (Para 28)

Cases Referred: Chronological Paras

AIR. 1971 SC 2567: (1972) 3 SCC 443: 1971 Lab IC 1507 15

AIR 1964 SC 1625: (1964) 5 SCR 86: 1964 (2) Cri LJ 590 11, 18

AIR 1963 Ker 18 12

Mr. K. K. Venugopal, Sr. Advocate,
M/s. S. S. Khanduja and G. C. Mishra,

Advocates with him, for Appellant; Mr. B. D. Sharma, Advocate, for Respondent.

FAZAL ALI, J.:— This appeal by special leave is directed against a judgment dated June 29, 1974 of the Rajasthan High Court overruling a preliminary objection taken by the accused before the Sessions Judge to the effect that the Sessions Judge, Tonk, was not competent to try the case as the accused Umesh Chandra was a child as contemplated by the provisions of the Rajasthan Children Act, 1970 (hereinafter referred to as the 'Act') on the date of the alleged occurrence. This Act appears to have been passed by the Rajasthan Legislature but after receiving assent of the President was enforced in various districts from time to time. Under the provisions of the Act any person below the age of 16 (sixteen) would be presumed to be a child and the trial of the delinquent child was to be conducted in accordance with the procedure laid down therein. The objection taken by the appellant was that as he was below the age of 16 at the time of the occurrence on 12-3-1973, he could not be tried by the Additional Sessions Judge, Tonk, or the Additional Sessions Judge, Jaipur city, to whom the case was transferred on 17-10-73.

2. The Sessions Judge overruled the objection taken by the accused and therefore he filed a revision to the Rajasthan High Court against the order. The High Court after considering the oral and documentary evidence came to the conclusion that the Act was not applicable to the appellant for two reasons — (1) that it was not brought into force in Tonk at the time of the offence, and (2) that it was not proved by the accused that he was below the age of 16 on 12-3-1973, the date of the occurrence. The accused was charged for offences punishable under Ss. 364 and 302 of the Penal Code. Aggrieved by the order of the High Court, the appellant moved this Court in special leave and at the time of granting special leave, this Court directed the High Court to return a finding of fact on the actual date of birth of the accused so that this Court may determine the applicability of the Act to the facts of the present case.

3. The High Court after reappraising the entire evidence—oral and docu-

mentary — by its order dated 18-11-76 came to a clear finding that the age of Umesh Chandra at the time when the offence was committed was 16 years 5 months and 20 days and that the exact date of birth of the appellant was proved to be 22-9-1956. After the finding of fact called for from the High Court was sent to this Court, the appeal was placed for hearing before us.

4. In support of the appeal, the learned counsel for the appellant has assailed the finding of the High Court — that the age of the appellant was above 16 years — and it was contended that the High Court has based its decision on wholly irrelevant material and has also committed errors of law in appreciating important documentary evidence.

5. Another point that was argued before us was as to the application of the Act to Tonk, where the offence was committed. As, however, the Act has now been enforced in the entire State, this question no longer survives because where a situation contemplated by Sec. 26 of the Act arises, an accused, who is found to be a child, has to be forwarded by the Sessions Court to the Children's court which can pass appropriate sentence. Where however proceedings against a child are pending before Sessions Judge, Sec. 26 of the Act enjoins a duty on the Court in which the proceeding in respect of the child is pending on the date on which the Act is extended to the area to act in the manner therein prescribed. In this eventuality, the Court is under an obligation to proceed with the trial and record a finding as if the Act does not apply. But after concluding the trial and recording a finding that the child had committed an offence, the Court cannot pass any sentence but the Court is under a statutory obligation to forward the child to the Children's court which shall pass orders in respect of that child in accordance with the provisions of the Act, as if it has been satisfied on inquiry under the Act that the child has committed the offence. In view of this provision, Sec. 21 would be attracted and the Children's court will have to deal with the child under Sec. 21.

6. Thus, the main point for consideration in this case is as to what is the exact date of birth of the appellant,

Umesh Chandra. The High Court appears to have brushed aside the documentary evidence produced by the appellant mainly on the ground that subsequent documents clearly proved that the father of the accused had not correctly mentioned the date of birth in the previous schools attended by him (accused) and later corrected his date of birth by an affidavit which was accepted by the High Court to be the correct date. The High Court also rejected the oral evidence adduced by the appellant as also the horoscope produced by his father.

7. We agree with the High Court that in cases like these, ordinarily the oral evidence can hardly be useful to determine the correct age of a person, and the question, therefore, would largely depend on the documents and the nature of their authenticity. Oral evidence may have utility if no documentary evidence is forthcoming. Even the horoscope cannot be reliable because it can be prepared at any time to suit the needs of a particular situation. To this extent, we agree with the approach made by the High Court.

8. Coming now to the facts on the basis of which the appellant sought protection to be tried only under the Act; according to the testimony of the father of the appellant he was born on 22-6-57 and was aged 15 years 9 months on 12-3-1973 — the date of the occurrence.

9. It is, however, not disputed that at the time when the appellant was born, his father was posted in a small village (Dausa) where the maternal grandfather of the appellant had lived and perhaps he was not meticulous enough to report the birth of his children. There is nothing to show the birth of the appellant nor any evidence has been produced to this aspect of the matter. There is also nothing to show that the dates of birth of the other children of Gopal (the father) were registered in any Municipal register or in chowkidar's register. We have mentioned this fact because the High Court seems to have laid special stress and great emphasis on the non-production of any reliable record to prove that the birth of the appellant had been entered therein. It is common knowledge that in villages people are not very vigilant in reporting either births or deaths and,

therefore, an omission of this type cannot be taken to be a most damaging circumstance to demolish the case of the appellant regarding his actual date of birth.

10. The first document wherein the age of the appellant was clearly entered is Ext. D-1 which is the admission form under which he was admitted to class III in St. Teresa's Primary School, Ajmer. In the admission form, the date of birth of the appellant has been shown as 22-6-1957. The form is signed by Sister Stella who was the Headmistress. The form also contains the seal of the school. DW, Ratilal Mehta, who proved the admission form, has clearly stated that the form was maintained in the ordinary course of business and was signed only by the parents. The evidence of Ratilal Mehta (DW 1) is corroborated by the evidence of Sister Stella (DW 3) herself who has also endorsed the fact of the date of birth having been mentioned in the admission form and has also clearly stated on oath that the forms were maintained in regular course and that they were signed by her. She has also stated that at the time when the appellant was first admitted she was the headmistress of St. Teresa Primary School, Ajmer. The High Court seems to have rejected this document by adopting a very peculiar process of reasoning which apart from being unintelligible is also legally erroneous. The High Court seems to think that the admission forms as also the School's register (Ext. D-3) both of which were, according to the evidence, maintained in due course of business, were not admissible in evidence because they were not kept or made by any public officer. Under Sec. 35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. The High Court seems to have confused the provisions of Sections 35, 73 and 74 of the Evidence Act in interpreting the documents which were admissible not as public documents or documents maintained by public servants under S. 34, 73 or 74 but which were admissible under Sec. 35 of the Evidence Act which may be extracted as follows:—

"35. Relevancy of entry in public record made in performance of duty:—

An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such books, register or record is kept, is itself a relevant fact." (Emphasis.ours).

11. A perusal of the provisions of Sec. 35 would clearly reveal that there is no legal requirement that the public or other official book should be kept only by a public officer but all that is required is that it should be regularly kept in discharge of her official duty. This fact has been clearly proved by two independent witnesses, viz., DW 1, Ratilal Mehta and DW 3, Sister Stella. The question does not present any difficulty or complexity as in our opinion the section which would assist in this behalf is S. 35 of the Evidence Act which provides for relevancy of entry in the public record. In this connection we may refer to a decision of this Court in Mohd. Ikram Hussain v. State of U. P. (1964) 5 SCR 86 at p. 100: (AIR 1964 SC 1625 at p. 1631) where Hidayatullah, J. speaking for the Court, observed as under:—

"In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school register which show that on June 20, 1960, she was under 17 years of age. There was also the affidavit of the father (here evidence on oath) stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age. These amounted to evidence under the Indian Evidence Act and the entries in the School Registers were made ante litem motam."

12. This topic has been elaborately dealt with particularly in regard to the entries in School Register and the admission forms in the case of Abdul Majeed v. Bhargava, AIR 1963 Ker 18. In these circumstances, the view of the High Court with regard to Sec. 35 is plainly untenable and Secs. 73 and 74 are utterly irrelevant.

13. Further, the High Court was of the view that as the documents pro-

duced by the Teresa Primary School were kept in loose sheets, no reliance can be placed on them. This fact is admitted but the headmistress has explained that the admission forms were bound much after the date of birth was recorded and hence it cannot be presumed that the documents were not kept in the regular course of business.

14. Moreover, the School where the documents were maintained was an English Public School and the record maintained by it was undoubtedly unimpeachable and authentic and could not be suspected or presumed to be tampered with. At the time when the age of the appellant was first mentioned in the admission form, there was absolutely no dispute about the date of birth or for that matter the exact date on which he was born and there could not have been any motive on the part of the parents of the accused to give a false date of birth because it was his first admission to a school at a very early age. Further, the school to which the appellant was admitted being a public School enjoyed good reputation of authenticity.

15. In Gannon Dunkerley & Co. Ltd. v. Their Workmen (1972) 3 SCC 443: (AIR 1971 SC 2567 at p. 2572) this Court made the following observations:

"In fact, if the register had been prepared at one sitting for purposes of these cases, the Company would have taken care that no suspicious circumstance comes into existence and, if, by chance, any error was committed, it could have prepared another register in lieu of Ext. C-1. The fact that this was not done shows that this register is the register kept in the course of business and, hence there is no reason to doubt the entries made in it."

16. These observations fully apply to the facts of the present case because if there had been any element of suspicion in giving the date of birth, the admission register and the School's register would have been corrected by the headmistress of the school.

17. Exts. D-1 and D-2, mentioned above, are corroborated by subsequent documentary evidence. It appears that on 1-7-65, the boy was admitted to 3rd standard (equivalent to 5th class) in St. Paul's school, Jaipur after the appellant's father was transferred from Ajmer to Jaipur. Here also the document shows

that the date of birth given was the same, namely, 22-6-1957.

18. Thus, consistently on two occasions, starting from 1963 and ending in 1965, the date of birth was mentioned in the relevant documents as 22-6-1957. This Court in Mohd. Ikram Hussain v. State of U. P. (AIR 1964 SC 1625) (supra) has held that copies of school certificates or the affidavit of the father constitute good proof of age, vide observations extracted hereinbefore.

19. In the instant case also there are two documents of two different schools showing the age of the accused appellant as 22-6-57 and both these documents have been signed by his father and were in existence ante litem motam. Hence, there could be no ground to doubt the genuineness of these documents and the High Court committed a serious error of law in brushing aside these important documents.

20. Another circumstance which weighed with the High Court was that when the boy was admitted in St. Paul's school, no transfer certificate appears to have been taken. This by itself is not sufficient to dislodge the case of the appellant unless a transfer certificate was taken and it had shown that the date of birth given there did not tally with the documents (Exts. D-1 to D-4).

21. It appears that as the father of the appellant was subsequently transferred from Jaipur sometime in June 1966 to Dhausa and he was admitted to the Sanskrit Pathshala in Dhausa, for the first time in this school the date of birth of the appellant was changed from 22-6-1957 to 22-9-56. The explanation given by his father is that as by this time the boy had become almost 10 years of age and as clause 10 of Chapter XVIII of the Rajasthan Board of Secondary Education Regulations required that no candidate could take the Higher Secondary Examination until he had attained the age of 15 years on the 1st of October of the year in which the Examination was held, he had to give an affidavit to change this fact in order to enable his son (appellant) to appear in the Higher Secondary Examination. This position was not disputed by the State. The High Court seems to have made much of this lacuna and has gone to the extent of labelling Gopal Sharma, appellant's father, as a liar having gone to the extent of making a false affida-

vit. Here also, we think the High Court has taken a most artificial and technical view of the matter. In our country, it is not uncommon for parents sometimes to change the age of their children in order to get some material benefit either for appearing in examination or for entering a particular service which would be denied to a child as under the original date of birth he would be either underaged or ineligible.

22. Thus, the appellant's father has given a cogent reason for changing the date of birth and there is no reason not to accept his explanation particularly because the offence was committed seven years after changing the date of birth, and, therefore, there could be no other reason why Gopal Sharma should have gone to the extent of filing an affidavit to change the date, except for the reason that he has given.

23. It was also argued that in the insurance policy, the appellant's mother had shown his age as 10 years without giving the exact date of birth. The age of the appellant was given as a rough estimate in the insurance policy but as the policy was not in the name of the appellant, nothing turns upon this fact particularly because by and large giving allowance for a few months this way or that way the boy was about 10 years old when the policy was taken. The High Court, therefore, was wrong in attaching too great an importance to this somewhat insignificant fact.

24. For these reasons we are satisfied that these circumstances also do not put the case of the appellant out of court.

25. These are the main reasons given by the High Court for distrusting what, in our opinion, seems to be unimpeachable documentary evidence produced by the appellant to show that his exact date of birth was 22-6-57 and not 22-9-56 as altered by his father later.

26. Another question argued at the Bar was as to what is the material date which is to be seen for the purpose of application of the Act. In view of our finding that at the time of the occurrence the appellant was undoubtedly a child within the provisions of the Act, the further question if he could be tried as a child if he had become more than 16 years by the time the case went up to the court, does not survive because the Act itself takes care of such a con-

tingency. In this connection Secs. 3 and 26 of the Act may be extracted thus:—

"3. Continuation of inquiry in respect of child who has ceased to be child:—

Where an inquiry has been initiated against a child and during the course of such inquiry the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a child.

xx xx xx xx xx

26. Special provision in respect of pending cases:—

Notwithstanding anything contained in this Act, all proceedings in respect of a child pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the child has committed an offence, it shall record such finding and, instead of passing any sentence in respect of the child, forward the child to the children's court which shall pass orders in respect of that child in accordance with the provisions of this Act as if it has been satisfied on inquiry under this Act that the child has committed the offence."

27. A combined reading of these two sections would clearly show that the statute takes care of contingencies where proceedings in respect of a child were pending in any court in any area on the date on which the Act came into force. Sec. 26 in terms lays down that the court should proceed with the case but after having found that the child has committed the offence it is debarred from passing any sentence but would forward the child to the children's court for passing orders in accordance with the Act.

28. As regards the general applicability of the Act, we are clearly of the view that the relevant date for the applicability of the Act is the date on which the offence takes place. Children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea as in the case of an adult. This being the intentment of the Act, a clear finding has to be recorded that the relevant date for

applicability of the Act is the date on which the offence takes place. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child. Therefore, Ss. 3 and 26 became necessary. Both the sections clearly point in the direction of the relevant date for the applicability of the Act as the date of occurrence. We are clearly of the view that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial.

29. The High Court has failed to take notice that the Act being a piece of social legislation is meant for the protection of infants who commit criminal offences and, therefore, its provisions should be liberally and meaningfully construed so as to advance the object of the Act. Bearing this in mind we have construed the documents in the instant case.

30. We, therefore, allow the appeals to the extent that while upholding the conviction of the accused we set aside the sentence awarded by the Sessions Judge as affirmed by the High Court, and direct the Additional Sessions Judge, Jaipur to forward the accused to the Children's court for receiving sentence in accordance with the provisions of Sec. 26 of the Act.

Appeal allowed.

AIR 1982 SUPREME COURT 1062

(From 1976 Lab. I. C. 1398 (Cal))

V. D. TULZAPURKAR, BAHARUL ISLAM AND A. VARADARAJAN, JJ.

Civil Appeal No. 519 (NL) of 1978, D/-16-3-1982.

Anil Kumar Chakraborty and another, Appellants v. M/s. Saraswatipur Tea Company Ltd. and others, Respondents.

Industrial Disputes Act (14 of 1947), Sch. 2 Item 3 — Dismissal of employee — Reinstatement — Delinquent, a compounder of tea-Company trafficking drugs and medicines entrusted for being supplied to workers of teagarden — Held, delinquent could not be reinstated — Compensation was adequate remedy.

DY/DY/B239/82/SMA/SNV

1976 Lab I. C. 1398 (Pt. B) (Cal), Reversed.

Where the services of the delinquent who held the position of trust and confidence as a compounder with a tea company and in that capacity he was entrusted with drugs and medicines for being supplied and distributed to the needy and ailing workers of the tea gardens free of cost were terminated as by abusing his position of trust he indulged in trafficking in those drugs and medicines to the detriment of the health and well being of the workers having a bearing on their efficiency and work in the Company, and he had indulged in similar activities on previous occasions for which he had been pardoned by the Chairman, Director of the Company, it was held that even if the order of dismissal was unsustainable on the ground that no proper and fair inquiry had been held against the delinquent, it was not a case where any order for reinstatement of the delinquent could be made. It was a case of loss of confidence in the employee on the part of the Management and compensation would be adequate relief. 1976 Lab IC 1398 (Pt. B) (Cal) Reversed, AIR 1960 SC 1264 and (1970) 1 Lab LJ 63 (SC) Rel. on. (Para 3)

Cases Referred: Chronological Paras
(1970) 1 Lab LJ 63: 20 Fac LR 59 (SC) 4

AIR 1960 SC 1264: (1960) 1 Lab LJ 587 4

TULZAPUKAR, J.:— Since we are inclined to dispose of this appeal on a very short point we need be very brief in the narration of facts.

2. On 15th Sept. 1965 the appellant Anil Kumar, a Compounder with the first respondent-company was dismissed by the Management after holding an inquiry and finding him guilty of (i) having incited labourers and workers to disrupt the administration and working of the tea gardens and (ii) having indulged in trafficking in drugs and medicines entrusted to him by the company for supply and distribution to the workers free of cost. The Industrial Tribunal, before whom the validity of dismissal was challenged, held that the inquiry, if at all one was held, was unfair and that the charges had not been proved by the Management and, therefore, the dismissal was set aside and the appellant was directed to be reinstated with full back wages. A learned single

Judge of the High Court confirmed the Tribunal's Award, but in appeal the Division Bench reversed the decision of the Tribunal as well as of the learned single Judge holding that the domestic enquiry held by the Management was quite fair and proper and that Tribunal had in fact dealt with the case as if it were a Court of Appeal and not only the evidence had been meticulously assessed afresh but the adequacy of the evidence had also been gone into and in doing so the Tribunal had exceeded its jurisdiction and substituted its own evaluation of the evidence for the evaluation done by the domestic Court of Enquiry. The Division Bench allowed the appeal and set aside the Award. This decision is challenged in appeal.

3. Rival submissions on the question whether or not the Division Bench itself had acted as a Court of appeal under its writ jurisdiction and had exceeded its powers in interfering with the findings of fact recorded by the Tribunal were made at great length before us by Counsel on either side and it was strenuously urged by Counsel for the appellants that the Division Bench ought not to have interfered with findings of fact recorded by the Tribunal particularly on the point that the inquiry that was held was unfair and improper and ought not to have interfered with the Award. It is unnecessary for us to go into these contentions for the reason that even proceeding on the basis that the order of dismissal is unsustainable on the ground that no proper and fair inquiry had been held against the appellant, this, in our view, is not a case where any order for reinstatement of the appellant could properly be made. Counsel for the first respondent-company has rightly contended that it is a clear case of loss of confidence in the employee on the part of the Management and compensation would be adequate relief. It cannot be disputed that the appellant Anil Kumar held the position of trust and confidence as a Compounder, that in that capacity he was entrusted with drugs and medicines for being supplied and distributed to the needy and ailing workers of the tea gardens free of cost but by abusing his position of trust he indulged in trafficking in those drugs and medicines to the detriment of the health and well being of the workers having a bearing on their efficiency and

work in the Company. Counsel pointed out that apart from the instances of trafficking which were the subject-matter of the charge, the material on record shows that the appellant had admittedly indulged in similar activities on previous occasions for which he had been pardoned by the Chairman-Director of the Company. It may be stated that in his Explanation submitted to the charges served on him the appellant had clearly averred that on previous occasion workers had made complaints against him for trafficking in medicines and the Chairman-Director had forgiven him for all those offences. The clear implication is about the truth of the complaints and he had sought pardon for it. In these circumstances it would be highly improper and inexpedient to direct reinstatement.

4. In Assam Oil Company's case (1960) 1 Lab LJ 587: (AIR 1960 SC 1264) this Court has taken the view that though the normal rule in cases of wrongful dismissal of an employee is to direct reinstatement there could be cases where it would not be expedient to follow this normal rule and a case of loss of confidence in the employee on the part of the management would be one such exceptional case where reasonable compensation would be the appropriate relief. Following this decision in Ruby General Insurance Co. v. Chopra (1970) 1 Lab LJ 63 this Court denied the relief of reinstatement having regard to the fact that the employee, Stenographer, was holding a position of trust and confidence and was found to have retained copies of some confidential letters dictated to him without the consent of the company and instead directed the compensation be paid to him for wrongful and punitive termination.

5. We, therefore, confirm the setting aside of the Tribunal's Award to the extent it had directed the appellant's reinstatement. The appellant as a Compounder was drawing a monthly salary of Rs. 174-60 at the time of his dismissal from service on 15-9-1965. His counsel has informed us that the total amount due to him calculated up to 31st March, 1973 comes to Rs. 36,486/-. The present grade payable to a Compounder with the Company is Rs. 550/- p. m. Having regard to these facts and

the lapse of time involved till now we direct the first respondent-company to make lump sum payment of Rs. 50,000/- to the appellant Anil Kumar as just and fair compensation in full satisfaction of all his claims for wrongful dismissal from service. Payment to be made within four weeks from today. Appeal disposed of accordingly with no order as to costs.

Order accordingly.

AIR 1982 SUPREME COURT 1064

(From: Delhi)*

A. D. KOSHAL, V. BALAKRISHNA
ERADI AND R. B. MISRA, JJ.

Civil Appeal No. 1742 of 1980 and
Civil Misc. Petns. Nos. 69 and 5698 of
1981, D/- 5-3-1982.

Wing Commander, J. Kumar, Appellant v. Union of India and others, Respondents.

(A) Constitution of India, Arts. 309, 311 — Rules under Art. 309 framed by Ministry of Defence of Govt. of India issued in office Memo No. Pers/1860 RD/Sel, BD 7971/D (R & D) dt. 23-11-1979, R. 16 — Seniority and promotion — Service Officers seconded to Organisation — Computation of seniority — R. 16 does not divest them of any acquired vested rights of seniority and promotion.

R. 16 laying down the principle that the seniority of service officers permanently absorbed and seconded to the Defence Research and Defence Organisation is to be reckoned with reference to the date of attainment of the rank of substantive Major/equivalent does not divest a service officer, seconded in the Organisation prior to coming into force of the Rules, any of his vested right to seniority and promotion. He could not claim that prior to commencement of the Rules he had acquired a vested right to have his seniority in the Organisation reckoned with reference to the date of his permanent secondment and to have all officers joining the Organisation on subsequent dates ranked only below him, firstly because prior to commencement of the Rules the policy and

*LPA No. 53 of 1980, D/- 11-4-1980.
(Delhi).

CZ/DZ/B63/82/DVT

practice followed in the Defence Research Development and Inspection Organisation and later in the Defence Research and Development Organisation was to fix the seniority of permanently seconded officers with reference to the date of attainment of the rank of substantive Major/equivalent, and by framing R. 16 the same policy and practice followed by the Organisation is now statutorily recognised, secondly, it is settled law that the service conditions pertaining to seniority are liable to alteration by subsequent changes that may be introduced in the rules and except to the extent of protecting promotions that have already been earned under the previous rules, the revised rules will operate to govern the seniority and future promotion prospects of all the persons in the concerned service. It is therefore open to the Government of India to introduce a new principle of seniority by promulgation of the rules so as to affect rights for future promotion. (Paras 16, 17)

(B) Interpretation of Statutes — Statute containing statement of factual background leading to enactment — Has to be accepted by Court as correct unless contrary is proved. (Para 16)

(C) Constitution of India, Arts. 309, 311, 14, 16 — Rules under Art. 309 framed by Ministry of Defence of Govt. of India issued in office Memo No. Pers/1860/RD/Sel BD/7971 D/ (R & D) dt. 23-11-1979, R. 16 — Seniority of Service Officers permanently seconded to Organisation — Computation of — Date of attainment of rank of substantive Major/equivalent taken as base — Reasonable criterion — R. 16 is not arbitrary, unjust or unreasonable.

The personnel of the Defence Research and Development Organisation consist of civilian scientists and service officers of high technological attainments in different disciplines who have been drawn to the Organisation from time to time according to its exigencies and needs. The intake of service officers is not on the basis of any general selection from service cadres. Those service officers having skill, experience and aptitude and who are spared for deputation by parent service are initially taken on a tenure basis, in the intake of officers into the Organisation, there is no comparative evaluation of the

merits of the other personnel occupying the same rank or possessing like experience in the Defence Services. Therefore, it cannot be claimed that the service officers who are seconded to the Organisation on a later date must take rank only below all those who had joined the Organisation earlier by virtue of their prior "selection". It will not be reasonable, just or fair to determine the seniority of the permanently seconded service personnel merely on the basis of the date of their secondment to the Organisation. (Paras 19, 22)

In all the three Services, the promotions up to and inclusive of the rank of Major/equivalent are time-scale promotions based only on fixed length of service, and not on any "selection". However, the promotional chances to the higher posts varies in the three Wings and depend on fortuitous circumstances. Therefore, the principle adopted under the rule of reckoning seniority with reference to a date of attainment of the rank of substantive Major/equivalent strikes a reasonable mean as it ensures to all the service officers in the Organisation the fixation of seniority in the integrated cadre giving full credit to the length of service put in by them in their respective parent services. The principle embodied in R. 12 is thus not arbitrary, unjust or unreasonable, AIR 1982 SC 101 Rel. on. (Paras 23, 26, 28, 33)

(D) Naval Ceremonials, Conditions of Service and Miscellaneous Regulations (1954), Regn. 251 and Order AO102173 thereunder — Applicability — Defence Research and Development Organisation — Not an "Inter-service Organisation" — Regn. 251 and Order thereunder are not applicable in computing seniority of Service Officers seconded to the Organisation. (Constitution of India, Articles 309, 311). (Para 30)

(E) Constitution of India, Arts. 309, 311 Rules under Art. 309 — Defence Research and Development Organisation Service Rules (1979), R. 16 — Statutory rule — Prevails over executive order contained in Para 7 of Government of India Office Memo No. 9372-Estt (d) Cabinet Secretariat, Department of Personnel dt. 22-7-1972 — Secondment of Service Officers to Defence R & D Organisation — Does not amount to transfer. (Para 31)

(F) Constitution of India, Arts. 309, 311 — Rules under Art. 309 framed by Ministry of Defence of Govt. of India issued in Office Memo No. Pers/1860 RD/Sel. BD 7971/D (R & D) dt. 23-11-1979, R. 16 — Seniority — Computation of — R. 16 is not retroactive — Service Officer seconded to Organisation prior to commencement of the Rules — Governed by the Rule.

It cannot be said that R. 16 not having been specifically declared to be retrospective in operation, its provisions cannot be applied to the Service Officer who had been inducted into the Defence Research & Development Organisation Cadre long prior to the promulgation of the new rules. When a statutory rule governing seniority is issued in respect of a service, the said rule would govern the personnel in the service with effect from the date of its promulgation and in so giving effect to the rule in future, there is no element of retroactivity involved. Of course, the rules will not operate to deprive any person of promotions already earned in the past, but, for purposes of future promotions and seniority in the department, the principles laid down in the rule will necessarily govern all the personnel alike.

(Para 34)

(G) Constitution of India, Arts. 309, 311, 14, 16 — Rules under Art. 309 framed by Ministry of Defence of Govt. of India issued in Office Memo No. Pers/1860/RD/Sel. BD/7971/D (R & D) dt. 23-11-1979, R. 16 — Lateral induction of officers higher than Major/equivalent to the Organisation — Does not amount to deprivation of existing service officers' chances to promotion. (Para 35)

(H) Constitution of India, Arts. 309, 311, 226 — Rules under Art. 309 framed by Ministry of Defence of Govt. of India issued in Office Memo No. Pers/1860/RD/Sel. BD/7971/D (R & D) dt. 23-11-1979, R. 16 — Statutory rule governing seniority — Its promulgation is legislative function and not quasi judicial function — Prior opportunity of hearing not necessary. (Para 36)

Cases Referred: Chronological Paras
AIR 1982 SC 101: (1982) 1 SCC 379: 1982
Lab IC 38 24, 33

Appellant in Person; Mr. P. A. Francis, Sr. Advocate, M/s. Narayan Nettar and Miss A. Subhashini, Advocates with him, for Respondents.

BALAKRISHNA ERADI, J.:— This appeal by special leave is directed against the judgment of a Division Bench of the Delhi High Court dismissing in limine a Letters Patent Appeal filed by the present appellant against the judgment of a learned Single Judge of that Court whereby the contentions raised by the appellant in Civil Writ Petn. No. 1423 of 1979 were rejected and the said writ petition was dismissed.

2. The appellant — Wing Commander J. Kumar — was commissioned in the Indian Air Force on September 3, 1956 with ante-dated seniority from December 10, 1955. He was permanently seconded to the Defence Research Development and Inspection Organisation (for short, the LRD&I Organisation) of the Ministry of Defence on October 14, 1971. On the bifurcation of the LRD&I Organisation effected in July 1976 by the separation of the Inspection Wing, the appellant was retained in the Defence Research and Development Organisation, which will hereinafter be referred to as the R&D Organisation. The Director-General of Defence Research and Development, who is also the Secretary to Government of India, Defence Research, is the controlling authority of the R&D cadre. The said cadre has service officers drawn from all the three Wings of the Armed Forces, namely, the Army, the Navy and the Air Force, and in addition thereto a large number of civilian employees are also borne on it.

3. In November 1979, in supersession of all previous Rules and Orders on the subject, the President of India promulgated under the proviso to Art. 309 of the Constitution rules laying down the procedure for the intake of service officers in the R&D Organisation and the terms and conditions of service of those permanently retained therein. Those rules were issued by the Ministry of Defence of the Government of India in Office Memorandum No. Pers/1860/RD/Sel. BD/7971/D (R & D) dated November 23, 1979. The provisions of the said Memorandum will hereinafter be referred to as the rules. Rule 16 deals with the subject of "Seniority after permanent secondment". That rule is in the following terms:

"As hithertofore seniority of all service officers permanently seconded to

DRDO will continue to be based upon their seniority of substantive rank of Major/Sqn. Ldr./Lt. Cdr., subject to any penalty/loss of seniority that an officer might suffer subsequently and the seniority of officers with substantive ranks higher than Major/Sqn. Ldr./Lt. Cdr. will after their permanent secondment, also reckon vis-a-vis other officers in the R&D Cadre, for future promotion/confirmation, from the date of their substantive rank of Major/Sqn. Ldr./Lt. Cdr., subject to any penalty/loss of seniority that an officer might have suffered in his parent Arm/Service."

4. The principal contention advanced by the appellant before us is that the principle for determination of seniority laid down in the above rule is arbitrary and violative of Arts. 14 and 16 of the Constitution. Alternatively, it is contended by the appellant that since he had been permanently seconded to the R&D Organisation in 1971, long prior to the promulgation of the impugned rules, his rights regarding seniority and promotions cannot, in any way, be affected by the provisions of the new rule. According to the appellant, he continues to be governed by the principles that had been originally laid down in Government of India (Ministry of Defence) Memorandum dated March 18, 1967, which were the rules in force at the time of his secondment to the R&D Organisation. It is the further case of the appellant that the R&D being an independent organisation, the seniority of the personnel absorbed therein has to be reckoned only with reference to the dates on which they were selected and appointed in the said Organisation and subsequent entrants into the R&D in any particular category or rank should, therefore, be placed only below all those who had already joined the Organisation by virtue of permanent secondment. The appellant also contends that by taking the date of substantive appointment to the rank of Major/equivalent as the basis for reckoning seniority, officers who had obtained substantive promotions to higher ranks in the parent service earlier than some of their seniors who were only subsequently promoted to such higher ranks, will suffer very serious prejudice because the latter will gain a

march over the earlier promotees and supersede them in the matter of seniority in the R&D Organisation. Elaborating this plea, it was urged on behalf of the appellant that the result of the impugned rule would be to bring about the anomalous situation where a person permanently seconded to the R&D and holding substantively the rank of Lt. Col./equivalent can be superseded in seniority in the said Organisation by a Major/equivalent of old vintage who had been overlooked for promotion in his parent service and may have thereupon come over to the R&D Organisation. Another objection strongly put forward by the appellant was against the lateral induction of officers at levels higher than that of substantive Major/equivalent. It was urged by the appellant that such subsequent inductees into the R&D Organisation cannot be legally assigned seniority above those already borne on the cadre, irrespective of the substantive rank held by them at the time of their intake into the R&D. The appellant has rested this contention on the premise that the intake of officers into the R&D is by a selection based on merit and hence those selected earlier must necessarily rank higher in the seniority list of the Organisation in relation to those who are selected and appointed in the Organisation only on later dates. The appellant has urged a further point before us that the seniority of officers of the Navy, Army and Air Force holding equivalent ranks who served in the Organisation is governed by the principle laid down in Regulation No. 251 of the "Naval Ceremonials, Conditions of Service and Miscellaneous Regulations, 1964", and the impugned rule in so far as it is contrary to the principle laid down in the said regulation has to be declared as invalid and inoperative. Some other incidental pleas and grievances were also put forward by the appellant before the High Court as well as before us and we shall be dealing with them later on at the appropriate stage.

5. The learned Single Judge of the High Court rejected all the aforesaid contentions advanced by the appellant and declined to grant any relief to him, except to the extent of directing the R&D Organisation to issue the tentative seniority list drawn up in accordance

with the impugned rule within three months from the date of the judgment and to record the Annual Confidential Reports of the appellant from April 1, 1976 to March 31, 1979 within the same period. The Letters Patent Appeal filed by the appellant against the said judgment having been dismissed in limine by a Division Bench of the High Court, the appellant has preferred this appeal after obtaining special leave from this Court.

6. The Defence Research and Development Organisation (R&D) has been set up under the Ministry of Defence for carrying on scientific and technological research and development work on projects of vital importance to the defence forces of this country. The head of the said Organisation is a civilian, namely, the Scientific Adviser to the Defence Ministry and its personnel consist of a large number of civilian scientists and a much smaller number of service officers drawn from the three defence services. The service officers are initially taken on short tenure and are later permanently seconded to the R&D Organisation if found suitable and willing. Those service officers who were permanently seconded and absorbed in the R&D cadre are thereafter governed by the terms and conditions of service applicable to the officers of the said cadre.

7. Originally, the Defence Research and Development Organisation (R&D) and the Director-General of Inspection (DGI) had a combined cadre — Research Development and Inspection — and the terms and conditions of service of the personnel borne on the said cadre were governed by the provisions contained in Government of India (Ministry of Defence) Memorandum No. 11/(5)/58/D-(R&D) dated March 18, 1967. But, those rules which had also been issued by the President of India under the proviso to Article 309 of the Constitution did not contain any provision laying down the principles for determination of the seniority of the officers functioning in the DRD&I Organisation. Those rules were in force at the time when the appellant was permanently seconded to the DRD&I Organisation in 1971.

8. In the writ petition filed in the High Court, the appellant had impleaded 8 officers of the R&D Organisation,

namely, respondents nos. 7 and 11 to 17 contending that they have been assigned seniority and granted promotions in supersession of the appellant's legitimate claims and in violation of the rules. In the appeal before this Court, the appellant had added several more service officers of the R&D as additional respondents. The appellant argued his case in person and so did some of the respondents whose promotions and seniority etc., have been challenged by the appellant.

9. Arguments advanced by the parties appearing in person were heard by us at considerable length and Sri P. A. Francis, Senior Advocate, appearing on behalf of Respondents Nos. 1 and 2, namely, the Union of India and the Director-General, R&D Organisation, also addressed arguments before us covering all the aspects.

10. As already noticed, the main contentions put forward by the appellant are two-fold, namely, that the principles laid down in rule 16 of the rules for determination of the seniority of officers permanently seconded to the R&D are arbitrary and illegal, and that lateral induction of officers holding ranks above substantive Major/equivalent and assigning of seniority to such subsequent inductees by applying the provisions of rule 16 amounts to deprivation of the vested rights of persons — like the appellant — who had joined the Organisation earlier and it is, therefore, illegal and unwarranted.

11. After giving our best consideration to the arguments advanced on both sides, we do not see any substance in either of the aforesaid contentions advanced by the appellant.

12. The Defence Research Development and Inspection Organisation is a Specialised Technological Organisation set up under the Ministry of Defence for carrying out research and development work in weapons like guns, electronics, missiles, tanks etc. Its personnel consist of a large number of civilian scientists (about 3,600) and about 430 service officers drawn from all the three Wings of the Armed Forces with operational experience of such weapon system to work with the scientists in the research and development programme. The policy followed in regard to the intake of service officers appears to have

been to take them initially on a tenure basis and subsequently to absorb them in the Organisation on a permanent basis in the event of their being found suitable and willing. It is seen from the affidavits and documents filed on behalf of the respondents that the secondment of service officers depended upon the exigencies and special type of need of the Organisation at each relevant point of time so much so that officers who could fill the bill by virtue of their qualification, experience, aptitude and suitability in that particular branch of defence science for which the need for personnel had arisen and whose services could be spared by their parent service were taken into the R & D Organisation from time to time. Since the officers from the three Services came to the R & D cadre with different lengths of service and at different levels, it became imperative to evolve a reasonable principle for determination of their inter se seniority after their secondment to the R & D Organisation.

13. The case of the respondents is that right from the beginning, the policy and practice followed by DRD & I Organisation as well as by the bifurcated R & D Organisation was to assign seniority with reference to the date on which the officers attained their rank of substantive Major/equivalent. This was, however, strongly refuted by the appellant who asserts that no such principle had been formulated or followed by the Organisation prior to the promulgation of the impugned rules. The respondents produced for our perusal various files pertaining to the determination of seniority and grant of promotions in the Organisation during the period prior to the issuance of the impugned rules. The appellant pointed out with reference to those very files that there were quite a few instances where promotions had been effected on a basis totally at variance with the principle propounded by the respondents.

14. From a scrutiny of the files of the Ministry of Defence - R & D Organisation — produced before us by the learned counsel appearing on behalf of the Government of India, it has clearly emerged that, excepting for a few stray instances, the practice followed in the R & D Organisation was to reckon the seniority of the permanently seconded

officers with reference to the date of their attaining substantive rank of Major/equivalent. The principle underlying the said practice was later formally incorporated in the Minutes of the DRD & I Selection Board as a decision taken by the Board at its meeting held in February 1974. The relevant paragraph of the Minutes runs thus:

"Officers with substantive ranks higher than Maj/Sqn Ldr/Lt Cdr who are offered permanent secondment will reckon their substantive seniority in the R & D/Inspection Organisation for future promotion confirmation from the date they got their substantive ranks as Maj/Sqn Ldr and subject to any penalties as regards loss of seniority that they might have suffered in their Arm/Service thereafter. The position as above should be clarified to the officers concerned and their acceptance obtained before issuing the orders of permanent secondment in such cases. These decisions will apply to cases of permanent secondment approved by the RD & I Selection Board from 2 (74) meeting onwards."

It is also seen from the files pertaining to the period subsequent to February 1974 that the aforesaid principle was thereafter consistently followed as a binding rule and when it was found that a departure from the said principle had been erroneously made by placing three Air Force officers in their substantive rank of Wing Commander, the authorities concerned rectified the said mistake after clearly noting in the file that the aforesaid principle went unnoticed by oversight during the processing of those cases by HQ, R & D and the ranking of those officers was revised so as to bring it into conformity with the aforesaid rule.

15. The relevant file leading up to the issuance of the impugned rules was also carefully perused by us. This file contains the Minutes of the Chief of Staff Committee recommending to the Government of India that the draft rules may be finally accepted and issued expeditiously and the noting therein also contains a clear statement that the principle incorporated in the decision taken at the combined meeting of the DRD & I Selection Board held in February 1974 was merely to incorporate "a rule which

was un-written earlier but actually applied in practice". Thus, there is sufficient material available on record to substantiate the plea put forward by the respondents that the policy and practice followed in the DR & DI Organisation and later in the R & D Organisation was to fix the seniority of permanently seconded officers with reference to the date of attainment of the rank of substantive Major/Equivalent.

16. Further, the impugned rules are statutory in origin as they have been promulgated by the President of India under the proviso to Article 309 of the Constitution. Rule 16 contains a categorical declaration that in the past also the seniority of service officers permanently seconded to the R & D Organisation was being reckoned on the basis of their dates of attainment of substantive rank of Major/Sqn Ldr/Lt Cdr, subject to any penalty/loss of seniority that an officer might suffer subsequently. The said declaration is clearly implied in the opening words "As hitherto" occurring in Rule 16 of the impugned rules. A statement contained in a statute or statutory rule of the factual background leading up to the enactment has ordinarily to be accepted and acted upon by the Court as wholly correct; nothing clinching has been brought to our notice by the appellant to justify any departure from the said principle. We do not, therefore, find it possible to accept the contention of the appellant that prior to the coming into force of the impugned rule, he had acquired a vested right to have his seniority in the R & D reckoned with reference to the date of his permanent secondment and to have all officers joining the Organisation on subsequent dates ranked only below him. The plea advanced by the appellant that the impugned rules have illegally purported to divest him of his vested rights of seniority and promotion in the R & D must therefore, be rejected as devoid of merit.

17. Apart from what is stated above, it is settled law that the service conditions pertaining to seniority are liable to alteration by subsequent changes that may be introduced in the rules and except to the extent of protecting promotions that have already been earned under the previous rules, the revised rules will operate to govern the seniority

and future promotion prospects of all the persons in the concerned service. There is, therefore, no substance in the argument advanced by the appellant that it was not open to the Government of India to introduce a new principle of seniority by promulgation of the impugned rules so as to affect his rights for future promotion.

18. The next question to be considered is whether the principle enunciated in Rule 16 can be said to be unreasonable or arbitrary, as contended by the appellant. It is in this context that the specialised character of the R & D Organisation assumes importance. Its personnel consist of civilian scientists and service officers of high technological attainments in different disciplines who have been drawn to the Organisation from time to time according to its exigencies and needs.

19. The structure and composition of the Organisation have necessarily to undergo rapid qualitative and quantitative changes in the light of the fast developments that take place in the field of science and technology as well as in international relations. The research and development work is carried on by the R & D in different systems of weapons and equipments and a variety of disciplines like electronics, missiles, tanks, telecommunication, rocketry, radars etc. In addition to about 3,600 civilian scientists, the Organisation has about 160 permanently seconded service officers and about 430 service officers taken on a tenure basis. The intake of service officers is not on the basis of any general selection from service cadres. As and when the Organisation finds it necessary to obtain the services of officers with operational experience in any particular weapon system or other scientific discipline, suitable hands with aptitude, skill and experience in that particular branch or speciality whom their parent service is willing to spare for deputation are initially taken on a tenure basis. Thus, there is a selection only in a very limited sense that the suitability of the concerned officer is adjudged before he is taken. But what is important to note is that in the intake of officers into R & D Organisation there is no comparative evaluation of the merits of the other personnel occupying the same rank or possessing

like experience in the Defence Services. There is no process of selection in which their claims or merits are considered. Thus, it is clear that the secondment of officers to the R & D Organisation is not effected on the basis of a general selection. There is, therefore, no substance in the contention advanced by the appellant that the service officers who are seconded to the R & D on a later date must take rank only below all those who had joined the Organisation earlier by virtue of their prior "selection". Officers who are senior in the parent service in relation to the person who is seconded and who may possess greater experience and superior attainments might not have been considered for secondment when their juniors in the service were seconded to the R & D Organisation, because the parent service might not have been in the position at the relevant point of time to spare the services of the former. Further, the disciplinewise requirement in the R & D at any particular time will depend upon the nature of the project then taken on hand and the posting of a service officer to the R & D Organisation will be on consideration of his experience and aptitude for that particular type of specialised work and not seniority in the parent service. It may well happen that a junior officer who has experience and expertise in that special discipline alone may be considered for secondment at that particular time. Thus, the entry of a service officer into the R&D is to a large extent dependant on fortuitous circumstances related to the exigencies and needs that arise in the Organisation from time to time. It is certainly not based on the result of any comparative evaluation of his merit, ability or suitability as against those of his compeers in the concerned parent service. Such being the factual situation, we are of the view that it will not be reasonable, just or fair to determine the seniority of the permanently seconded service personnel merely on the basis of the date of their secondment to the Organisation.

20. The next question to be considered is whether the principle for determination of seniority laid down in the impugned rule 16 is just, fair and reasonable or whether it is arbitrary and violative of Articles 14 and 16 of the

Constitution, as contended by the appellant.

21. The R & D Organisation has in its cadre service officers who were taken initially on tenure basis from the Army, the Air Force and the Navy and were later on permanently seconded into the DRD&I/R&D cadre on their being found suitable and willing. The contention of the appellant is that on such permanent secondment into the R&D, the inter se seniority of the officers should be reckoned only with reference to the dates of their selection for such permanent secondment. It is the further plea of the appellant that since at the time of permanent secondment the officer concerned has to certify in writing that he is relinquishing all his claims of seniority etc., in his parent service, no weightage can thereafter be given to the rank or seniority which the person inducted had earned in his parent service prior to the date of his permanent secondment. We do not find it possible to accept this contention. Officers from the three Services holding different ranks are inducted into the R & D Organisation from time to time depending upon the needs of the Organisation, and if the appellant's contention is to be accepted, it would lead to serious anomalies and manifest injustice by upsetting the norms of seniority and rank structure which is the basic fabric on which the Armed Forces of the country are built. The unreasonable consequences that will flow from the acceptance of the appellant's arguments will be clearly seen from the following simple illustration:

Suppose, in the year 1974, on a particular date, when two officers are working in the Air Force — one as a Wing Commander and the other in the higher rank of Group Captain — the Wing Commander is permanently seconded to the R & D Organisation and, later, the Group Captain is also permanently seconded to the R & D in 1975. If the principle advocated by appellant is to be accepted, the Group Captain will become junior to the Wing Commander by virtue of the latter's earlier induction into the R & D despite the fact that he had not been even considered for secondment to the R & D at the time when the Wing Commander was taken.

22. In view of our having already found that the appellant's contention

that the secondment to the R & D is based on a "selection" is incorrect, the basic premise on which the appellant has founded his plea that the date of secondment should be the determinative factor for reckoning seniority in the R & D cadre, falls to the ground.

23. Since officers from different sources are taken into the R & D for meeting the disciplinewise requirements arising in the Organisation from time to time and they are brought into a common pool on such permanent secondment, it is inevitable that a reasonable principle has to be evolved for fixation of their inter se seniority within the R & D cadre. The fixation of the seniority on the basis of the ranks held by them in the different branches of the Armed Forces would not be reasonable or fair, because substantive ranks above Major/equivalent in the three Wings of the Armed Forces are, conferred by different Selection Boards at different times and under varying circumstances and conditions depending upon the vacancies arising at the different levels in the distinct services from time to time. It is pointed out in the counter-affidavit filed on behalf of the Union of India (Respondent No. 1) that the promotional chances of officers belonging to the three distinct Wings of the Armed Forces to posts above the rank of Major/equivalent vary widely and are dependant upon fortuitous circumstances which may obtain in relation to the distinct services at any relevant point of time. We find there is force in this submission. In all the three Services, the promotions up to and inclusive of the rank of Major/equivalent are time-scale promotions based only on fixed length of service. In the Air Force and the Army, the rank of Major and Sqn. Leader, respectively, are attained on an officer putting in 13 years' service. In the Navy, the time-scale period for promotion to the equivalent rank of Lt. Commander is said to vary between about 10 and 13 years. But, what is important to notice is that the promotion to the rank of Major/equivalent is based only on length of service and not on any "selection". For posts higher than that of Major/equivalent, promotions in all the three Services would depend upon the occurrence of vacancies in the particular branch or group in the concerned Service, the

schemes of expansion that may be taken up from time to time in the particular Service or branch and also the extent of stagnation that may be caused to officers at lower levels by reason of the officers who are young in age occupying posts in the immediate higher levels, etc. When due regard is had to all the aspects and circumstances, narrated above, it will be seen that the principle adopted under the impugned rule of reckoning seniority with reference to a date of attainment of the rank of substantive Major/equivalent strikes a reasonable mean as it ensures to all the service officers in the R & D the fixation of seniority in the integrated cadre giving full credit to the length of service put in by them in their respective parent services.

24. A similar seniority rule formulated by the State of Maharashtra in a somewhat like situation, when an integrated cadre consisting of personnel drawn from different sources was formed in the State of Maharashtra for administering the Rationing Scheme, was recently upheld by this Court in *R. S. Makashi v. I. M. Menon*, (1982) 1 SCC 379 : (AIR 1982 SC 101),

25. The following observations contained in that judgment are apposite in the present context (At p. 117 of AIR):—

"When personnel drawn from different sources are being absorbed and integrated in a new department, it is primarily for the Government or the executive authority concerned to decide as a matter of policy how the equation of posts should be effected. The courts will not interfere with such a decision unless it is shown to be arbitrary, unreasonable or unfair, and if no manifest unfairness or unreasonableness is made out, the court will not sit in appeal and examine the propriety or wisdom of the principle of equation of posts adopted by the Government."

26. In enunciating the principle incorporated in the impugned rule, the rule-making authority has adopted as the base for reckoning seniority the highest common factor applicable in respect of time scale promotions in the three services, namely the rank of Major/equivalent and thereby ensured to the service officers seconded to the R&D Organisation a just and equitable treatment. The rule provides for the

reckoning of the seniority of the seconded officers by taking into account the length of their service in the parent service, for which the date of attainment of the rank of substantive Major/equivalent would furnish a safe index. In our opinion, the said principle cannot be said to be arbitrary, unjust or unreasonable and the contention to contrary put forward by the appellant will, therefore, stand rejected.

27. It is no doubt true that in the Navy, promotions to the rank of Lt. Commander which is equivalent to that of Major in the Army may be attained by an officer within a slightly shorter period of service, namely, between 10 and 13 years whereas, in the Army and the Air Force, the promotion to the rank of Major/equivalent is given only on completion of 13 years of service. The slight disparity in the promotion prospects between the Navy and the other two Services will not, however, affect the reasonableness of the impugned rule because it is impossible to achieve perfect arithmetical precision in such matters where officers drawn from different sources are to be integrated into one common cadre and a rule for fixing their inter se seniority is formulated. Further, it is seen from the counter-affidavits of Respondents 1 to 3 that out of about 160 permanently seconded officers of the R&D Organisation, the large majority are from the Army, a considerable section of the balance is from the Air Force and only less than 10 officers have come from the Navy.

28. It is also relevant to notice in this context that it is specifically provided in rule 4 of the impugned rules that the intake of service officers to fill appointments in the R&D Organisation will ordinarily be at Major/equivalent level. Under rule 5, officers in higher ranks should be considered for permanent secondment only in exceptional cases and when such a course is adopted, it will be subject to the condition that their seniority in the R&D cadre will be fixed as stipulated in rule 16. The incorporation of the aforesaid provisions which operate as a safeguard against large scale induction of officers above the substantive rank of Major/equivalent further fortifies the conclu-

sion arrived at by us that the adoption of the date of substantive Major/equivalent as the criterion for fixing inter se seniority in the R&D cadre was logically fair, just and reasonable.

29. The appellant sought to rely strongly on Regulation 251 of the Naval Ceremonials, Conditions of Service and Miscellaneous Regulations, 1954 and on the provisions contained in the Order AO102/73. Regulation 251 provides that "The relative seniority of officers of the Army, Navy and Air Force, holding equivalent ranks, who serve together in an Inter-service Organisation will be regulated as follows." The later Order is in the following terms:

"(a) Officers holding equivalent substantive rank (no acting rank) will rank according to their seniority in the substantive rank; and

(b) Officers holding acting rank will rank after officers holding corresponding substantive rank and in relation to each other, they will rank according to their seniority in the substantive rank."

30. In our opinion, neither the Regulation aforementioned nor the Order, extracted above, has any application to the present situation. The R&D Organisation is not an Inter-Service Organisation within the meaning of the expression as used in the aforementioned Regulation and Order. It is predominantly a civil organisation headed by a civilian Director-General and having a total strength of about 24,000 employees. The large majority of the personnel working in the R&D Organisation are civilian scientists who are more than 3,000 in number, there are also about 160 service officers permanently seconded to the R&D cadre and about 240 service officers taken on tenure basis. But, merely because the R&D Organisation has on its staff serving officers from the Army, Air Force and Navy, it cannot be said to be an "Inter-service Organisation" governed by the provisions of the aforesaid Regulation and Order. The topic dealt with in the aforesaid Regulation and Order is only "seniority" for purposes of command, precedence, discipline etc., for working purposes to be applied in situations where officers from more than one service operate together in one group as

in times of war for carrying out any particular mission or task.

31. Another argument advanced by the appellant was that the impugned rule cannot be upheld as valid inasmuch as it is in conflict with paragraph 7 of the Government of India Office Memorandum No. 9372-Estt (D), Cabinet Secretariat, Department of Personnel, dated July 22, 1972, which is in the following terms:

"7. Transferees:— (i) The relative seniority of persons appointed by transfer to Central Services from the subordinate offices of the Central Government or other department shall be determined in accordance with the order of their selection for such transfer."

We see no substance in this contention. The secondment of an officer from his parent service to the R&D is not a transfer to Central Service from a subordinate service or from another department. Further, the impugned rule being statutory in origin, its validity cannot be affected by reason of any inconsistency with the provisions of a prior executive order issued by the Central Government.

32. An allegation has been put forward by the appellant that "the letter dated November 23, 1979 was a fraud on rules and the Constitution, played by respondent No. 5 who got the same issued to obtain personal gain by misusing his official position, leading to colourable exercise of power by the authority who actually issued that letter". To put it mildly, we find that this is a reckless allegation devoid of any factual basis. We have gone through the files leading up to the issuance of the impugned rules and it is seen therefrom that the matter has been processed by different authorities at different stages and before the draft rules were ultimately submitted to the Government of India for approval, they had been considered and approved at a joint meeting of the Chiefs of Staff also.

33. Equally untenable is the further plea advanced by the appellant that since the R&D is an integrated cadre, there cannot be any further classification of the officers comprised therein on the basis of the length of service put

in by them in their respective parent services prior to their permanent secondment in the R&D. As pointed out by this Court in the decision in *R. S. Makashi, v. I. M. Menon*, AIR 1982 SC 101 (supra), it is a just and wholesome principle commonly applied in such situations where persons from different sources are drafted to serve in a new service that their pre-existing length of service in the parent department should be respected and preserved by taking the same into account in determining their ranking in the new service cadre. Such a provision does not involve any discrimination violative of Article 16 of the Constitution.

34. Yet, another argument advanced by the appellant is that the impugned rule not having been specifically declared to be retrospective in operation, its provisions cannot be applied to the appellant inasmuch as he had been inducted into the R&D cadre on October 14, 1971 long prior to the promulgation of the new rules. We have already found that, as a matter of fact, the practice generally followed in the R&D Organisation, even prior to the promulgation of the impugned rules, was to reckon seniority with reference to the date of attainment of the rank of substantive Major/equivalent. Even otherwise, when a statutory rule governing seniority is issued in respect of a service, the said rule would govern the personnel in the service with effect from the date of its promulgation and in so giving effect to the rule in future, there is no element of retroactivity involved. Of course, the rules will not operate to deprive any person of promotions already earned in the past, but, for purposes of future promotions and seniority in the department, the principles laid down in the impugned rule will necessarily govern all the personnel alike. This contention of the appellant has also to fail.

35. It was very strongly contended, by the appellant that the lateral induction of senior service officers holding ranks above the substantive Major/equivalent level operates to deprive the existing R&D personnel of their vested rights to promotions within the cadre and hence, such inductions must be held to be illegal and void. This contention ignores the fact that rule 5 specifically,

provides that in exceptional cases, officers above the rank of Major/equivalent may be drafted into the R&D. The contention of the appellant appears to us to be based on a fallacious assumption that the R&D cadre exists for the sake of the personnel working therein and not for effectuating the purpose underlying its constitution which is of such vital importance to the Nation's safety. The Organisation has been formed with a view to have a highly specialised cadre of technological and scientific experts to design and develop military hardware etc., for the Armed Forces of the country keeping abreast of the latest developments and advances in the field of defence science. To effectuate this purpose, such an Organisation by its very nature cannot remain static or stagnant, but has to be constantly expanding qualitatively and quantitatively. The personnel requirements of the Organisation are, therefore, bound to change from time to time and to meet such changing needs, the services of qualified experts with specialised knowledge, skill and experience will have to be enlisted from time to time. A particular service officer in the Army, Air Force or Navy may be the best person suited for being placed in charge of a specialised job newly taken on hand, and in such a situation the Organisation must have the freedom to indent for the services of the officer concerned irrespective of the rank that he may be holding in his parent service. We do not find it possible to recognise any right in the officers already working in the R&D to object to the lateral induction of senior officers under such circumstances. The contention put forward by the appellant that lateral inductions into the R&D cadre constitute an illegal deprivation of the vested rights of persons already working therein and are consequently illegal and void cannot, therefore, be accepted.

36. The next point urged by the appellant is that since the impugned rules disturb the previously fixed seniority, it is quasi-judicial in nature and they ought to have been issued only after giving notice to all the affected persons. We have already found that no alteration in the pre-existing policy relating to determination of seniority in the R&D has been brought about by the

impugned rules. Quite apart from that, the promulgation of a statutory rule governing seniority is not a quasi-judicial function. It is the exercise of a legislative power and in respect thereof the principles of natural justice have no application at all.

37. Detailed facts pertaining to the history of service of the various officers impleaded in the appeal as respondents were referred to by the appellant during the course of his arguments, and such of the respondents who appeared in person countered those submissions by placing before us, what, according to them, are the correct facts relating to their service history. The challenge made by the appellant against the ranking and seniority of the officers impleaded as respondents is based solely on his contention that the seniority principle enunciated in rule 16 is arbitrary, illegal and ultra vires and that, in any event, the said principle cannot be applied to him. The said contention has been found by us to be untenable. Hence, it is not necessary for us to refer to the details regarding the service history of the appellant vis-a-vis those of the service officers who have been impleaded as respondents in the appeal.

38. In the light of our foregoing discussion, it follows that the High Court was perfectly right in upholding the validity of the impugned rule and in rejecting the challenge raised by the petitioner-appellant against the selections, inductions and promotions made in the R&D Organisation on the basis of the said rule.

39. In the course of his submission before this Court, the appellant put forward a grievance that, notwithstanding the directions issued by the High Court in its judgment under appeal, he has not been given any posting or assignment. Counsel appearing on behalf of the Union of India and the Scientific Adviser to the Defence Minister made available for our perusal the files relating to the appellant's posting to the DR&D Laboratory at Hyderabad and the allotment of specific assignments therein to the appellant from time to time. Having gone through the files, we have come to the conclusion that there is no factual foundation for the grievance put forward by the appellant, and hence no directions from this Court

are called for in regard to the said matter. We are purposefully refraining from dwelling in greater detail on this aspect lest any observations that we may make should prejudicially affect the future service prospects of the appellant. We, however, consider it necessary to observe that the appellant would do well to rid himself of the obsession that all his official superiors are out to harass or persecute him and open up a new chapter of devoting his high talents and skills for advancing the effectiveness of the R&D Organisation.

40. The charges put forward by the appellant in the Contempt Application (C. M. P. No. 5698 of 1981) and in C.M.P. No. 69 of 1981 filed by the appellant under Section 340 (1), Code of Criminal Procedure are bereft of merit and those applications will accordingly stand dismissed.

41. In the result, we dismiss this appeal but direct the parties to bear their respective costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 1076

= 1982 Cri. L. J. 850

(From : Allahabad)

S. MURTAZA FAZAL ALI,

BAHARUL ISLAM AND

A. VARADARAJAN, JJ.

Criminal Appeal No. 503 of 1976, D/- 5-5-1981.

State of U. P., Appellant v. Suresh alias Chhavan and others, Respondents.

(A) Criminal P. C. (2 of 1974), S. 386 — Appeal against acquittal — Appreciation of evidence — Murder — Medical evidence proving that injuries sustained by deceased were sufficient in ordinary course of nature to cause death — Discussion of evidence and its appreciation by High Court largely tainted by speculation — Held, High Court was not justified in rejecting evidence of material witnesses and coming to conclusion that the prosecution failed to prove guilt of accused beyond reasonable doubt — It could not be said that the view taken by High Court was reasonably possible — Appeal allowed. Decision of Allahabad High Court, Reversed. (1) Penal Code (1860), S. 300; (2) Evidence Act (1872),

S. 3; (3) Constitution of India, Art. 136). (Para 14)

(B) Evidence Act (1 of 1872), S. 3 — Credibility of witness — Relationship — Fact that the witness is wife of the deceased is no ground for rejecting her evidence though her evidence should be scrutinised with care. Decision of Allahabad High Court, Reversed. (Para 13)

(C) Penal Code (45 of 1860), S. 302 — Murder — Sentence — Accused sentenced to death by Sessions Judge — Acquittal by High Court — Having regard to the fact that the Supreme Court was convicting the accused after he had been acquitted and more than 7 years after the date of occurrence, it was held that the extreme penalty was not called for — Accused sentenced to imprisonment for life. Decision of Allahabad High Court, Reversed. (Para 14)

VARADARAJAN, J.:— This appeal by special leave is by the State of Uttar Pradesh against the acquittal of the respondents—accused, Suresh alias Chhavan s/o Kalyan Singh (hereinafter referred to as Suresh) and Ram Kishan and Bhajorey sons of Madho Singh, all residents of Miholi village situate within the limits of Auraiya Police Station in Etawah district. Suresh is said to be the first cousin of Ram Kishan and Bhajorey, who are brothers. The learned Sessions Judge, Etawah, who tried these three accused in Sessions Trial No. 140A of 1974, convicted all of them u/s. 302 r/w S. 34, I. P. C. for the murder of Virendra Singh, the husband of Kanti Devi, PW 1 and sentenced Suresh to death and Ram Kishan and Bhajorey to imprisonment for life. The usual reference for confirmation of the sentence of death by the High Court was made by the learned Sessions Judge. All the three accused filed Criminal Appeal No. 2508 of 1974 against their conviction by the Sessions Judge and the sentences awarded to them.

2. The case of the prosecution was this : There was enmity between the three accused, Suresh Ram Kishan and Bhajorey on the one hand and the deceased victim Virendra Singh on the other. There were a number of criminal cases between the accused and Virendra Singh. In the last of those cases, Virendra Singh was convicted by the Trial Court for the murder of one Ram Swarup, the brother of Ram Kishan and Bhajorey; but on appeal Virendra Singh was acquitted by the High Court on 11-12-1972 (vide judgment Ext. Ka-24). Shital, the brother of Suresh was the

prosecution witness in that case against Virendra Singh. Virendra Singh figured as a prosecution witness in the case in which accused Ram Kishan was prosecuted for the murder of his wife. The occurrence in the present case is stated to have taken place in this background.

3. On 7-2-1974 Virendra Singh had gone to the Panchayat Bhavan, Miholi for having darshan of Jaini Baba, who appears to have come there with certain Jain pilgrims. Virendra Singh's wife, PW 1, went to that place for having darshan of the Jain pilgrims and also for calling her husband for taking his meals. Virendra Singh was standing at that time on the chabutra of the Panchayat Bhavan. Then Suresh armed with a double barrel gun and Ram Kishan and Bhajorey armed with a Dharia and a Kanta respectively came there at about 6 p.m. Suresh proclaimed that "the enemy is standing alone, kill him" and fired at Virendra Singh with his gun on the back side (arm side). When Virendra Singh turned, Suresh fired a second shot at him and struck him on the front side of the abdomen. Virendra Singh fell down on the chabutra. Thereafter Ram Kishan and Bhajorey attacked Virendra Singh with their respective weapons. Virendra Singh and PW 1 raised alarm, and Chotey Lalla alias Avinash Kumar (PW 5) and Gorey Lal (PW 6) and Ram Sandhani came there and saw the incident. All the three accused ran away towards the south. The injured Virendra Singh was taken by the villagers accompanied by PW 1 to the Government Hospital, Auraiya, situated five miles away at about 8.45 p.m.

4. Dr. Chandrajeet Singh, PW 4, who was in the Hospital at Auraiya, examined Virendra Singh and gave him first aid. As the condition of Virendra Singh was serious, PW 4 sent an intimation to the Tehsildar/Magistrate (PW 3) for recording his dying declaration. PW 3, who received that intimation at about 9.10 p.m. reached the hospital at 9.25 p.m. and recorded Virendra Singh's statement, Ext. Ka-4 in the presence of the Doctor, PW 4, who has certified in Ext. Ka-4A that the patient was conscious throughout. PW 3 obtained the thumb impression of Virendra Singh in the dying declaration Ext. Ka-4. PW 4 referred Virendra Singh to the hospital at Kanpur for further treatment.

5. After Virendra Singh was taken to Kanpur in a mini bus, PW 1 went to the police station at Auraiya, and her

First Information Report Ext. Ka-1 was recorded at 9.45 p.m. by the constable, PW 7. Virendra Singh died on the way to Kanpur and was brought back by the same mini bus to the Police Station at Auraiya at 11.30 p.m. The case registered u/s. 307, I. P. C. was altered into one under S. 302, I. P. C.

6. The Investigating Officer, PW 11 proceeded to the scene of occurrence and recovered bloodstained earth from the chabutra of the Panchayat Bhavan, Miholi. Dr. Gupta, PW 2, conducted autopsy on the body of Virendra Singh and found sixteen wounds including three gunshot wounds of which two were entry wounds, on the epigastrium 5" about the umbilicus on the left side of the abdomen and on the left side of the chest, incised wounds, lacerated wound and abrasions. The 10th and 11th thoracic vertebrae were found fractured. Both the kidneys were found lacerated and torn. The right eye ball was found cut. The pleura was found punctured on the right side. The gall-bladder was lacerated. The Doctor PW 2 opined that the injuries were sufficient in the ordinary course of nature to cause death.

7. The accused could not be traced in the village when PW 11 searched for them but they surrendered in the Court on 11-2-1974. Ram Kishan and Bhajorey admitted that the deceased Virendra Singh was convicted by the Trial Court for the murder of their brother Ram Swarup but acquitted by the High Court and that Virendra Singh figured as a prosecution witness in the case in which accused Ram Kishan was tried for the murder of his wife. All the three accused pleaded that they had been falsely implicated in this case. They examined a police constable of the Police Lines, Etawah, as DW 1 to prove that a head-constable and some constables had been deputed from 9-2-1974 to 17-2-1974 for protecting some Jain pilgrims who were on pad yatra.

8. Of the 11 witnesses examined on the side of the prosecution, PWs 1, 5 and 6 were put forward as eye witnesses. Before the learned Sessions Judge, it was contended on behalf of the accused that the presence of PW 1 at the time of the occurrence is doubtful. PW 1 has denied the suggestion that she did not go to call her husband Virendra Singh for taking his meals prior to the occurrence, that the occurrence did not take place at the chabutra of the Panchayat Bhavan, that

she did not see the occurrence and that she did not go to the police station at Auraiya. But it is significant to note that the evidence of PW 11 that bloodstains were found in the Chabutra of the Panchayat Bhavan, has not been challenged in cross-examination and it has not been suggested to PW 7 that PW 1's report Ext. Ka-1 was not recorded at the police station at Auraiya though it has been suggested to him that the report was not written at 9.45 p.m. on 7-2-1974 but was written on the next morning, and he has denied the suggestion. PW 1 has stated that the meal time is 6 p. m. The learned Sessions Judge accepted the evidence of PW 1 and found that she would not have given the F. I. R. Ext. Ka-1 at the police station at Auraiya at 9.45 p.m. mentioning the names of the accused and the witnesses and the weapons used if in fact she had not witnessed the occurrence.

9. PW 5 has no doubt admitted that in March 1959 his elder brother Sarwan Kumar was shot at and that in the case brought against one Sone Lal Chamar and Madho, the father of the accused Ram Kishan and Bhajorey they were acquitted but he has denied the suggestion that he did not witness the occurrence in this case. He has deposed about PW 1 and others accompanying the injured Virendra Singh to the Hospital at Auraiya and has stated that it is he who got Virendra Singh admitted in that hospital. The learned Sessions Judge accepted the evidence of PW 5 as that of a natural witness who has been mentioned even in the F. I. R. as a witness and he has observed that the fact that Madho Singh, the father of accused Ram Kishan and Bhajorey had figured as an accused in the case of murder of PW 5's brother Sarwan Kumar in 1959 is not a sufficient reason for suspecting his evidence.

10. PW 6 no doubt belongs to a different village. But it is in evidence that people from other villages also had come to the Panchayat Bhavan at Miholi for having darshan of the Jain pilgrims on the day of occurrence. Therefore, it is not improbable that PW 6 was present at the time of the occurrence. There is no enmity between the accused and PW 6 for the latter to falsely implicate the accused in this case. PWs 5 and 6 were examined by the Investigating Officer, PW 11 on 8-2-1974. PW 6 could not be examined during the night of 7/8-2-1974 because PW 11 had to return to the Police Station at Auraiya during the

night itself on receipt of information that the dead body of Virendra Singh had been brought to the Police Station. Even PW 6 is mentioned in the F. I. R. as a witness. The learned Sessions Judge accepted the evidence of P.W. 6 also.

11. The dying declaration Ext. Ka-4 is brief and starts in an abrupt manner. It is stated clearly in the dying declaration that Suresh caused the gunshot injuries and that Bhajorey and Dharia residents of Miholi struck the deceased with Kanta. The time of occurrence is mentioned in the dying declaration as 4/5 O'clock in one place and as 6/6-30 O'clock in the evening at another place in Ext. Ka-4. Reference is made in the dying declaration to motive, and it is stated that the deceased was a witness in the case of murder of the wife of Ram Kishan and that there is enmity on that account. The learned Sessions Judge accepted the dying declaration as genuine. Relying upon the oral evidence of P.Ws. 1, 5 and 6, corroborated by the medical evidence of P.W. 2, and the dying declaration Ext. Ka-4, the learned Sessions Judge convicted all the three accused and sentenced them as mentioned above, observing that Suresh deserves the sentence of death as he had used a fire arm, a deadly weapon, and he had fired a second shot at Virendra Singh, not being satisfied with having fired the first shot and that Ram Kishan and Bhajorey have used only Dharia and Kanta and, therefore, they deserve the lesser of the two sentences.

12. But on appeal the learned Judges of the High Court acquitted the accused. They have observed in their judgment that P.Ws. 1, 5 and 6 could not be stated to be independent witnesses and that the prosecution has not examined other persons, who were stated by those eye-witnesses to have been present at the time of the occurrence or even any of the Jain pilgrims or police personnel escorting the Jain pilgrims. The learned Judges have doubted the time and place of the occurrence and have observed that the occurrence must have taken place much later than 6 p.m. after sun set which had taken place at Etawah at 5-45 p.m. They declined to accept the evidence that the deceased was taken to the hospital at Auraiya by a bullock cart on the ground that he could have been taken by a faster vehicle and the private car of one Tiwari of Miholi was available, one mile away from the village and that that car was used by P.W. 1 for going back to Auraiya from Miholi after she received informa-

tion about the death of her husband. The learned Judges declined to place reliance upon the dying declaration Ext. Ka-4 on the ground that the time of occurrence is mentioned differently as 4/5 O'clock and 6/6-30 O'clock in the evening and that the place of occurrence, the number of shots fired and the persons present in the vicinity are not mentioned in it, and also that it is defective with regard to the names of the assailants. They have observed that the victim Virendra Singh was not in a position to make a coherent statement and that he was obsessed with the enmity which existed between him and accused Ram Kishan. They have further observed that having regard to the nature of the injuries sustained by the deceased, he could not have been in a position to make a coherent and intelligent statement specially with regard to the identity of the assailants with "unmistaken certainty." They have observed that it is improbable that P.W. 1 would have gone to call her husband for taking meals without first calling her young children for taking their food. They have further observed that in the F.I.R. Ext. Ka-1 P.W. 1 has stated that her husband was shot by Suresh and that in her evidence she has stated that he did so after exhorting the other accused to kill the deceased. They have stated that if P.W. 1 had gone to Auraiya with her husband by the bullock cart it is improbable that she would not have gone with him by the mini bus to proceed to Kanpur. For these reasons the learned Judges of the High Court have held that the prosecution has not proved the time and place of occurrence and the guilt of the accused beyond reasonable doubt and they have observed that the possibility of the deceased having been attacked by some unknown assailants in darkness could not be ruled out. They, thus, allowed the criminal appeal and acquitted the accused and set aside the convictions and the sentences awarded to them.

13. We were taken through the evidence and the judgments of the learned Sessions Judge and the High Court by the learned counsel for the parties. After a careful consideration of the evidence on record, we are clearly of the opinion that it is not possible to sustain the judgment of the High Court. The reasons given by the learned Judges of the High Court for not relying upon the oral evidence of the eye-witnesses P.Ws. 1, 5 and 6 corroborated as it is by the evidence of the Doctor P.W. 2, who conducted autopsy on the

body of the deceased Virendra Singh, and for suspecting the genuineness of the dying declaration Ext. Ka-4 recorded by the Taluk Magistrate, P.W. 3 in the presence of the Doctor, P.W. 4 are not convincing. The learned Judges are not right in observing that all the three witnesses, P.Ws. 1, 5 and 6 are interested. It is true that P.W. 1 is the wife of Virendra Singh. But it is not possible to reject her evidence for that reason alone though her evidence would have to be scrutinised with care. The mere fact that Madho, the father of the accused Ram Kishan and Bhajorey and one Sone Lal Chamar had been prosecuted in March, 1959 in a case for the murder of P.W. 5's brother Sarwan Kumar, is not a sufficient reason for holding that P.W. 5 is interested in the prosecution of the accused in this case nearly 15 years after the murder of his elder brother. There is nothing on record to show that P.W. 6 who belongs to another village is in any way related to the deceased or P.W. 1. The evidence of P.Ws. 1, 5 and 6 no doubt shows that some 50 or 60 persons had gathered at the Panchayat Bhavan where some Jain pilgrims had camped for some time in the course of the pad yatra. It is true that none of those persons who came to the Panchayat Bhavan in connection with the visit of the Jain pilgrims and none of the Jain pilgrims has been examined in this case. It may be that the Jain pilgrims were strangers, ordinarily they must have been more interested in their pad yatra than in figuring as witnesses in this case of murder. Therefore, it is not possible to blame the prosecution for not examining any of the Jain pilgrims as witnesses in this case. There is no evidence to show that any police personnel was present at the time of the occurrence. The question is not whether the prosecution should have examined some other persons, who were present at the time of the occurrence, but it is whether the evidence of P.Ws. 1, 5 and 6, who have been put forward as eye-witnesses is acceptable or not for proving the case of the prosecution against the accused. The learned Judges of the High Court were not right in doubting the time and place of the occurrence in this case and observing that the occurrence must have taken place much later than 6 p.m. after sun set, which had taken place at Etawah at 5-45 p.m. The evidence of the Investigating Officer PW 11 that bloodstained earth was recovered from the chabutra of the Panchayat Bhavan has not been challeng-

ed in the cross-examination. The presence of bloodstains in the Panchayat Bhavan would probalilise the case of the prosecution that the occurrence had taken place in that chabutra. The time of occurrence has no doubt been given variously in the dying declaration Ext. Ka-4 as 4/5 O'clock and 6/6-30 O'clock in the evening. There is no satisfactory reason for not accepting the evidence of P.Ws. 1, 5 and 6 that the injured Virendra Singh was taken by his own bullock cart from the place of occurrence to the Government Hospital at Auraiya situated five miles away from the scene of occurrence. The Doctor, P.W. 4, saw the injured Virendra Singh at 8-45 p.m. and he thereafter sent a memo to the Tehsildar Magistrate, P.W. 3 for recording his dying declaration. P.W. 3 received that intimation at 9-10 p.m. and recorded the dying declaration Ext. Ka-4 at 9-25 p.m. Having regard to the distance between the scene of occurrence and the Government Hospital, Auraiya which is five miles, and the fact that the injured Virendra Singh had been taken there from the scene of the occurrence by a bullock cart, during night, there is no reason to suspect the case of the prosecution that the occurrence had taken place at about 6 p.m. on 7-2-1974. It is not reasonable to expect that P.W. 1 and others should have waited for securing a faster moving vehicle for taking the injured Virendra Singh to the hospital and thereby lose time in making medical attention available to him immediately. It may be that they thought that the car of Tiwari, who appears to live one mile away from Miholi village, might not have been readily available at that time for taking the injured Virendra Singh to the hospital. No doubt P.W. 1 had gone by that car to Auraiya at about 11 or 1-30 a.m. on 8-2-1974 after receipt of information that her husband had died. P.W. 1 might have reasonably expected that the car to be available at the residence of its owner during that part of the night. Therefore, there is nothing strange or unreasonable in Virendra Singh having been taken by his bullock cart. The fact that the time of occurrence has been given differently in the dying declaration Ext. Ka-4 namely 4/5 O'clock at one place and 6/6-30 O'clock in the evening at another place and that the place of occurrence, the number of shots fired and the number of persons present in the vicinity are not mentioned therein, are not sufficient reasons for not relying upon it. Virendra Singh appears to have been

seriously injured and he could not have been in a position to make a more coherent statement though it is seen from the evidence of the Doctor P.W. 4 that he was conscious right through. P.W. 4 has appended the certificate Ext. Ka-4 to that effect. The learned Judges of the High Court were not right in observing that having regard to the nature of the injuries sustained by Virendra Singh, he could not have been in a position to make a coherent and intelligent statement specially as to the identity of the assailants for, as stated earlier, the evidence of the Doctor P.W. 4 shows that Virendra Singh was conscious throughout when he made the dying declaration Ext. Ka-4 before the Taluk Magistrate, P.W. 3. In observing that P. W. 1 could not have gone to call her husband for taking his meal without first calling her young children for taking their food, the learned Judges of the High Court have overlooked the evidence of P.W. 1 that the children were not available in the house and had gone somewhere to play when she went to call her husband for taking his meals. It is a matter for P.W. 1 to decide, whether she should have called her husband who had gone to Panchayat Bhavan for having darshan of the Jain pilgrims first for taking his meals or gone in search of her children who had gone somewhere for playing for calling them first for taking their food. There is nothing unnatural in her having gone to call her husband for taking his meal at the meal time. Therefore, it is not possible to reject the evidence of P.W. 1 that she went to call her husband for taking his food without first calling her young children for the purpose. There is no doubt some confusion in the dying declaration Ext. Ka-4 regarding the assailants, for only the names of Suresh and Bhajorey are mentioned and Dharia and Kanta are referred to and it is stated that there is enmity because the deceased had figured as a witness against Ram Kishan in the case of murder of his wife. Dharia and Kanta are weapons and not names of persons. We are, therefore, of opinion that P.W. 1 had probably not understood the deceased correctly when he was narrating the dying declaration Ext. Ka-4 in relation to the third assailant. But the dying declaration read with the evidence of the eye-witnesses P.Ws. 1, 5 and 6 would show that another person in addition to Bhajorey must have used one of the weapons Dharia and Kanta, and that that person is accused Ram Kishan. The learned

Judges of the High Court are not right in observing that if P.W. 1 had gone to Auraiya with her husband by the bullock cart she would not have failed to go with him by mini bus when he was sent to the hospital at Kanpur. This observation overlooks the evidence of P.W. 1 that she did not proceed to Kanpur with her husband by the mini bus because he was being taken by other persons and she thought that she must go and give a report at the police station at Auraiya. P.W. 1 has denied the suggestion that she came to know about the occurrence at 7-30 p.m. through other persons. As stated earlier, the F.I.R. Ext. Ka-1 was recorded by the head constable P.W. 7, at 9-45 p.m. after the Doctor P.W. 4 saw the injured Virendra Singh at 8-45 p.m. in the hospital at Auraiya. If P.W. 1 had received information about the occurrence only at 7-30 p.m., it is not probable that she would have been in the police station at Auraiya at 9-45 p.m., after her husband had been despatched by a mini bus to Kanpur for further treatment. There is nothing on record to hold that the deceased might have been attacked by some unknown persons in darkness.

14. PWs 1 & 5 are natural witnesses. There is no reason to hold that P W 6 could not have been present during the occurrence. The evidence of P.Ws. 1, 5 and 6 is clear and convincing. There is no reason to suspect the genuineness of the dying declaration Ext. Ka-4. The evidence of P.Ws. 1, 5 and 6 and the dying declaration Ext. Ka-4 prove satisfactorily and beyond reasonable doubt that the three accused came to the scene of occurrence armed with deadly weapons, that Suresh fired two shots at the deceased Virendra Singh with his double barrel gun with the intention of killing him, and that after Virendra Singh fell down on receipt of the two gun shot injuries, Ram Kishan and Bhajorey attacked him with Dharia and Kanta respectively with the common intention of murdering him as a consequence of which Virendra Singh died at some time before 1 or 1-30 a.m. during the night of 7/8-2-1974. The evidence of the Doctor P.W. 2, who conducted autopsy on the body of Virendra Singh, proves that the injuries sustained by Virendra Singh are sufficient in the ordinary course of nature to cause death. In these circumstances we are of the opinion that the learned Sessions Judge was perfectly justified in relying upon the oral evidence of P.Ws. 1, 5 and 6 and the dying declaration Ext. Ka-4 and convicting

the accused u/s. 302 r/w S. 34, I.P.C. and that the learned Judges of the High Court were not justified in rejecting the evidence and coming to the conclusion that the prosecution has not proved the time and place of the occurrence as well as the guilt of the accused beyond reasonable doubt. Thus, the discussion of the evidence and its appreciation by the High Court is largely tainted by speculation and we are clearly of the opinion that this is certainly not a case where it can be said that the view taken by the High Court was reasonably possible. Therefore, we allow the appeal and find all the three accused guilty u/s. 302 r/w S. 34, I.P.C. of the murder of Virendra Singh and convict them accordingly. Though the learned Sessions Judge might have had justification for awarding the extreme penalty of the law to Suresh, yet having regard to the fact that we are convicting the accused after they had been acquitted by the High Court and more than 7 years after the date of the occurrence, we are of the opinion that the extreme penalty of the law is not called for in regard to Suresh. We accordingly sentence each of the accused to imprisonment for life.

Appeal allowed.

AIR 1982 SUPREME COURT 1081

(From: Andhra Pradesh)*

Y. V. CHANDRACHUD, C. J.,
A. VARADARAJAN AND AMARENDRA
NATH SEN, JJ.

Civil Appeals Nos. 2031 of 1977 with
136 and 137 of 1978, D/- 16-3-1982.

Govt. of Andhra Pradesh, Appellant v.
Thummala Krishna Rao and another, Respondents.

With

Govt. of Andhra Pradesh, Appellant v.
Bandi Venkatarama and others, Respondents.

And

Govt. of Andhra Pradesh, Appellant v.
Veiluri Kesava Rao and another, Respondents.

(A) A. P. Land Encroachment Act (3 of 1905), Ss. 6 (1), 7 — Person in unauthorised occupation of Government land — Power of Government to evict summarily

* (1) Writ Petn. No. 905 of 1975, D/- 30-6-1977 (Andh Pra) (2) Writ Petns. Nos. 796 and 922 of 1975, D/- 30-6-1977 (Andh. Pra.).

CZ/DZ/B240/82/GDR

— Cannot be resorted to in cases where complicated questions of title arise for decision.

The summary remedy for eviction which is provided for by S. 6 of the Act can be resorted to by the Government only against persons who are in unauthorised occupation of any land which is "the property of Government". If there is a bona fide dispute regarding the title of the Government to any property, the Government cannot take a unilateral decision in its own favour that the property belongs to it, and on the basis of such decision take recourse to the summary remedy provided by S. 6 for evicting the person who is in possession of the property under a bona fide claim or title. The summary remedy prescribed by S. 6 is not the kind of legal process which is suited to an adjudication of complicated questions of title. (Para 7)

Held, that the question as to the title to the three plots could not appropriately be decided in a summary inquiry contemplated by Ss. 6 and 7 of the Act. The long possession of the respondents and their predecessors-in-title of those plots raised a genuine dispute between them and the Government on the question of title, remembering especially that the property, admittedly, belonged originally to the family of Nawab Habibuddin from whom the respondents claimed to have purchased it. The question as to whether the title to the property came to be vested in the Government as a result of acquisition and the further question whether the Nawab encroached upon that property thereafter and perfected his title by adverse possession had to be decided in a properly constituted suit and until the Government succeeded in establishing its title to the property the respondents could not be evicted summarily. Writ Petns. Nos. 905 and 796 and 922 of 1975, D/- 30-6-1977 (Andh Pra), Affirmed. (Para 9)

(B) A. P. Land Encroachment Act (3 of 1905), Ss. 6 (1), 7 — Power of Government to evict summarily a person committing encroachment — Duration of encroachment is not decisive. (1970) 1 Andh LT 88 and AIR 1971 Andh Pra 382, Overruled; Writ Petns. Nos. 905 and 796 and 922 of 1975, Dt. 30-6-1977 (Andh Pra), Reversed.

It is not the duration, short or long, of encroachment that is conclusive of the question whether the summary remedy prescribed by the Act can be put into operation for evicting a person. What is

relevant for the decision of that question is more the nature of the property on which the encroachment is alleged to have been committed and the consideration whether the claim of the occupant is bona fide. But duration of occupation is relevant in the sense that a person who is in occupation of a property openly for an appreciable length of time can be taken, prima facie, to have a bona fide claim to the property requiring an impartial adjudication according to the established procedure of law. (1970) 1 Andh LT 88 and AIR 1971 Andh Pra 382, Overruled; Writ Petns. Nos. 905 and 796 and 922 of 1975, D/- 30-6-1977, (Andh Pra), Reversed. (Para 8)

Cases Referred: Chronological Paras
AIR 1971 Andh Pra 382: (1971) 1 Andh LT 292 8
(1970) 1 Andh LT 88 8

Mr. Ramachandra Reddy, Advocate General, Mr. B. Parthasarathi, Advocate with him, for Appellant; Mr. P. Rama Reddy, Sr. Advocate, Mr. A. V. V. Nair, Advocate with him (for No. 2) in C. A. No. 2031/77, (for No. 3) in 136/78 and (for No. 2) in C. A. No. 137/78; Mr. A. Subba Rao, Advocate (for Nos. 1 & 2) in C. A. No. 136/78; Mr. A. K. Sen, Sr. Advocate, M/s. K. Rajendra Choudhury, G. R. Subbarayan, I. Koti Reddy and Mahabir Singh, Advocates with him (for No. 1) in C. A. No. 137/78 and Mr. B. Kanta Rao, Advocate (for No. 1) in C. A. No. 2031/77, for Respondents.

CHANDRACHUD, C. J.— These three appeals arise out of a common judgment dated June 30, 1977 of a Division Bench of the High Court of Andhra Pradesh, setting aside the judgment of a learned single Judge dated November 18, 1975 in Writ Petitions Nos. 1539 of 1974 and 798 of 1975, Civil Appeal No. 2031 (NCM) of 1977 is by special leave while the other two appeals are by certificate granted by the High Court. The question which these appeals involve is whether the appellant, the Government of Andhra Pradesh, has the power to evict the respondents summarily in exercise of the power conferred by the Andhra Pradesh Land Encroachment Act, 1905. This question arises on the following facts:

We are concerned in these appeals with three groups of lands situated in Habsiguda, Hyderabad East Taluk, Andhra Pradesh. Those lands are: R. S. No. 10/1, which corresponds to plot No. 94 measuring 10 acres and 2 guntas; R. S. No. 10/2 which corresponds to plot No. 104 ad-

measuring 9 acres and 33 guntas; and R.S. Nos. 7, 8 and 9 which correspond to plot No. 111 admeasuring 26 acres and 14 guntas. These lands belonged originally to Nawab Zainuddin and after his death, they devolved on Nawab Habibuddin. Sometime between the years 1932 and 1937, certain lands were acquired by the Government of the Nizam of Hyderabad under the Hyderabad Land Acquisition Act of 1309 Fasli, the provisions of which are in material respects similar to those of the Land Acquisition Act, 1894. The lands were acquired for the benefit of the Osmania University which was then administered as a Department of the Government of Hyderabad. The University acquired an independent legal status of its own under the Osmania University Revised Charter, 1947, which was promulgated by the Nizam.

2. The question whether the aforesaid three plots of land were included in the acquisition notified by the Government of Nizam became a bone of contention between the parties, the Osmania University contending that they were so included and that they were acquired for its benefit and the owner, Nawab Habibuddin, contending that the three plots were not acquired. On February 13, 1956 the Osmania University filed a suit (O.S. No. 1 of 1956) against Nawab Habibuddin, in the City Civil Court, Hyderabad, claiming that the three lands were acquired by the Government for its benefit and asking for his eviction from those lands. That suit was dismissed in 1959 on the ground that plot No. 111 was not acquired by the Government and that though plots Nos. 94 and 104 were acquired, the University failed to prove its possession thereof within twelve years before the filing of the suit. In regard to plots Nos. 94 and 104, it was found by the trial court that Habibuddin had encroached thereupon in the year 1942, which was more than twelve years before the filing of the suit. Civil Appeal No. 61 of 1959 filed by the University against that judgment was dismissed on January 24, 1964 by the High Court which affirmed the findings of the trial court. The State Government was not impleaded as a party to those proceedings.

3. On May 8, 1964 the Osmania University wrote a letter to the Government of Andhra Pradesh, requesting it to take steps for the summary eviction of persons who were allegedly in unauthorised occupation of the 3 plots. On December 8, 1964, the Tahsildar, Government of Andhra

Pradesh, acting under Section 7 of the Land Encroachment Act, 1905, issued a notice to Nawab Habibuddin to vacate the lands and on December 15, 1964 the Tahsildar passed an order evicting him from the lands. The appeal filed by Habibuddin to the Collector was dismissed in 1965 and the appeal against the decision of the Collector was dismissed by the Revenue Board in 1968. During the pendency of the appeal before the Revenue Board, the respondents purchased the plots from Habibuddin for valuable consideration and on the death of Habibuddin, they were impleaded to the proceedings before the Revenue Board. They preferred an appeal from the decision of the Revenue Board to the Government but that appeal was dismissed on November 26, 1973.

4. On March 19, 1974, the respondents filed Writ Petitions in the High Court of Andhra Pradesh challenging the order by which they were evicted from the plots summarily under the provisions of the Act of 1905. The learned single Judge dismissed those Writ Petitions observing:

"The question whether the lands with which we are concerned in the writ petition were acquired by the Government or not and the question whether the Government had transferred its title to the University or not are questions which cannot properly be decided by me in an application under Article 226 of the Constitution. The appropriate remedy of the petitioners is to file a suit to establish their title."

The learned Judge held that:

"Though the title of the Government is not admitted by the alleged encroacher, there is a finding by the Civil Court that there was encroachment by the alleged encroacher. That is sufficient to entitle the Government to initiate action under the provisions of the Land Encroachment Act."

5. Three appeals were preferred to the Division Bench against the judgment of the learned single Judge, two of them being by the petitioners in one writ petition and the third by the petitioner in the other writ petition. The Division Bench, while setting aside the judgment of the learned single Judge, held:

"The question whether the lands belong to Osmania University or not will have to be decided as and when the Government comes forward with a suit for the purpose. Even if we assume for the purpose of our judgment, as we are not pro-

nouncing any conclusion as to whether the land vested in the Government or University, that the Government is the owner, the dispute going back from 1942 cannot be dealt with in summary proceedings under Section 7 of the Land Encroachment Act."

The summary remedy provided by Section 7, according to the Division Bench, cannot be resorted to "unless there is an attempted encroachment or encroachment of a very recent origin" and further, that it cannot be availed of in cases where complicated questions of title arise for decision.

6. We are in respectful agreement with the view taken by the Division Bench, subject however to the observations made herein below. The Andhra Pradesh Land Encroachment Act, 1905, was passed in order "to provide measures for checking unauthorised occupation of lands which are the property of Government". The preamble to the Act says that it had been the practice to check unauthorised occupation of lands which are the property of the Government "by the imposition of penal or prohibitory assessment or charge" and since doubts had arisen whether such practice was authorised by law, it had become necessary to make statutory provisions for checking unauthorised occupations. Section 2 (1) of the Act provides that all public roads, streets, lands, paths, bridges, etc. shall be deemed to be the property belonging to Government, unless it falls under clauses (a) to (e) of that section. Section 2 (2) provides that all public roads and streets vested in any public authority shall be deemed to be the property of the Government. By Section 3 (1), any person who is in unauthorised occupation of any land which is the property of Government, is liable to pay assessment as provided in clauses (i) and (ii) of that section. Section 5 provides that any person liable to pay assessment under Section 3 shall also be liable, at the discretion of the Collector, to pay an additional sum by way of penalty. Sections 6 (1) and 7, which are relevant for our purpose, read thus:

"Sec. 6 (1). Any person unauthorisedly occupying any land for which he is liable to pay assessment under Section 3 may be summarily evicted by the Collector, Tahsildar or Deputy Tahsildar and any crop or other product raised on the land shall be liable to forfeiture and any building or other construction erected or anything deposited thereon shall also, if

not removed by him after such written notice as the Collector, Tahsildar, or Deputy Tahsildar may deem reasonable, be liable to forfeiture. Forfeitures under this section shall be adjudged by the Collector, Tahsildar or Deputy Tahsildar and any property so forfeited shall be disposed of as the Collector, Tahsildar or Deputy Tahsildar may direct."

"Sec. 7. Before taking proceedings under Section 5 or Section 6, the Collector or Tahsildar or Deputy Tahsildar as the case may be shall cause to be served on the person reputed to be in unauthorised occupation of land being the property of Government, a notice specifying the land so occupied and calling on him to show cause before a certain date why he should not be proceeded against under Section 5 or Section 6."

7. It seems to us clear from these provisions that the summary remedy for eviction which is provided for by Section 6 of the Act can be resorted to by the Government only against persons who are in unauthorised occupation of any land which is "the property of Government". In regard to property described in sub-sections (1) and (2) of Section 2, there can be no doubt, difficulty or dispute as to the title of the Government and, therefore, in respect of such property, the Government would be free to take recourse to the summary remedy of eviction provided for in Section 6. A person who occupies a part of a public road, street, bridge, the bed of the sea and the like, is in unauthorised occupation of property which is declared by Sec. 2 to be the property of the Government and, therefore, it is in public interest to evict him expeditiously, which can only be done by resorting to the summary remedy provided by the Act. But Section 6 (1) which confers the power of summary eviction on the Government limits that power to cases in which a person is in unauthorised occupation of a land "for which he is liable to pay assessment under Section 3." Section 3, in turn, refers to unauthorised occupation of any land "which is the property of Government". If there is a bona fide dispute regarding the title of the Government to any property, the Government cannot take a unilateral decision in its own favour that the property belongs to it, and on the basis of such decision take recourse to the summary remedy provided by Section 6 for evicting the person who is in possession of the property under a bona fide claim or title. In the instant

case, there is unquestionably a genuine dispute between the State Government and the respondents as to whether the three plots of land were the subject-matter of acquisition proceedings taken by the then Government of Hyderabad and whether the Osmania University, for whose benefit the plots are alleged to have been acquired, had lost title to the property by operation of the law of limitation. The suit filed by the University was dismissed on the ground of limitation, inter alia, since Nawab Habibuddin was found to have encroached on the property more than twelve years before the date of the suit and the University was not in possession of the property at any time within that period. Having failed in the suit, the University activated the Government to evict the Nawab and his transferees summarily, which seems to us impermissible. The respondents have a bona fide claim to litigate and they cannot be evicted save by the due process of law. The summary remedy prescribed by Section 6 is not the kind of legal process which is suited to an adjudication of complicated questions of title. That procedure is, therefore, not the due process of law for evicting the respondents.

8. The view of the Division Bench that the summary remedy provided for by S. 6 cannot be resorted to unless the alleged encroachment is of "a very recent origin", cannot be stretched too far. That was also the view taken by the learned single Judge himself in another case which is reported in *Mehrunnissa Begum v. State of A. P.*, (1970) 1 Andh LT 88 which was affirmed by a Division Bench (1971) 1 Andh LT 292: (AIR 1971 Andh Pra 382). It is not the duration, short or long, of encroachment that is conclusive of the question whether the summary remedy prescribed by the Act can be put into operation for evicting a person. What is relevant for the decision of that question is more the nature of the property on which the encroachment is alleged to have been committed and the consideration whether the claim of the occupant is bona fide. Facts which raise a bona fide dispute of title between the Government and the occupant must be adjudicated upon by the ordinary courts of law. The Government cannot decide such questions unilaterally in its own favour and evict any person summarily on the basis of such decision. But duration of occupation is relevant in the sense that a person who is in occupation of a property openly for an appreciable length of time can be

taken, prima facie, to have a bona fide claim to the property requiring an impartial adjudication according to the established procedure of law.

9. The conspectus of facts in the instant case justifies the view that the question as to the title to the three plots cannot appropriately be decided in a summary inquiry contemplated by Ss. 6 and 7 of the Act. The long possession of the respondents and their predecessor-in-title of these plots raises a genuine dispute between them and the Government on the question of title, remembering especially that the property, admittedly, belonged originally to the family of Nawab Habibuddin from whom the respondents claim to have purchased it. The question as to whether the title to the property came to be vested in the Government as a result of acquisition and the further question whether the Nawab encroached upon that property thereafter and perfected his title by adverse possession must be decided in a properly constituted suit. May be, that the Government may succeed in establishing its title to the property but, until that is done, the respondents cannot be evicted summarily.

10. For these reasons, we uphold the judgment of the Division Bench of the High Court and dismiss these appeals with costs.

11. We do not propose to pass any orders on Civil Misc. Petitions Nos. 18974, 18975, 18976, 18497, 18498 and 18499 of 1981 which have been filed for adding certain parties as respondents to these appeals. Those petitions involve the question of a will alleged to have been made by Nawab Habibuddin in favour of Entashamuddin alias Anwar Siddiqui and his elder brother. We cannot go into the validity of that will and other incidental questions in these appeals.

Appeals dismissed.

AIR 1982 SUPREME COURT 1085

(From : Calcutta)

V. D. TULZAPURKAR, R. S. PATHAK
AND A. N. SEN, JJ.

Civil Appeal No. 1553 (T) of 1973, D/-
13-4-1982.

Commissioner of Income-tax, West Bengal-III, Appellant v. M/s. Pigot Champar & Co., Respondent.

DZ/DZ/B679/82/SNV

Income-tax Act (11 of 1922), S. 25 (4) — Dissolution of old firm and constitution of new firm — It has to be determined on basis of documents executed by and between partners. (Partnership Act (1932), Ss. 40, 43 and 44).

The question whether there has been a dissolution of the firm and upon such dissolution a new firm has succeeded to the business of the old firm is a question which depends upon the intention of the parties to be gathered from the document or documents, if any, executed by and between the partners and other facts and surrounding circumstances of the case. Under Sec. 40 of the Partnership Act, a firm can be dissolved with the consent of all the partners or in accordance with the contract between the partners; under Section 43 a partnership at will can be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm and upon such notice being given the firm gets dissolved as from the date mentioned in the notice as the date of dissolution and if no date is so mentioned as from the date of the communication of the notice, while Sec. 44 contemplates dissolution of a firm by and under orders of the court in certain contingencies mentioned therein. It is quite conceivable that in cases of dissolution of the firm brought about by a notice under Sec. 43 or by an order of the court under Sec. 44 some of the erstwhile partners may take over the assets and liabilities and carry on the same business by constituting a new firm and even such cases would be cases of succession to the old business within the meaning of Sec. 25 (4) of the Income-tax Act. In this view, it cannot be said that upon a dissolution of a firm succession to the old business by another person would only arise if a solitary partner takes over assets and liabilities and carries on the business as a sole proprietor thereof or if some of the erstwhile partners along with some strangers take over the assets and liabilities of the old firm and carry on the business. (Para 9)

On an examination of the documents entered into from the commencement of the initial partnership the following facts emerged clearly: (a) that the initial partnership between partners was for a fixed term of six years and as such the same automatically stood dissolved under Section 42 (a) of the Partnership Act on the last day of the fixed term; (b) under the deed entered into on the last day of the term the partnership between the part-

ners in the firm on that day was in terms "dissolved by mutual consent as from the following date"; (c) that document expressly stated both in the recital portion and in the operative part that the firm had been dissolved by mutual consent (d) the continuing partners were given the sole right to collect all the assets of the dissolved firm and to issue, recover and give full receipts for all debts of that firm; (e) each of the parties to the deed released the other from all proceedings accounts, costs, claims and demands in respect of the dissolved firm; (f) the Tribunal found as a fact that the relevant account books clearly indicated that the old firm stood dissolved and its assets and liabilities were taken over by the new firm of the two continuing partners and (g) within three months another document was executed by and between the continuing partners recording the terms and conditions on which the continuing partners, to the exclusion of the retiring partner, were to carry on the business of the old firm with effect from the dissolution of the initial partnership.

Held that having regard to the facts and circumstances which emerge clearly on record that the old firm was dissolved on the day following the last date of the fixed term and it was the case of a new firm succeeding to the old business and therefore, the new firm was entitled to the relief claimed under Sec. 25 (4) of the Income-tax Act in respect of its income for the assessment year following the expiry of the fixed term. (Para 10)

Cases Referred: Chronological Para AIR 1953 SC 455 : 24 ITR 405 9

TULZAPURKAR, J.— This appeal at the instance of Commissioner of Income-tax and by a certificate granted by the Calcutta High Court raises the question whether the respondent-assessee is entitled to relief under Sec. 25 (4) of the Indian Income-tax Act, 1922 for the assessment year 1959-60 which in turn depends upon the proper answer to the question whether on the facts and circumstances of the case and on a proper construction of the Deed dated 30th March 1959 it is a case of mere reconstitution of the old firm or a new firm succeeding to the business of the old firm entitling the respondent-assessee to claim the relief?

2. The undisputed facts giving rise to the above question are these: M/s. Pigot Champan & Co. is a firm of foreign exchange brokers which had been operating in Calcutta for a very long time. There

is no dispute that the firm had been taxed on its business income under the Indian Income-tax Act, 1918 and that the other conditions laid down in Sec. 25 (4) of the 1922 Act for entitling an assessee to the relief under that provision are satisfied. The constitution of the firm had undergone several changes in the past; the firm was re-constituted for short periods and whenever any partner retired he gave up his claim to the partnership assets which vested in the continuing partners. A deed of partnership was executed by and between Rogers Haywood, Leonard Mark Blomestok, H. G. Ablitt and S. C. Roy on 18th May, 1953 which, after reciting the various deeds executed in the earlier years, provided inter alia:

(a) That the partnership should be continued for a term of 6 years from 1-4-1953 and shall expire on 31-3-1959;

(b) that Rogers Haywood would retire from the firm on 31-3-1957 but the partnership should be continued by the remaining partners until 31-3-1959;

(c) What would be the shares of the partners as varied from year to year including the shares of the remaining partners after Haywood's retirement;

(d) that goodwill of the firm was to belong to Haywood until his retirement; thereafter it was to devolve on the three continuing partners in equal shares and on the retirement of Blomestok it was to devolve on Ablitt and Roy in equal shares.

3. By a deed of variation dated 7-4-1955 one Leonard William Mclean was admitted as a partner of the firm for one year; by another deed of variation dated 30th April, 1956 Mclean was admitted as the partner for the rest of the term and the retirement of Haywood was postponed from 31-3-1957 to 31-3-1958 but it was provided that on such retirement the partnership was to be continued by the remaining 4 partners till 31-3-1959; the deed also provided that Blomestok would retire from the firm on 31-3-1959 and on such retirement the goodwill and the capital of the firm shall devolve absolutely on Ablitt and Roy and Mclean in certain shares set out therein.

4. Haywood retired on 31-3-1958 and Blomestok on 31-3-1959. On 30th March, 1959 a Deed was executed by and between Mclean, describing himself as the retiring partner, and Ablitt and Roy jointly describing themselves as continuing partners, whereby it was provided that the partnership business of M/s.

Pigot Champan & Co. subsisting between them shall be deemed to have been dissolved by mutual consent as from 1st April, 1959 and that thereafter the said business with its assets and goodwill shall belong to and be carried on by the continuing partners whose shares were defined. The retiring partner released all his claims to his share of goodwill and assets of the firm in favour of the continuing partners while the continuing partners in their turn absolved and indemnified the retiring partner from any liability of the firm. The business was then carried on by Ablitt and Roy on terms and conditions recorded in a Deed of Partnership executed by them on 29th June, 1959. This new deed of partnership dated 29th June, 1959 inter alia recited the following facts: (a) that by a deed dated 30th March, 1959 made between Mclean, Ablitt and Roy their partnership was mutually dissolved as from 1-4-1959, (b) that Ablitt and Roy shall remain partners under terms and conditions mentioned therein to the exclusion of any other document, (c) that the business shall be that of exchange brokers and (d) that the same shall be carried on under the name and style of M/s. Pigot Champan & Co.

5. For the assessment year 1959-60, for which the accounting year ended on 31-3-1959, the respondent-assessee filed a return of income declaring its total income of Rs. 1,80,300; the return was filed on 10-8-1959 but by a letter dated 21-8-1959 the assessee claimed relief under Sec. 25 (4) of the 1922 Act in respect of that income; it was claimed that by the deed dated 30th March, 1959 the firm of M/s. Pigot Champan & Co. (which had been assessed and had paid taxes under the 1918 Act and had been regularly assessed to income-tax thereafter) had been dissolved as from 1st April, 1959 and was succeeded by another firm of two partners Ablitt and Roy and as such relief under Sec. 25 (4) in respect of the assessment year 1959-60 was due to the respondent assessee. The Income-tax Officer, however, took the view that there was no dissolution of the firm and what had actually taken place on 1-4-1959 was merely a change in the constitution of the firm; according to him the entire assets and liabilities of the old partnership were taken over by the new firm as on 1-4-1959 and there was no cessation of the business within the meaning of Sec. 25 (4) of the 1922 Act. He, therefore, dismissed the assessee's claim for relief under S. 25 (4).

On appeal, the Appellate Assistant Commissioner agreed with the view taken by the Income-tax Officer and dismissed the appeal. On further appeal the Tribunal on a consideration of the various deeds of the partnership, deeds of variation and the deed dated 30th of March, 1959 held that the assessee firm must be regarded as having been dissolved under Sec. 40 of the Indian Partnership Act in terms of the deed dated 30-3-1959, that as the retiring partner had given up all claims to his share in the goodwill and assets of the firm and in turn had been indemnified with regard to the liabilities, there was no necessity for taking an account and striking a balance and since it was the case of the assessee firm succeeding to the business of the old firm which had been dissolved the assessee was entitled to relief under Sec. 25 (4) in respect of its income for the assessment year 1959-60 and in this view of the matter it allowed the appeal.

6. At the instance of the Commissioner of Income-tax the following question was referred to the High Court for its opinion:

"Whether in the facts and circumstances of the case and on a proper construction of the agreement dated 30th March, 1959 the Tribunal was right in upholding that the assessee firm was dissolved on 1-4-1959 and was entitled to relief under Sec. 25 (4) of the Indian Income-tax Act, 1922 in respect of its income for the Assessment year 1959-60?"

The High Court called for a supplementary statement of the case from the Tribunal directing the Tribunal to forward to the High Court a true copy of the new deed of partnership that was subsequently executed by Ablitt and Roy on 29th June, 1959 and on a consideration of the said deed together with the earlier documents that were on record the High Court upheld the view of the Tribunal and answered the question in favour of the respondent assessee. The Commissioner of Income-tax has come up in appeal challenging the view taken by the High Court.

7. Section 25 (4) of the 1922 Act under which relief has been granted by the Tribunal and by the High Court to the respondent-assessee runs thus:—

"Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939. (VII of 1939), carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded

in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the periods between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

8. Counsel for the Appellant pointed out that Sec. 25 (4) itself makes a distinction between a case of succession by another person upon a dissolution of the firm and a case where there is merely a change in the constitution of a partnership and according to him in order to get relief thereunder it is necessary to show that there has been a succession by another person and not merely a change in the constitution of the partnership. Counsel further pointed out that in the instant case the firm had been undergoing several changes in the past; that the firm was reconstituted for shorter periods, that whenever any partner retired he gave up his claims to the assets and goodwill which vested in the continuing partners and what happened as of 1st April, 1959 as evidenced by the deed dated 30th March, 1959 was a similar reconstitution of the same firm; according to him if on the earlier occasions there was no succession then the change in the firm as of 1st April, 1959 was also not a succession. He urged that the recitals as also the operative part of the deed dated 30th March, 1959 clearly contemplated that Ablitt and Roy were to carry on the firm's business from 1st April, 1959 as continuing partners, the goodwill and assets having devolved on them by the outgoing partner Mclean releasing his claims therein in their favour. He pointed out that a retiring partner releasing all his claims in the goodwill and assets of the firm in favour of the continuing partners and in turn getting himself indemnified by the continuing partners with regard to the liabilities of the firm were the normal things usually provided for whenever there was a reconstitution of the firm and would have no bearing on the aspect whether

there was a dissolution of the firm. Counsel, therefore, supported the view taken by the Income-tax Officer and Appellate Assistant Commissioner on the construction of the deed dated 30th March, 1959 and urged that what had actually taken place on 1-4-1959 was merely a change in the constitution of the firm and it was not a case of another person succeeding to the business of the old firm upon its dissolution. According to counsel when a partnership is dissolved and only one of the erstwhile partner takes over the business and carries it on as the proprietor thereof or upon dissolution some of the erstwhile partners take some outsiders as partners and carry on the business, those would be the cases where another person (entity) could be said to have succeeded to the business within the meaning of the Section 25 (4) but in the instant case after retirement of Mclean, the two erstwhile remaining partners, namely, Ablitt and Roy jointly described as continuing partners by the deed dated 30th March, 1959, took over the business and carried it on as from 1-4-1959 under the style of M/s. Pigot Champan & Co. at the same place and therefore it could not be said that it was a case of a dissolution of the erstwhile firm and succession to the old business by a new firm and as such both the Tribunal and the High Court were in error in granting relief under Section 25 (4) to the respondent-assessee.

9. We might mention that in support of the aforesaid contention, counsel for the appellant relied upon a few decided cases including a decision of this Court in Commr. of Income-tax v. A. W. Figgies & Company, (1953) 24 ITR 405: (AIR 1953 SC 455) but in our view it is unnecessary to discuss the facts of those cases and the conclusions reached therein because the principle is well settled that it is on examination of relevant documents and relevant facts and circumstances that the Court has to be satisfied in each case as to whether there has been a succession or a mere change in the constitution of the partnership. It cannot be disputed that 'dissolution' and 're-constitution' are two distinct legal concepts, for, a dissolution brings the partnership to an end while a reconstitution means the continuation of the partnership under altered circumstances but in our view in law there would be no difficulty in a dissolution of a firm being followed by the constitution of a new firm by some of the erstwhile

partners who may take over the assets and liabilities of the dissolved firm. In other words it is not possible to accept the contention of counsel for the appellant that upon a dissolution of a firm succession to the old business by another person would only arise if a solitary partner takes over assets and liabilities and carries on the business as a sole proprietor thereof or if some of the erstwhile partners along with some strangers take over the assets and liabilities of the old firm and carry on the business. The two instances mentioned by counsel for the appellant are undoubtedly clear cases of succession to the old business by another person or entity but succession to the old business contemplated under Section 25 (4) need not be and cannot be confined to the instances mentioned by counsel for the appellant. Under S. 40 of the Partnership Act, 1932 a firm can be dissolved with the consent of all the partners or in accordance with the contract between the partners; under S. 43 a partnership at will can be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm and upon such notice being given the firm gets dissolved as from the date mentioned in the notice as the date of dissolution and if no date is so mentioned as from the date of the communication of the notice, while S. 44 contemplates dissolution of a firm by and under orders of the court in certain contingencies mentioned therein. It is quite conceivable that in cases of dissolution of the firm brought about by a notice under S. 43 or by an order of the court under S. 44 some of the erstwhile partners may take over the assets and liabilities and carry on the same business by constituting a new firm and even such cases would be cases of succession to the old business within the meaning of S. 25 (4) of the 1922 Act. In our view the question whether there has been a dissolution of the firm and upon such dissolution a new firm has succeeded to the business of the old firm is a question which depends upon the intention of the parties to be gathered from the document or documents, if any, executed by and between the partners and other facts and surrounding circumstances of the case.

10. In the instant case, therefore, the question is whether there has been a dissolution of the old firm followed by the creation of a new firm which could be said to have succeeded to the business of the old firm. We have already summaris-

ed, while narrating the undisputed facts, the effect of the earlier documents commencing from the initial deed of partnership dated 18th May, 1953 right up to the Deed dated 30th of March, 1959 with which we are principally concerned. On an examination of these documents the following facts emerge clearly : (a) that the initial partnership between Haywood, Blumenstok, Ablitt and Roy under the deed dated 18th May, 1953 was for a fixed term of six years from 1-4-1953 and as such the same would automatically stand dissolved under S. 42 (a) of the Partnership Act on 31-3-1959; (b) under the deed dated 30th of March, 1959 the partnership between Mclean, Ablitt and Roy was in terms "dissolved by mutual consent as from 1st April, 1959"; (c) the document expressly states both in the recital portion and in the operative part (vide clauses 1 and 2) that the firm has been dissolved by mutual consent; (d) the continuing partners were given the sole right to collect all the assets of the dissolved firm and to issue, recover and give full receipts for all debts of that firm; (e) each of the parties to the deed released the other from all proceedings, accounts, costs, claims and demands in respect of the dissolved firm; (f) the Tribunal found as a fact that the relevant account books clearly indicated that the old firm stood dissolved and its assets and liabilities were taken over by the new firm of the two continuing partners and (g) within three months another document was executed on 29th June, 1959 by and between the continuing partners recording the terms and conditions on which the continuing partners, to the exclusion of the retiring partner, were to carry on the business of the old firm with effect from 1-4-1959. Having regard to these facts and circumstances which emerge clearly on record it seems to us that both the Tribunal as well as the High Court were right in coming to the conclusion that the old firm was dissolved on 1st April, 1959 and it was the case of a new firm succeeding to the old business and therefore, the respondent assessee was entitled to the relief claimed under S. 25 (4) of the 1922 Act in respect of its income for the Assessment Year, 1959-60.

In the result the appeal fails and is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 1090

(From : Gujarat)

V. D. TULZAPURKAR AND
AMARENDRA NATH SEN, JJ.

Civil Appeal No. 1869 of 1970, D/- 13-1-1982.

Patel Ambalal Gokalbhai, Appellant v. State of Gujarat and others, Respondents.

(A) Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act (16 of 1960), Pre. — Validity — Act having been included in Ninth Schedule of Constitution, its validity cannot be challenged on ground that it offends Arts. 14, 19 and 31. Decision of Gujarat High Court affirmed. (Constitution of India, Arts. 14, 19, 31 and 31B). (Para 1)

(B) Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act (36 of 1965), Pre. — Validity — Act cannot be challenged as violative of Arts. 14, 19 and 31 of Constitution in view of Art. 31A (1) (a). Decision of Gujarat High Court, Affirmed. (Constitution of India, Arts. 14, 19, 31 and 31A). (Para 1)

JUDGMENT :— In the writ petitions that were filed in the High Court both the Gujarat Amending Acts, namely Gujarat Act No. 16 of 1960 and Gujarat Act No. 36 of 1965, whereby the Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act No. 67 of 1948) was amended, were challenged and the validity thereof was challenged on the ground that the provisions thereof offended Articles 14, 19 and 31. The challenge has been negatived by the Gujarat High Court. In so far as Act No. 16 of 1960 is concerned the challenge has been negatived on the ground that it has been included in the Ninth Schedule of the Constitution and so far as Act No. 36 of 1965 is concerned the challenge has been negatived on the ground that it formed a chain in the agrarian reform and as such it was protected by Art. 31A (1) (a) and that the same was clarificatory in nature. We are satisfied with the reasons which have been given by the High Court upholding the validity of both the Acts and find no ground for interference. It is unnecessary to dilate on the reasons given by the High Court over again. The appeal is, therefore, dismissed with no order as to costs.

Appeal dismissed.

CZ/DZ/A877/82/JHS

AIR 1982 SUPREME COURT 1091

(From : AIR 1980 Delhi 145)

S. MURTAZA FAZAL ALI AND**A. VARADARAJAN, JJ.**Civil Appeal No. 1533 of 1980, D/-
16-4-1982.Baldev Sahai Bangia, Appellant v.
R. C. Bhasin, Respondent.

Delhi Rent Control Act (59 of 1958), S. 14 (1) (d) — Eviction — Members of the family — Tenant shifting to foreign country and leaving his mother, sister and brother in tenanted house — It cannot be said that they ceased to be members of family — Cannot be evicted on such ground. (Interpretation of Statutes — Word — Family). AIR 1980 Delhi 145, Reversed.

The tenant was living in the tenanted house with his father, mother, two sisters and a brother. Subsequently the tenant shifted permanently to Canada followed by his wife and children. While leaving for Canada the tenant had left his mother and brother in the house who were regularly paying rent to the landlord. The landlord filed an application for ejectment of the tenant on the ground of requirement and non-residence of the tenant under S. 14 (1) (d), (e). It was alleged by the landlord that with the exit of the tenant from the house it became vacant and his mother and brother who were left behind could not be treated as members of the family.

Held, that the tenant could not be evicted on such ground. The view that after the exit of the main tenant from India to Canada, neither the mother, nor the brother, nor the sister could be legally termed as a member of the family of the tenant was wrong. AIR 1980 Delhi 145, Reversed.

The word 'family' has to be given not a restricted but a wider meaning so as to include not only the head of the family but all members or descendants from the common ancestors who are actually living with the same head. A beneficial provision must be meaningfully construed so as to advance the object of the Act, and curing any lacuna or defect appearing in the same. Thus the term "family" must always be liberally and broadly construed so as to include near relations of the head of the family. Case law discussed.

(Paras 12, 17, 20, 27)

Cases Referred: Chronological Paras

(1979) 1 Rent LR 466: (1979) 1 Ren CJ	21
145 (Delhi)	21
AIR 1971 Delhi 151	22
(1963) 65 Pun LR 256	23
(1930) 143 LT 333: 46 TLR 411: 94 JP	24
210 Price v. Gould	24
(1870) 23 LT 303: LR 9 Eq 622: 39 LJ	24
Ch. 420 Snow v. Teed	24

Mr. S. K. Mehta, Advocate, for Appellant; Mr. Yogeshwar Prasad, Sr. Advocate, M/s. Ravinder Bana and Mrs. Rani Chhabra, Advocates with him, for Respondent.

FAZAL ALI, J.:— This appeal by special leave is directed against a judgment dated February 20, 1980 of the Delhi High Court decreeing the landlord's suit for ejectment of the tenant.

2. The facts giving rise to the present litigation are summarised in the judgments of the Rent Controller and the High Court and need not be repeated.

3. Shorn of details, the position seems to be that Baldev Singh took the premises on rent on May 12, 1961 at a monthly rental of Rs. 95/-. At the time when the tenancy started, the tenant was living in the tenanted house with his father, mother, two sisters and a brother. The tenant himself was at that time a bachelor but seems to have married subsequently. One of his sisters was married in this very house.

4. As it happened, in 1971 the tenant went to Canada followed by his wife and children. It is alleged that after having gone to Canada, the husband along with his wife took up some employment there. Admittedly, the tenant did not return to India after 1971. While leaving for Canada the tenant had left his mother and brother in the house who were regularly paying rent to the landlord. There is some controversy as to whether or not the mother and brother, who were left behind, were being supported by the tenant or were living on their own earnings or by the income of the property left by the tenant in India. Such a controversy, however, is of no consequence in deciding the question of law which arises for consideration in this case.

5. On Sept. 27, 1972 the landlord filed an application for ejectment of the tenant on the ground of bona fide requirement and non-residence of the tenant under clauses (d) and (e) of sub-sec. (1) of S. 14 of the Delhi Rent Control Act, 1958 (hereinafter referred to as the 'Act'). The fundamental plea taken by the landlord was that with the exit of

the tenant from the house it became vacant and his mother and brother who were left behind could not be treated as members of the family. Hence, in the eye of law the tenanted premises must be deemed to have fallen vacant...

6. The suit was resisted by the mother, brother and sister of the tenant who averred that even if the tenant along with his wife and children had shifted to Canada, the non-applicants were continuing to live in the tenanted premises and as they had been paying rent to the landlord regularly, who had been accepting the same, no question of the tenancy becoming vacant arose.

7. Thus, the entire case hinges on the interpretation of the word 'family' as also clauses (d) and (e) of S. 14 (1) of the Act. So far as cl. (e) is concerned, both the courts below found as a fact that the landlord was not able to prove his bona fide necessity. Therefore, as far as ground (e) is concerned, the same no longer survives in view of the findings of fact recorded by the courts below. The only question that remains to be considered is whether the landlord can bring his case for eviction within the ambit of cl. (d) of S. 14 (1) which may be extracted thus :

"14. (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any court or Controller in favour of the landlord against a tenant :

Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely:—

xx xx xx xx

(d) that the premises were let for use as a residence and neither the tenant nor any member of his family has been residing therein for a period of six months immediately before the date of the filing of the application for the recovery of possession thereof."

8. A close analysis of this provision would reveal that before the landlord can succeed, he must prove three essential ingredients—

(1) that the premises were let out for use as a residence,

(2) that the tenant after having taken the premises has ceased to reside, and

(3) that apart from the tenant no member of his family also has been residing

for a period of six months immediately before the date of the filing of the application for ejectment.

9. It is manifest that unless the afore-said conditions are satisfied the landlord cannot succeed in getting a decree for ejectment. In the instant case, while it is the admitted case of the parties that the tenant had shifted to Canada along with his wife and children, yet he had left his mother, brother and sister in the house, hence the second essential condition of cl. (d) continues to apply with full force.

10. The learned counsel for the appellant, however, submitted that the mother, brother and sister were undoubtedly living with the tenant and so long as they continued to reside in the tenanted premises, there could be no question of the premises falling vacant. To this, the counsel for the landlord countered that neither the mother, nor the brother nor the sister could in law be treated as members of the family of the tenant after he had himself shifted to a country outside India. Even though while he was living in Delhi, he was in Government service. Thus, it was argued that in the eye of law, the so-called family members would lose their status as members of the family of the tenant and would be pure trespassers or licensees or squatters.

11. While the suit of the landlord was dismissed by the Rent Controller, the Rent Control Tribunal allowed the appeal and directed eviction of the family members of the tenant under cl. (d) of S. 14 (1) of the Act. The family members of the tenant then went up in appeal to the High Court which also affirmed the findings of the Tribunal and upheld the order of eviction passed by it. The High Court was also of the view that after the exit of the main tenant from India to Canada, neither the mother, nor the brother, nor the sister could be legally termed as a member of the family of the tenant.

12. We have heard counsel for the parties and given our anxious consideration to all aspects of the matter and we feel that the High Court has taken a palpably wrong view of the law in regard to the interpretation of the term 'member of the family' as used in cl. (d) of S. 14 (1) of the Act. In coming to its decision, the High Court seems to have completely overlooked the dominant purpose and the main object of the Act which affords several intrinsic and ex-

trinsic evidence to show that the non-applicants were undoubtedly members of the family residing in the house and the migration of the main tenant to Canada would make no difference. The word 'family' has been defined in various legal dictionaries and several authorities of various courts and no court has ever held that mother or a brother or a sister who is living with the older member of the family would not constitute a family of the said member. Surely, it cannot be said by any stretch of imagination that when the tenant was living with his own mother in the house and after he migrated to Canada, he had severed all his connections with his mother so that she became an absolute stranger to the family. Such an interpretation is against our national heritage and, as we shall show, could never have been contemplated by the Act which has manifested its intention by virtue of a later amendment.

13. Coming now to the definitions, we find that in Words and Phrases (Permanent Edition — volume 16) at pp. 303-311 the word 'family' has been defined thus:

"The father, the mother, and the children ordinarily constitute a 'family'."

"The word 'family' embraces more than a husband and wife and includes children."

"A 'family' constitutes all who live in one house under one head."

"Father and mother of two illegitimate children, and children themselves, all living together under one roof, constituted a 'family.'" (pp. 303-304)

"The word 'family' in statute authorizing use of income for support of ward and 'family' is not restricted to those individuals to whom ward owes a legal duty of support, but is an expression of great flexibility and is liberally construed, and includes brothers and sisters in poor financial circumstances for whom insane ward, if competent, would make provision." (P. 311)

"The general or ordinarily accepted meaning of the word 'family', as used in Compensation Act, means a group, comprising immediate kindred, consisting of the parents and their children, whether actually living together or not."

(p. 343). (Emphasis ours)

14. Similarly, in Webster's Third New International Dictionary, the word 'family' is defined thus:

"Family — household including not only the servants but also the head of

the household and all persons in it related to him by blood or marriage..... a group of persons of common ancestry." (p. 821) (Emphasis supplied)

15. In Chambers Twentieth Century Dictionary (New Edition 1972), the word 'Family' has been defined thus:

"Family — the household, or all those who live in one house (as parents, children, servants: parents and their children)"

16. In Concise Oxford Dictionary (Sixth Edition), the same definition appears to have been given of the word 'family' which may be extracted thus:

"Family — Members of a household, parents, children, servants, etc. set of parents and children, or of relations, living together or not; persons children. All descendants of common ancestor."

17. A conspectus of the connotation of the term 'family' which emerges from a reference to the aforesaid dictionaries clearly shows that the word 'family' has to be given not a restricted but a wider meaning so as to include not only the head of the family but all members or descendants from the common ancestors who are actually living with the same head. More particularly, in our country, blood relations do not evaporate merely because a member of the family — the father, the brother or the son — leaves his household and goes out for some time. Furthermore, in our opinion, the legislature has advisedly used the term that any member of the family residing therein for a period of six months immediately before the date of the filing of the action would be treated as a tenant. The stress is not so much on the actual presence of the tenant as on the fact that the members of the family actually live and reside in the tenanted premises. In fact, it seems to us that cl. (d) of S. 14 (1) of the Act is a special concession given to the landlord to obtain possession only where the tenanted premises have been completely vacated by the tenant if he ceased to exercise any control over the property either through himself or through his blood relations.

18. In fact, a controversy arose as to what would happen to the members of the family of the tenant if while residing in the premises he dies and in order to resolve this anomaly the legislature immediately stepped in to amend certain provisions of the Act and defined

the actual connotation of the term 'members of the family'. By virtue of Act 18 of 1976 the definition of "Tenant" was inserted so as to include various categories of persons. Sub-cl. (iii) of cl. (1) of S. 2 of the Act actually mentions the persons who could be regarded as tenant even if main tenant dies. This sub-clause may be extracted thus:—

"(1) "tenant" means any person by whom or on whose account or behalf the rent of any premises is, or, but for a special contract, would be, payable, and includes—

(i) a sub-tenant;
(ii) any person continuing in possession after the termination of his tenancy; and

(iii) in the event of the death of the person continuing in possession after the termination of his tenancy, subject to the order of succession and conditions specified, respectively, in Explanation I and Explanation II to this clause, such of the aforesaid person's—

(a) spouse,
(b) son or daughter or, where there are both son and daughter, both of them,
(c) parents,
(d) daughter-in-law, being the widow of his predeceased son, as had been ordinarily living in the premises with such person as a member or members of his family up to the date of his death, but does not include,....."

19. It would appear that parents were expressly included in sub-cl. (iii). It has also been provided that apart from the heirs specified in clauses (a) to (d) (extracted above), even those persons who had been ordinarily living in the premises with the tenant would be treated as members of the family. The statement of objects and reasons for this amendment may be extracted thus:—

"There has been a persistent demand for amendments to the Delhi Rent Control Act, 1953 with a view to conferring a right of tenancy on certain heirs/successors of a deceased statutory tenant so that they may be protected from eviction by landlords and also for simplifying the procedure for eviction of tenants in case the landlord requires the premises bona fide for his personal occupation. Further, Government decided on the 9th September, 1975 that a person who owns his own house in his place of work should vacate the Government accommodation allotted to him before the 31st Dec. 1975. Government considered that in the circumstances, the Act required to be amended urgently."

20. If this was the intention of the legislature then clause (d) of S. 14 (1) of the Act could not be interpreted in a manner so as to defeat the very object of the Act. It is well settled that a beneficial provision must be meaningfully construed so as to advance the object of the Act, and curing any lacuna or defect appearing in the same. There are abundant authorities to show that the term "family" must always be liberally and broadly construed so as to include near relations of the head of the family.

21. In *Hira Lal v. Banarsi Dass* (1979) 1 Rent LR 466 (Delhi) even the learned Judge who decided that case had observed at page 472 that the term "members of the family" on the facts and circumstances of the case should not be given a narrow construction.

22. In *Govind Dass v. Kuldip Singh*, AIR 1971 Delhi 151, a Division Bench of Delhi High Court consisting of H. R. Khanna, C. J. (as he then was) and Prakash Narain, J. while recognising the necessity of giving a wide interpretation to the word "family" observed as follows (at p. 153):—

"I hold that in the section now under consideration the word "family" includes brothers and sisters of the deceased living with her at the time of her death. I think that that meaning is required by the ordinary acceptance of the word in this connection and that the legislature has used the word "family" to introduce a flexible and wide term."

23. In *Mrs. G. V. Shukla v. Shri Prabh Ram Sukhram Dass Ojha*, (1963) 65 Pun LR 256 Mahajan, J. (as he then was) observed as follows:—

"Therefore, it must be held that the word 'family' is capable of wider interpretation, but that interpretation must have relation to the existing facts and circumstances proved on the record in each case."

24. Even as far back as 1930, Wright, J. In *Price v. Gould*, (1930) 143 LT 333 (a King's Bench decision) had clearly held that the word "family" included brothers and sisters and in this connection observed as follows:—

"I find as a fact that the brothers and sisters were residing with the deceased at the time of her death..... It has been laid down that the primary meaning of the word "family" is children, but that primary meaning is clearly susceptible of wider interpretation, because the cases decide that the exact scope of the word must depend on the context and

the other provisions of the will or deed in view of the surrounding circumstances."

.....
 "Thus, in *Snow v. Teed*, (1870-23 LT 303; LR 9 Eg 622) it was held that the word "family" could be extended beyond not merely children but even beyond the statutory next of kin."

25. In view, however, of the very clear and plain language of cl. (d) of S. 14 (1) of the Act itself, we do not want to burden this judgment by multiplying authorities.

26. On a point of fact, we might mention that the Rent Controller had given a clear finding that the mother, younger brother (Davinder Kumar Bangia) and sister (Vijay Lakshmi) were undoubtedly residing in the disputed premises along with the main tenant and continued to reside there even on the date when the action for ejectment was brought.

27. In these circumstances, we are satisfied that the view taken by the High Court is legally erroneous and cannot be supported. The landlord has miserably failed to prove the essential ingredients of clause (d) of Section 14 (1) of the Act so as to entitle him to evict the members of the family of the main tenant.

28. We, therefore, allow this appeal, set aside the judgment and order of the High Court and dismiss the plaintiff's action for ejectment and restore the judgment of the Rent Controller. In the peculiar circumstances of the case, there will be no order as to cost.

Appeal allowed.

AIR 1982 SUPREME COURT 1095

(From : Delhi)

Y. V. CHANDRACHUD, C. J. AND

A. VARADARAJAN, J.

Criminal Appeal No. 712 of 1979, D/- 15-9-1981.

Paramjit Singh, Appellant v. The Municipal Corporation of Delhi and another, Respondents.

Prevention of Food Adulteration Act (37 of 1954), Ss. 2 (i) (f) (as stood prior to 1976 amendment), 7 (1) and 16 — Sen-

EZ/EZ/B854/82/SMA/DVT-H

tence — Quantum — Broken cashewnut found insect infested to 6.93 per cent only — Occurrence taking 13 years before — In view of then existing legal trend accused released on probation.

Where the sample of broken cashewnut taken from the shop of the accused on 13-11-1968 was found to be "insect infested" to the extent of 6.93% it was held that the infestation of insects was not of such an extent as to necessitate the passing of a sentence of imprisonment upon the accused. The offence was committed as long back as in Nov. 1968 and nearly thirteen years have gone by since then. In 1968, when the offence was committed the legislature had prescribed a minimum sentence but the courts were allowed the discretion to impose either a sentence of imprisonment or a sentence of fine. Not only that, but courts had then the power, in appropriate cases, to release an offender on probation. Taking these aspects of the matter into consideration, the accused held, should be released on probation of good conduct. Decision of Delhi High Court modified on question of sentence. (Para 4)

Cases Referred: Chronological Paras

AIR 1980 SC 174: 1980 Cri LJ 216	3
AIR 1976 SC 394: (1976) 2 SCR 1: 1976 Cri LJ 336	2

CHANDRACHUD, C. J.:— On Nov. 13, 1968 a sample of broken cashewnut was taken from the shop of the appellant Paramjit Singh. The sample was analysed three days later. The report of the public analyst dated November 21, 1981, shows that the sample was 'insect infested' to the extent of 6.93 per cent. On these facts the appellant was tried for an offence under S. 7 (1) read with S. 16 of the Prevention of Food Adulteration Act, 1954 ("The Act"). The trial Court by its judgment dated Sept. 25, 1972, acquitted the appellant but in appeal the High Court of Delhi by its judgment dated Oct. 11, 1979 convicted the appellant and sentenced him to suffer rigorous imprisonment for a period of six months and to pay a fine of Rs. 2,000. Being aggrieved by that judgment, the appellant has filed this appeal by special leave.

2. Section 2 (ia) (f) of the Act provides that an article of food shall be deemed to be adulterated "if the article consists wholly or in part of any filthy, putrid, rotten, decomposed or diseased animal or vegetable substance or is in-

sect-infested or is otherwise unfit for human consumption". Mr. V. S. Desai who appears on behalf of the appellant contends that there is no evidence in this case to show that the presence in insects in the cashewnuts was of such an order or to such an extent that by reason thereof, the cashewnuts could be said to be unfit for human consumption. He urges that the words 'insect infested' cannot be understood to mean merely 'that the presence of insects was found in the article of food. The word 'infested', according to the learned counsel, connotes the presence of insects of a magnitude or extent which makes the article unfit for human consumption. In support of this submission reliance is placed on a two-Judge Bench judgment of this court in *Municipal Corporation of Delhi v. Kacheroo Mal*, (1976) 2 SCR 1: (AIR 1976 SC 394).

3. Mr. Prem Malhotra who appears on behalf of the Municipal Corporation of Delhi has, on the other hand drawn our attention to another judgment of this court in *Municipal Corporation of Delhi v. Ram Swarup*, AIR 1980 SC 174, which was rendered by a three-Judge Bench. The learned Judges, in that case, expressed their "reservations about the correctness" of the decision on which Mr. Desai relies, but they distinguished it,

4. In the ordinary course, we would have referred this matter to a larger Bench in order that the true legal position may be pronounced so as to avoid doubt in a matter which arises frequently for consideration. In the circumstances of this case, however, we do not propose to adopt that course. The offence was committed as long back as in Nov. 1968 and nearly thirteen years have gone by since then. The infestation of insects was not of such an extent as to necessitate the passing of a sentence of imprisonment upon the appellant. In 1968, when the offence was committed the legislature had prescribed a minimum sentence but the courts were allowed the discretion to impose either a sentence of imprisonment or a sentence of fine. Not only that, but courts had then the power, in appropriate cases, to release an offender on probation. Taking these aspects of the matter into consideration, we are of the view that the appellant should be released on probation of good conduct. Accordingly, while confirming the conviction of the appellant we set aside the sentence imposed upon him on his executing a bond

of good behaviour for a period of one year in the sum of Rs. 2,000.

Order accordingly.

AIR 1982 SUPREME COURT 1096

(From : Allahabad)

S. MURTAZA FAZAL ALI, D. A. DESAI
AND A. VARADARAJAN, JJ.

Writ Petn. No. 5064 of 1981, D/- 12-1-1982.

Mohd. Salim Khan, Petitioner v. State of U. P., Respondent.

Criminal P. C. (2 of 1974), S. 167 — No charge-sheet submitted for 3 years — Accused in jail custody — Direction given that accused be released on bail on furnishing personal bond. (Para 1)

FAZAL ALI, J.:— In this writ petition it appears that the petitioner was arrested between the night of 29th and 30th Nov. 1978 and since then he has been in detention although it is alleged by the other side that there are several serious cases pending against him and a list was also given but Mr. Bhatt was directed to produce a single case in which any charge-sheet was submitted against him and despite sufficient opportunity having been given to him he has not been able to produce such record. In these circumstances, therefore, we are left with no alternative but to release the petitioner from jail custody. We are constrained to observe that as the liberty of the subject was involved in this case it is extremely regrettable that the State should act in such a casual or cavalier manner and was even unable to produce any evidence or document to show why the petitioner was detained without trial for a period of about 3 years. We may also point out that the position becomes still worse when Mr. Bhatt informs that some of the cases against the petitioner were tried and he was acquitted. In these circumstances, we direct that the petitioner be released on bail on furnishing a personal bond of Rs. 500/- before the Jail Superintendent who will forward the same to the Magistrate concerned. Let a copy of this order be sent to the Secretary (Home) of the State Government. This order covers all the cases which may be pending against the petitioner.

Order accordingly.

CZ/DZ/A879/82/JHS

AIR 1982 SUPREME COURT 1097

(From : Bombay)*

**S. MURTAZA FAZAL ALI, A. P. SEN
AND E. S. VENKATARAMIAH, JJ.**

Civil Appeal No. 1843 of 1981, D/- 21-4-1982.

O. N. Bhatnagar, Appellant v. Smt. Rukibai Narsindas and others, Respondents.

(A) Maharashtra Co-operative Societies Act (24 of 1961), S. 91 (1) — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 28 (1) — Harmonious construction — Absence of jural relationship of landlord and tenant between parties — Proceedings u/s. 91 (1) not barred by S. 28 (1).

The two Acts can be best harmonised by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Co-operative Act, should apply. But where the parties admittedly do not stand in the jural relationship of landlord and tenant, the dispute would be governed by S. 91 (1) of the Co-operative Act. (Para 20)

The two enactments deal with two distinct and separate fields and therefore the non obstante clause in S. 91 (1) of the Co-operative Act and that in S. 28 of the Rent Act operate on two different planes. The two legislations pertain to different topics of legislation. Sec. 28 of the Rent Act proceeds on the basis that exclusive jurisdiction is conferred on certain courts to decide all questions or claims under that Act as to parties between whom there is or was a relationship of landlord and tenant. It does not invest those courts with exclusive power to try questions of title, such as between the rightful owner and a trespasser or a licensee, for such questions do not arise under the Act. If, therefore, plaintiff in the plaint does not admit a relationship which would attract any of the provisions of the Rent Act on which the exclusive jurisdiction given in S. 28 depends, the defendant cannot by his plea force the plaintiff to go to a forum where on averments the claim does not lie. (Para 8)

Where the agreement of leave and license was duly revoked by the member by the notice D/- 31-3-1965, the occupant was nothing but a rank trespasser and he could plead bar of S. 28 (1) to the

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maintainability of proceedings u/s. 91 (1) by the member for possession. (Para 10)

(B) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) (as amended by Mah. Act 17 of 1973), Ss. 5 (4A), 15A and 28 — Maharashtra Co-operative Societies Act (24 of 1961), S. 91 — Effect of Amendment Act — Person in occupation of premises under subsisting licence as on 1-2-1973 — Dispute between licensor and licensee for possession — It falls outside purview of S. 91 (1).

As a result of the introduction of Section 15A and S. 5 (4A) of the Rent Act by Maharashtra Act 17 of 1973, the licensee of any premises or any part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Act, who was in occupation of such premises under a subsisting licence as on Feb. 1, 1973, is by a legal fiction, deemed to be a tenant and thus has the protection of the Rent Act. In such a case, the dispute between a licensor and a licensee relating to possession of the premises of a flat would attract Sec. 28 read with Ss. 15A and 5 (4A) of the Rent Act and fall outside the purview of the Registrar's jurisdiction to adjudicate upon such dispute under S. 91 (1) of the Co-operative Act. (Paras 12, 13)

(C) Maharashtra Co-operative Societies Act, 1960 (21 of 1961), S. 94 — Order allowing transposition of Society as co-disputant — Legality.

Dispute by member flat-owner for possession against appellant licensee after revocation of license — Application by Society for transposition as co-disputant allowed by Tribunal — Writ petition challenging such order dismissed — Award in favour of member subsequently — Legality or propriety of order allowing transposition, held, not open to question in special leave appeal against decision of High Court upholding award — Order, held, was both eminent and just and was necessary for doing complete justice between parties — Appellant who was a rank trespasser had no equity in his favour. (Para 14)

(D) Maharashtra Co-operative Societies Act (24 of 1961), S. 91 (1) — "Touching the business of the Society" — Tenant Co-partnership type Housing Society — Initiation of proceedings for removal of trespasser is part of its business.

Where the society is a tenant co-partnership type housing society formed with the object of providing residential

accommodation to its co-partner tenant members, it logically follows that whatever the society does in the normal course of its activities such as by initiating proceedings for removing an act of trespass by a stranger, from a flat allotted to one of its members, cannot but be part of its business. It is as much the concern of the society formed with the object of providing residential accommodation to its members, which normally is its business, to ensure that the flats are in occupation of its members, in accordance with the bye-laws framed by it, rather than of a person in unauthorised occupation, as it is the concern of the member, who lets it out to another under an agreement of leave and licence and wants to secure possession of the premises for his own use after the termination of the licence. It must, therefore, follow that a claim by the society together with such member for ejectment of a person who was permitted to occupy having become a nominal member thereof, upon revocation of licence, is a dispute falling within the purview of S. 91 (1) of the Act. AIR 1972 SC 1893 and AIR 1969 SC 1320, Distinguished.

(Para 19)

Cases Referred : Chronological Paras

AIR 1972 SC 1893 : (1973) 1 SCR 53 21, 22
AIR 1969 SC 1320 : (1969) 1 SCR 887
17, 18, 19, 20

M/s. H. H. Advani, P. R. Ramasesh and Mr. Manu Iyanger, Advocates, for Appellant; Mr. S. N. Kacker, Sr. Advocate, M/s. V. K. Panwani and Girish Chandra, Advocates with him, for Respondents.

SEN, J.:— This appeal by special leave directed against the judgment of the Bombay High Court dated April 21, 1981 raises a question of some importance. The question is whether a claim for ejectment of an occupant of a flat by a housing co-operative society, who had been let into possession of the premises under an agreement of leave and licence executed between him and a member of the society, by virtue of his being a nominal member thereof, is a 'dispute touching the business of the society' within the meaning of sub-s. (1) of S. 91 of the Maharashtra Co-operative Societies Act, 1960 (for short 'the Act').

2. The material facts giving rise to this appeal are as follows. The respondent No. 2 herein, Shyam Co-operative Housing Society Limited is constituted under the provisions of the Maharashtra Co-operative Societies Act, 1960 as a tenant co-partnership type housing

society to which Regulations in Form-A apply viz., Regulations relating to tenancies to be granted by the society to members in respect of houses held by the society. It owns and manages two housing colonies known as 'Shyam Niwas' and 'Navik Niwas' at Warden Road, Bombay. The society continues to be governed by Regulations in Form A ever since they were adopted by it after approval by the Registrar of Co-operative Societies in 1950. It appears that in 1954 the Directors passed a resolution for the introduction of Regulations in Form-B but it was never implemented. The respondent No. 1 Rukibai N. Bhavnani is a co-partner tenant member of flat No. 52 in building No. 5-A in the housing colony known as 'Shyam Niwas' situate at Warden Road, Bombay. The respondent No. 1 inducted the appellant in flat No. 52 under an agreement of leave and licence dated Nov. 28, 1961. The bye-laws of the society provide that no member can part with his possession of the flat under an agreement of leave and licence to another except with the approval of the society and unless such licensee becomes a nominal member thereof. The respondent No. 1 and the appellant accordingly applied to the society on December 8, 1961 for accepting the appellant to be a nominal member. The respondent No. 2 society passed a resolution No. 90 on December 15, 1961 accepting the appellant as a nominal member. The leave and licence agreement executed by the respondent No. 1 was renewed from time to time and the last agreement was executed on Jan. 10, 1965, the term of which was to expire on Feb. 28, 1965. By her notice dated March 31, 1965 the respondent No. 1 called upon the appellant to vacate the premises as his occupation of the premises had become unlawful after termination of the licence. The appellant failed to comply with the demand and has remained in unauthorised occupation of the flat for all these years.

3. After termination of the agreement, in May 1965, the respondent No. 1 Smt. Rukibai N. Bhavnani claiming to be a co-partner tenant member of the society and as such holder of flat No. 52, brought proceedings against the appellant before the District Deputy Registrar Co-operative Societies, Bombay under S. 91 (1) of the Act for his eviction and for recovery of arrears of compensation and mesne profits, impleading the society as opponent No. 3. On receipt of the claim under S. 91 (1) the Assistant Registrar, Co-operative Societies issued notice to

the appellant for the purpose of satisfying himself that a dispute under that section existed. The appellant however did not appear, before the Assistant Registrar who was seized with the matter but instead filed an application before the Court of Small Causes, Bombay for fixing standard rent of the flat in dispute. These proceedings were stayed pending adjudication of the dispute by the Assistant Registrar. The Assistant Registrar in the meanwhile proceeded with the inquiry and after holding that such a dispute exists he referred the case to the Registrar's nominee for adjudication. The appellant did not challenge the decision of the Assistant Registrar.

4. Before the Registrar's nominee the appellant filed his written statements and thereafter evidence of the parties was recorded. It appears that when the proceedings before the nominee were about to end he returned the papers to the Registrar as he did not want to proceed further in the matter. When the Registrar's nominee returned the papers, the Registrar assigned the case to a retired District Judge as an Officer on Special Duty to adjudicate upon the dispute under S. 91 of the Act, as by then the old system of such adjudication by the Registrar's nominees had been replaced by the appointment of Officers on Special Duty. Before the Officer on Special Duty the appellant made a demand for a de novo trial which was granted. Again, the evidence of both the parties was recorded and the matter reached the stage of argument but in the meanwhile, in April, 1970, the appellant brought a suit in the Court of Small Causes, Bombay for a declaration that he was a tenant of respondent No. 3 in respect of the flat in dispute and obtained a temporary injunction restraining respondent No. 1 from proceeding with her case before the Officer on Special Duty. Thus, the proceedings before the Officer on Special Duty remained stayed till April, 1972, when the suit filed by the appellant in the Court of Small Causes, Bombay was dismissed both on merits as well as on the ground that it was barred by limitation.

5. After the dismissal of the suit brought by the appellant, the proceedings before the Officer on Special Duty were revived in 1972. Meanwhile, the case had been assigned to another Officer on Special Duty, a retired Presidency Magistrate, for adjudication. Before him the appellant again demanded a de novo trial

which was granted and therefore evidence, had to be recorded afresh. During the stage of evidence, respondent No. 2 applied for and obtained leave to be transposed as a "disputant" as the Bombay High Court took the view that unless the society was a disputant the Registrar would have no jurisdiction to proceed under S. 91 (1) of the Act. The Officer on Special Duty by his order dated August 27, 1973 rejected the application for transposition made by respondent No. 2. Thereupon, respondent No. 2 preferred a revision before the Maharashtra Co-operative Societies Tribunal which by its order dated February 8, 1974 allowed its application for transposition as a co-disputant. The appellant tried to assail the order of the Tribunal by a writ petition but a Division Bench of the High Court by its judgment dated January 9, 1976 declined to interfere. By this time the system of Officers on Special Duty was again replaced, now by the setting up of Co-operative Courts. After the dismissal of the writ petition, the proceedings initiated by respondent No. 1 were assigned to a Judge of the Co-operative Court, Maharashtra. Before him the original plaint was amended making necessary averments with respondent No. 2 as a co-disputant. Again the appellant asked for a de novo trial, but in view of the provisions of S. 91-A (4) his application was rejected. Respondent No. 1 was however re-summoned for further cross-examination and thereafter the appellant's evidence was recorded. In August, 1977 there was a change of the Judge of the Co-operative Court and the appellant repeated his prayer for a de novo trial but this application of his was also rejected. The learned Judge of the Co-operative Court by his judgment dated April 28, 1978, made an award against the appellant for possession of the flat in dispute and for arrears of rent and mesne profits amounting to Rs. 30,000. Against the award the appellant filed an appeal before the Co-operative Appellate Court but it was dismissed in January, 1979. Thereafter the appellant filed a writ petition in the High Court in February, 1979 and it was dismissed in March, 1981 by a learned single Judge. The appellant unsuccessfully preferred a Letters Patent Appeal which was dismissed by a Division Bench on April 21, 1981.

6. There are three questions to be determined in the appeal. They are: (1) Whether having regard to the fact that the parties stood in the relationship of landlord and tenant in respect of flat No.

52, the remedy of the respondent No. 1 lay by way of a suit for eviction before the Court of Small Causes, Bombay and not by a reference to the Registrar under S. 91 (1) of the Act? It is urged that the agreement of leave and licence was merely a colourable transaction for what in reality, was a lease and therefore the appellant was entitled to the protection from eviction under S. 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'the Rent Act') which is a special law dealing with the relationship of landlord and tenant and therefore the forum for trial is the Court of Small Causes which is a court of exclusive jurisdiction over such matters. It is said that the non obstante clause in S. 28 of that Act has an overriding effect over the non obstante clause in S. 91 (1) of the Act. (2) Whether the respondent No. 2-society had any locus standi to make an application for transposition, even assuming that the appellant was not a tenant but a licensee: It is urged that the appellant was entitled to question the legality and propriety of the order of transposition made in revision by the Maharashtra State Co-operative Tribunal permitting the society to be impleaded as a co-disputant so as to bring the dispute within the purview of S. 91 (1) of the Act. It is said that the respondent No. 2-society without first terminating the nominal membership of the appellant could not make a claim for his eviction from the flat in question; (3) Whether a claim for ejectment of an occupant of a flat by a housing co-operative society having been let into possession of the premises under an agreement of leave and licence executed between him and a member of the society by virtue of his being a nominal member thereof, is a 'dispute touching the business of the society' within the meaning of S. 91 (1) of the Act? We proceed to deal with these questions in turn.

7. The statutory provisions bearing upon these questions are set out below. The relevant provision of sub-sec. (1) of S. 91 of the Act, prior to its amendment, provides:

"91 (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the..... business of a society, shall be referred by any of the parties to the dispute..... to the Registrar, if both the parties thereto are one or other of the following:

(a) a Society.....

(b) a member, past member or a person claiming through a member....."

Section 91 (2) of the Act lays down that when any question arises whether for the purpose of sub-sec. (1) any matter referred to for decision is a dispute or not, the question shall be considered by the Registrar whose decision shall be final. The Registrar is, therefore, required to decide as a preliminary issue the question whether the dispute is of the kind as between the parties in sub-sec. (1). Unless he finds that the dispute falls within S. 91 (1) of the Act he will have no jurisdiction to decide it. It also attaches finality to the decision of the Registrar on the preliminary issue. Section 91 (3) states that save as otherwise provided under S. 91 (3) of the Act, no civil Court shall have jurisdiction to entertain any suit or other proceeding in respect of any dispute referred to in sub-sec. (1).

Section 28 (1) of the Rent Act insofar as material, reads:

"28 (1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction

(a) in Greater Bombay, the Court of Small Causes, Bombay,

(aa) xx xx xx

(b) xx xx xx

shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this part apply.....and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and.....no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question."

8. The two enactments deal with two distinct and separate fields and therefore the non obstante clause in S. 91 (1) of the Act and that in S. 28 of the Rent Act operate on two different planes. The two legislations pertain to different topics of legislation. It will be noticed that S. 28 of the Rent Act proceeds on the basis that exclusive jurisdiction is conferred on certain courts to decide all questions or claims under that Act as to parties between whom there is or was a relationship of landlord and tenant. It does not invest those courts with exclusive power to try questions of title, such as between the rightful owner and a trespasser or a licensee, for such questions do not arise under the Act. The appellant having rais-

ed a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by the respondent No. 1 under S. 91 (1) of the Act and those allegations must be taken to be true. The respondent No. 1 unequivocally asserts that the parties stood in the relation of licensor and licensee and that fact is clearly borne out by the terms of the agreement of leave and licence as between the parties. The burden was on the appellant to establish that he had the status of a "tenant" within the meaning of S. 5 (11) of the Rent Act, as it then stood, and that burden he has failed to discharge. If, therefore, plaintiff in the plaint does not admit a relationship which would attract any of the provisions of the Act on which the exclusive jurisdiction given in S. 28 depends, the defendant cannot by his plea force the plaintiff to go to a forum whether (where?) on averments the claim does not lie.

9. In our opinion, there is a felt need at the very outset to displace the appellant's apprehensions that the effect of upholding the judgment of the High Court would be to throw all licensees of residential flats in multi-storeyed buildings belonging to co-operative housing societies without any protection. The apprehensions, if we may say so, appear to be wholly unfounded. The Legislature was fully aware of the acute paucity of housing accommodation in the metropolitan city of Greater Bombay and other urban areas in the State, and also the fact that lessors of ownership flats were adopting a device of inducting tenants under the garb of an agreement of leave and licence which left the licensee with no protection. The Legislature therefore stepped in and by Maharashtra Act 17 of 1973 the following provisions were inserted in the Rent Act. Sub-sec. (1) of S. 15A of the Rent Act, as introduced now, provides :

"15A (1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract, where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purposes of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) xx xx xx".

The term "licensee" as defined in S. 5 (4A), insofar as material, reads:—

"5. In this Act unless there is anything repugnant to the subject or context—

(4A) "licensee", in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge; and includes any person in such occupation of any premises or part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Maharashtra Co-operative Societies Act, 1960; but does not include a paying guest, a member of a family residing together, a person in the service or employment of the licensor etc..... and the expressions "licence", "licensor" and "premises given on licence" shall be construed accordingly."

It is clear upon the terms of these sections that the appellant is not entitled to the protection of S. 15A of the Rent Act. The Legislature in its wisdom has drawn a line at February 1, 1973 and laid down the condition that a licensee in occupation under a subsisting licence as on that date shall be deemed to be a tenant. The sine qua non for the applicability of Section 15A of the Rent Act is that a licensee must be in occupation as on February 1, 1973 under a subsisting licence. It is not disputed that the appellant does not answer that description since the agreement of leave and licence in his favour admittedly stood terminated by the notice of the respondent No. 1 dated March 31, 1965. That being so, the appellant is nothing but a rank trespasser and is not entitled to the protection of S. 15A of the Rent Act and cannot therefore plead the bar of S. 28 (1) thereof.

10. As a result of the introduction of S. 15A and S. 5 (4A) of the Rent Act by Maharashtra Act 17 of 1973, the licensee of any premises or any part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Act, who was in occupation of such premises under a subsisting licence as on February 1, 1973, is by a legal fiction, deemed to be a tenant and thus has the protection of the Rent Act. In such a case, the dispute between a licensor and a licensee relating to possession of the premises of a flat would attract S. 28 read with Sections 15A and 5 (4A) of the Rent Act and fall outside the purview of the Registrar's jurisdiction to adjudicate upon such dispute under S. 91 (1) of the Act. Once

this aspect is kept in view, there need be no apprehension as expressed by learned counsel for the appellant that the effect of upholding the judgment of the High Court would be to throw all licensees of residential flats in multi-storeyed buildings belonging to co-operative housing societies without any protection.

11. It would be convenient to deal with the first two questions together. The submission that the appellant was inducted as a tenant under the agreement of leave and licence is wholly misconceived. The distinction between a lease and a licence is well-known. A bare reading of the agreement of leave and licence is clearly indicative of the fact that the appellant was a licensee. Admittedly, his occupation of the flat was not as a tenant but as a licensee. That apart, the appellant brought a suit before the Court of Small Causes seeking a declaration that he was a tenant duly protected by the Rent Act and the agreement of leave and licence was only a colourable transaction. The suit was heard on merits and was dismissed by the Court of Small Causes in July, 1972. Aggrieved by that decision, the appellant preferred an appeal before the Appellate Bench of the Small Causes Court but that appeal also was dismissed. The question whether or not the appellant was a licensee of the flat or a tenant thereof was directly and substantially in issue between the parties in that suit. The finding that he was not a tenant but had only the status of a licensee operates as *res judicata* between the parties. The appellant having failed in his suit for declaration of his alleged status of a tenant brought in the Court of Small Causes cannot be permitted to re-agitate the same question in these proceedings. Further, the licence of the appellant having been terminated by the respondent No. 1 by her notice dated March 31, 1965, the appellant was not in occupation of the flat on February 1, 1972 under a subsisting tenancy and did not acquire the status of a tenant under Section 15A and is therefore not protected under S. 13 of the Rent Act.

12. As hereinbefore adumbrated, the respondent No. 2-society is governed by the Regulations in Form A. It is registered as a co-partnership type housing society. The bye-laws of the society provide, inter alia, by bye-law 2 that one of the objects of the society would be to carry on the trade of buying, selling, hiring, letting and developing land in accordance with co-operative principles. The respondent No. 1 is a co-partner ten-

ant member and holds flat No. 52 in Form A (sic). The flat in question therefore belongs to the society and she is a co-partner tenant member thereof. Paragraph 5 of Form A reads:

"5. No tenant shall assign, underlet, vacate or part with the possession of the tenement or any part thereof without the consent in writing of the society."

The two bye-laws relevant for our purposes are Bye-laws 66 and 68 (a) which provide as follows:

"66. Whenever a member to whom a tenement, a shop or a godown has been allotted by the Society does not require the same for his own use temporarily or for a specific period, he may offer the same to any person, as a licensee for temporary occupation for a specified period, provided that he shall— (a) sign an undertaking as required by the Society; (b) get such temporary occupant enrolled as a nominal member of the Society; (c) shall not permit such occupation before receiving permission from the Society's Committee to do so, provided such permission shall not be considered, unless the member has paid all his dues to the Society up-to-date, and authorizes the Society to recover from the nominal member, out of compensation or rent receivable by him from the nominal member any amount due from the member to the Society by way of taxes, general charges or any other dues."

"68. (a) No person shall be a sub-tenant or licensee or lessee etc. of the Society or of a member, unless the Committee first enrolls him as Nominal Member of the Society and he pays Rs. 500 as a security deposit to the Society. For this purpose, he has to apply in a form prescribed by the Society. The Security Deposit will bear no interest and will be issued in the joint names of the Society or the member (as the case may be) and the occupant and it will be refunded on the occupant vacating the tenement in question."

13. The respondent No. 1 could not have let the premises to the appellant in view of para 5 of the Form A. All that she could do if she did not require the flat for her immediate occupation was to permit the appellant or some one to occupy the same under an agreement of leave and licence. But for that purpose both the parties had to comply with the requirements of Bye-laws 66 and 68 (a). The respondent No. 1 and the appellant accordingly by their application dated December 8, 1961 applied to the society for permission to let the flat on leave and licence and for the issuance of five 'B'

shares of Rs. 100 each in their joint names called "occupancy shares". The respondent No. 2-society by its resolution dated December 15, 1961 issued the shares applied for in their joint names and also admitted the appellant as a nominal member for the purpose of occupying the flat. After the termination of the agreement of leave and licence, the appellant had no right to remain in occupation of the flat. The contention that the respondent No. 2-society cannot raise a dispute regarding his unauthorized occupation of the premises after the revocation of the licence is devoid of substance. The respondent No. 2-society being a co-partnership type housing society, having let flat No. 52 to the respondent No. 1 as a co-partner tenant member, was vitally interested in ensuring that no stranger is in unauthorized occupation of the flat after the expiry of the term of the licence as it would tend to cause annoyance and inconvenience to the other co-partner tenant members of the society.

14. There was a determined effort to question the legality and propriety of the order passed by the Maharashtra State Co-operative Tribunal allowing the application for transposition made by respondent No. 2-society but we did not permit the appellant to do so for obvious reasons. The appellant had challenged the impugned order of the Tribunal by a writ petition in the High Court and eventually failed. The appellant not having questioned the judgment of the High Court, the order of the Tribunal allowing transposition of the respondent No. 2-society as a co-disputant has attained a finality which cannot now be upset. The proceedings initiated by the respondent No. 1 under S. 91 (1) of the Act could not go on after the High Court had taken the view in certain cases that unless the co-operative housing society is a disputant, the claim by a member thereof for possession of the premises of a flat against a licensee would not be a dispute falling within the ambit of S. 91 (1) of the Act. That being so, quite apart from technicalities, we are inclined to the view that the High Court was fully justified in not interfering with the impugned order of the Tribunal allowing transposition. The Tribunal adopted a course which was both eminent and just and was necessary for doing complete justice between the parties. The appellant who is a rank trespasser has no equity in his favour. The contention that the respondent No. 2-

society could not be transposed as a co-disputant in the proceedings under Section 91 (1) of the Act must therefore fail.

15. The third question is the much vexed question on which the decision of the appeal must turn. It is submitted that the dispute between the licensor and the licensee was not one falling within the purview of S. 91 (1) of the Act. It is said that a dispute between a flat-owner and the occupant as regards tenancy cannot be taken cognizance of by the Registrar under S. 91 (1) of the Act, but the remedy of the flat-owner lies by way of suit for ejectment under S. 28 of the Rent Act. The submission is that the fact that such letting was forbidden by a regulation of the society was immaterial. In reply, it is urged that the dispute undoubtedly is a dispute touching the business of the society and therefore comes within the ambit of S. 91 (1) of the Act. It is further urged that the non obstante clause in S. 91 (1) of the Act had an overriding effect over S. 28 of the Rent Act, prior to the introduction of S. 15A and S. 5 (4A) in that Act.

16. There has been a long debate as to the true meaning of the words 'touching the business of the society' occurring in S. 43 (1) of the Co-operative Societies Act, 1912 and there was a divergence of opinion expressed by different High Courts but it is not necessary to burden the judgment with many citations.

17. In *Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalichand Jugraj Jain*, (1969) 1 SCR 887: (AIR 1969 SC 1320) this Court had occasion to construe the meaning of the expression 'touching the business of a society' occurring in S. 91 (1) of the Act. It was observed that the answer depends on the words used in the Act and that the non obstante clause clearly ousts the jurisdiction of civil Courts if the dispute falls squarely within the ambit of S. 91 (1) of the Act. The Court then went on to enumerate five kinds of disputes mentioned in S. 91 (1): first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society and fifthly, disputes touching the business of a society. In the context, it was said (at p. 1325 of AIR):

"It is clear that the word 'business' in this context does not mean affairs of a

society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word 'business' has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws." In regard to the question whether a dispute touching the assets of a society would be dispute touching the business of the society, it was observed (at p. 1326 of AIR):

"Ordinarily, if a society owns buildings and lets out parts of buildings, which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business."

18. Thus, the Court adopted the narrower meaning given to the word 'business' as expressed by the Madras, Bombay and Kerala High Courts in preference to the wide meaning given by the Madhya Pradesh and Nagpur High Courts. According to the view taken in Deccan Merchants Co-operative Bank's case, (supra), the word 'business' in the context means "any trading or commercial or other similar business activity of the society."

It was held that the word 'business' in S. 91 (1) of the Act has been used in a narrower sense and that it means the actual trading, commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the rules and its bye-laws.

19. In the present case, the society is a tenant co-partnership type housing society formed with the object of providing residential accommodation to its co-partner tenant members. Now, the nature of business which a society carries on has necessarily to be ascertained from the object for which the society is constituted, and it logically follows that whatever the society does in the normal course of its activities such as by initiating proceedings for removing an act of trespass by a stranger, from a flat allotted to one of its members, cannot but be part of its business. It is as much the concern of the society formed with the object of providing residential accommodation to its

members, which normally is its business, to ensure that the flats are in occupation of its members, in accordance with the bye-laws framed by it, rather than of a person in unauthorised occupation, as it is the concern of the member, who lets it out to another under an agreement of leave and licence and wants to secure possession of the premises for his own use after the termination of the licence. It must, therefore, follow that a claim by the society together with such member for ejectment of a person who was permitted to occupy having become a nominal member thereof, upon revocation of licence, is a dispute falling within the purview of S. 91 (1) of the Act. The decision in Deccan Merchants Co-operative Bank's case (AIR 1969 SC 1320) (supra), is clearly distinguishable on facts. There, the Court was dealing with a society which was a co-operative bank and ordinarily a co-operative bank cannot be said to be engaged in business when it lets out property owned by it. In that case, the dispute was not a dispute between a society and a member or a person claiming through a member. Further when the original owner executed the lease, he was not acting as a member but as a mortgagor in possession and therefore the co-operative bank's claim for ejectment of the lessee did not fall within S. 91 (1) (b) of the Act.

20. It is true that the Court in Deccan Merchants Co-operative Bank's case, (supra), dealt with the question whether on the facts and circumstances of that case, the Rent Act applied and accordingly the jurisdiction of the Registrar under S. 91 (1) of the Act was ousted and it was only the Court of Small Causes which had jurisdiction to evict the tenant. The Court referred to the twin social objectives with which the two enactments were designed and observed that while S. 91 (1) of the Act was intended and meant, in the main, to shorten litigation, lessen its costs and to provide a summary procedure for the determination of the disputes relating to the internal management of the societies, the Rent Act was intended to achieve a different social objective i.e. to prevent the eviction of tenants and enhancements of rent, and then went on to say that it was necessary that a dispute between the landlord and tenant should be dealt with by the Courts set up under the Rent Act and in accordance with the special provisions of that Act. It then dealt with the inter-relation between the non obstante clause in

S. 91 (1) of the Act and S. 28 of the Rent Act and observed that this special objective under the Act does not impinge on the objective underlying the Rent Act. It seems to us that the two Acts can be best harmonised by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Act, should apply. But where the parties admittedly do not stand in the jural relationship of landlord and tenant, as here, the dispute would be governed by Section 91 (1) of the Act. No doubt, the appellant acquired a right to occupy the flat as a licensee, by virtue of his being a nominal member, but in the very nature of things, his rights were inchoate. In view of these considerations, we are of the opinion that the proceedings under S. 91 (1) of the Act were not barred by the provisions of S. 28 of the Rent Act.

21. A great deal of reliance has been placed by the appellant's counsel on the decision in *Sabharwal Brothers v. Smt. Guna Amrit Thandani of Bombay*, (1973) 1 SCR 53: (AIR 1972 SC 1893). The importance of that case lies in the fact that it relates to the respondent No. 2-Society, and the disputant there was the owner of a flat on the second floor of Block No. 8 "Shyam Niwas". She was a member of the society and had acquired the flat in question, which was let out to the appellant Sabharwal Brothers under an agreement of leave and licence, which was renewed from time to time and when she asked the appellant to vacate as she required the flat for her personal occupation, they did not comply with the demand as a result of which the owner of the flat filed a statement of claim before the Registrar under S. 91 (1) of the Act which required adjudication. There was a challenge to the jurisdiction of the nominee of the Registrar to whom it was referred, and ultimately he made an award that the appellant Sabharwal Brothers had occupied the flat on leave and licence basis and was therefore liable to be evicted. In revision, the Bench of the Small Cause Court held that the Registrar's nominee did have jurisdiction and the High Court upheld the order of the Bench. Allowing the appeal, this Court observed (at p. 1895 of AIR):

"With all respect to the High Court, it seems to us that there was a fundamental error in the above approach. No doubt it was the business of the society to let out premises and a member had no un-

qualified right to let out his flat or tenement to another by virtue of the bye-laws and a breach of the bye-laws could affect the defaulting member's right to membership. But we are not able to see how letting by a member to another member would touch the business of the society which included inter alia the trade of buying, selling, hiring and letting land in accordance with co-operative principles. The letting of flat by respondent No. 1 was a transaction of the same nature as the society itself was empowered to enter into but such letting by itself did not concern the business of the society in the matter of its letting out flats. Nothing was brought to our notice to show that such a letting would affect the business of the society once it had sold the flat to the respondent No. 1. The position might have been different if the latter had himself been a tenant of the flat under the society. "To touch" means "to come in contact with" and it does not appear that there is a point of contact between a letting by the respondent No. 1 and the business of the society when the society was not itself the landlord of the flat."

It is we think, important to remember that this authority decided only one point albeit a point of great importance namely, that the society having sold the flat, like any other vendor of immovable property, the letting out of the flat by the flat-owner was no concern of the society. There was nothing to show that such letting would affect the business of the society once it has sold the flat. With respect, we entirely agree with all that was said. But then the Court went on to say:

"The position might have been different if the latter had himself been a tenant of the flat under the society."

It logically follows, as a necessary corollary, that if the transaction between the society and the holder of the flat were governed by Regulations in Form A, as here, that is to say, if the society had let out the flat to her, the decision of the Court would have been otherwise.

22. The decision in *Sabharwal Brothers' case* (AIR 1972 SC 1893) (supra) is distinguishable for two reasons. First, there was an outright sale of the flat by the society and not that it had been let out to her under Regulations in Form A; and secondly, the society having sold the flat, the letting of the flat by the flat-owner did not in any way affect the busi-

ness of the society in the matter of its letting out the flat. The observation made by this Court that the fact that such letting was forbidden by a regulation of the society was immaterial did not fall for decision in that case and was a mere obiter.

23. In the result, the appeal must fail and is dismissed with costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 1106

= 1982 Tax. L. R. 3121

(From: AIR 1980 Punj & Har 278)

R. S. PATHAK, E. S. VENKATARAMIAH
AND V. BALAKRISHNA ERADI, JJ.

Civil Appeal No. 2963 (NT) of 1980, D/-
30-7-1981.

State of Haryana and others, Appel-
lants v. M/s. Krishna Rice Mills, Respon-
dent.

Constitution of India, Art. 226 — Peti-
tion against levy of sales tax — State
counsel assuring withdrawal of instruc-
tion in respect of levy — Petition, held,
infructuous — High Court should not
decide case on merits. AIR 1980 Punj &
Har 278, Reversed. (Punjab General Sales
Tax Act (46 of 1948), S. 5 (1)).

Where in a writ petition challenging
the instructions to assessing authorities
under the Haryana General Sales Tax
Act and Central Sales Tax Act directing
them to treat the supply of rice to the
State Government in pursuance of a levy
procurement scheme as transaction of
sale so as to be liable to sales tax, the
High Court after recording the assurance
by the counsel for the State that the
State Govt. would withdraw the instruc-
tions held the writ petition to have be-
come infructuous, therefore, the High
Court ought not to have pronounced on
the merits of the question as to whether
the transaction constituted a sale under
the aforesaid sales tax enactments. AIR
1980 Punj & Har 278, Reversed. (Para 2)

PATHAK, J.:— This appeal is directed
against the judgment dated April 3, 1980
of the High Court of Punjab & Haryana
disposing of a writ petition filed by the
respondent. It seems that the principal
grievance embodied in the writ petition
was that the Government of Haryana
acted contrary to law in issuing in-
structions to assessing authorities under

the Haryana General Sales Tax Act, 1973
and the Central Sales Tax Act, 1956 di-
recting them to treat the supply of rice
to the State Government in pursuance
of a levy procurement scheme under the
provisions of the Punjab Rice Procure-
ment (Levy) Order, 1950 as transactions
of sale liable to sales tax. When the
writ petition came on for hearing before
the High Court it was conceded by coun-
sel appearing for the State that it was
not proper for the Government to issue
such instructions and, indeed, learned
counsel assured the Court that the State
Government would withdraw the instruc-
tions complained of. The High Court
noted the assurance and on that observ-
ed that the writ petition would become
infructuous. But the High Court did not
stop there. It proceeded to consider the
question on the merits whether the afore-
said transactions constituted a sale for
the purpose of the Haryana General
Sales Tax Act and the Central Sales Tax
Act. The High Court held that they did
not. Hence this appeal.

2. After hearing learned counsel for
the parties, it seems to us that the High
Court should not have proceeded beyond
recording the assurance that the State
Government would withdraw the instruc-
tions and holding that therefore the
writ petition had become infructuous. In
our opinion, no further question arose for
consideration by the High Court. The
High Court erred in pronouncing on the
merits of the question whether the trans-
action constituted a sale under the afore-
said sales tax enactments. We think that
its observations and findings on the ques-
tion should be vacated. It will be for the
assessing authorities to deal with the
question on the merits in accordance with
law. The assessing authorities should pro-
ceed on the basis that no opinion has
been expressed either by the High Court
or by us. They should also examine the
cases before them without reference to
the instructions issued by the Govern-
ment. We order accordingly.

3. The appeal is disposed of in these
terms. There is no order as to costs.

Order accordingly,

AIR 1982 SUPREME COURT 1107

**S. MURTAZA FAZAL ALI,
E. S. VENKATARAMIAH AND
A. VARADARAJAN, JJ.**

Writ Petns. Nos. 5880-82, 6176-77, 5921, 5922, 6220, 6426-27, 6355-56, 6264-70, 6276, 6178-79, 6191, 1718 of 1980 and 228-22 and 2113 of 1981, D/- 15-4-1982.

K. Rajendran and others etc. etc.,
Petitioners v. State of Tamil Nadu and
others, Respondents.

**(A) Constitution of India, Art. 19 (1)
(g) — Tamil Nadu Abolition of Posts of
Part-time Village Officers Act (3 of 1981),
Pre. — Act, not violative of Art. 19 (1)
(g).**

The Tamil Nadu Abolition of Posts of Part-time Village Officers Act (3 of 1981) does not violate Art. 19 (1) (g) as it does not affect the right of any of the incumbents of the posts to carry on any occupation of their choice even though they may not be able to stick on to the posts which they were holding. AIR 1981 SC 344, Foll. (Para 18)

(B) Constitution of India, Arts. 310, 311, 226 — Relative scope of — Power to abolish post — Justiciable — Person ceasing to be Govt. servant — Question of his rehabilitation — It is a matter of policy. AIR 1965 J & K 15 (FB), Overruled.

While the doctrine of pleasure incorporated in Art. 310 cannot be controlled by any legislation, the exercise of that power by the President or the Governor, as the case may be, is however made subject to the other provisions of the Constitution, one of them being Art. 311, which is not made subject to any other provision of the Constitution and is paramount in the field occupied by it.

(Para 22)

The power to abolish a post which may result in the holder thereof ceasing to be a Government servant has got to be recognised. But any action legislative or executive taken pursuant to that power is always subject to judicial review. AIR 1965 J & K 15 (FB), Overruled. (Para 33)

The question whether a person who ceases to be a Government servant according to law should be rehabilitated by giving an alternative employment is a matter of policy on which the Court has no voice. (Para 34)

**(C) Constitution of India, Art. 311 (2)
— Abolition of posts — Tamil Nadu**

Abolition of Posts of Part-time Village Officers Act (3 of 1981), Pre. — Act does not contravene Art. 311 (2).

The Tamil Nadu Abolition of Posts of Part-time Village Officers Act (3 of 1981) by which the village offices in the State of Tamil Nadu were abolished does not contravene Art. 311 (2) of the Constitution. Neither the decision in Moti Ram Dekka's case, AIR 1964 SC 600 nor the decision in Papanna Gowda's case, 1969 SLR 50 lays down that the provisions of Art. 311 (2) should be complied with before the services of a Government servant are terminated as a consequence of the abolition of the post held by him for bona fide reasons. (Para 35)

Art. 311 (2) deals with the dismissal, removal, or reduction in rank as a measure of penalty on proof of an act of misconduct on the part of the official concerned. This fact is emphasised by the introduction of the words 'an inquiry in which he has been informed of the charges against him' in Art. 311 (2) in 1963. It is not possible to hold that the termination of service brought about by the abolition of a post effected in good faith attracts Art. 311 (2). Scope of Article 311 (2). Explained. (Para 35)

**(D) Constitution of India, Arts. 14, 16
— Tamil Nadu Abolition of Posts of Part-time Village Officers Act (3 of 1981),
Pre. — Act is neither arbitrary nor
colourable.**

The Tamil Nadu Abolition of Posts of Part-time Village Officers Act (3 of 1981) by which the decision to abolish the village offices which were feudalistic in character and anachronisms in the modern age was neither arbitrary nor unreasonable nor colourable. AIR 1966 SC 1571 and AIR 1964 Mys. 84, Foll.

(Paras 39, 40)

The posts of village officers which were governed by the Madras Act 2 of 1894, the Madras Act 3 of 1895 and the Board's Standing Orders were feudalistic in character and the appointments to those posts were governed by the law of primogeniture, the family in which the applicant was born, the village in which he was born, and the fact whether he owned any property in the village or not. These factors are alien to modern administrative service and are clearly opposed to Arts. 14 and 16 of the Constitution. Rightly, therefore, the Administrative Reforms Commission recommended their abolition and reorganisation of the village service. (Para 37)

(E) Constitution of India, Art. 14 — Tamil Nadu Abolition of Posts of Part-time Village Officers Act (3 of 1981), S. 2 (e) — Abolition of posts of officials appointed after 16-12-1970 — Art. 14 not violated.

The abolition of posts of officials appointed after 16-12-1970 under the Tamil Nadu Village Officers Service Rules (1970) made under the proviso to Article 309 of the Constitution is not violative of Article 14 of the Constitution. The grouping together of the part-time posts mentioned in S. 2 (c) of the Tamil Nadu Abolition of Posts of Part-time Village Officers Act (3 of 1981) is not unconstitutional. Any classification should satisfy two tests — (i) that there exists an intelligible differentia between those who are grouped together and those who are not included in the group and (ii) that there exists a reasonable nexus between the differentia and the object for which classification is made. (Para 42)

The object of the impugned legislation is to abolish posts which were part-time in nature and which had come into existence under laws which were feudalistic in character and to replace them by posts held by new incumbents who are recruited under it. (Para 42)

It is also clear from the recommendations of the Administrative Reforms Commission and other materials, that the revenue villages will be reorganised so as to form viable administrative units which would require the services of a whole time village administrative Officer. The area under a village administrative officer is much larger than many of the existing revenue villages. When such reorganisation of the village administration is contemplated, it would not be possible to allow charges of diverse sizes to continue to remain in any part of the State of Tamil Nadu. (Para 42)

Hence, even though the village officers appointed after 16-12-1970 are in a way different from the village officials appointed prior to that date, they too cannot be equated with the new village administrative officers who will be appointed under the Act and the Rules made thereunder. It cannot, therefore, be said that Art. 14 of the Constitution has been violated in abolishing the posts held by those appointed after 16-12-1970. (Para 42)

(F) Constitution of India, Arts. 38, 43 — Scope of — Articles not enforceable by Courts — Still they are fundamental in the governance of the country. (Para 48)

Cases Referred : Chronological Paras

AIR 1981 SC 344 :	(1981) 2 SCR 52 :	
1980 Lab IC 1367	17, 19	
AIR 1976 SC 1199 :	(1976) 2 SCR 1034 :	
1976 Lab IC 849	32	
AIR 1973 SC 2641 :	(1974) 1 SCR 515 :	
1973 Lab IC 1593	30, 33	
AIR 1971 SC 191 :	(1971) 2 SCR 831	28
1969 Lab IC 730 :	1969 Serv LR 50	
(Mys)	29, 35	
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AIR 1966 SC 1571		39
AIR 1965 J & K 15 (FB)		33
AIR 1964 SC 600 :	(1964) 5 SCR 683	
	24, 26, 30, 31	
AIR 1964 SC 1854 :	(1964) 5 SCR 190	30
AIR 1964 Mys 84		40
AIR 1961 SC 564 :	(1961) 2 SCR 931	6, 7
AIR 1958 SC 36 :	1958 SCR 828	
	22, 24, 26, 27, 30, 33	
AIR 1958 SC 937 :	1959 SCR 1167	5
AIR 1954 SC 369 :	(1955) 1 SCR 26	30
AIR 1953 SC 250 :	1953 SCR 655	30
AIR 1953 SC 375		39

Mr. K. K. Venugopal, (6355-56 of 1980) (in W. P. Nos. 6212, 6427 and 5880-82/80), Mr. F. S. Nariman, (in W. P. Nos. 6264-70/80), Mr. R. K. Garg, (in W. P. Nos. 6191 and 5426/80), S. N. Kacker, (in W. P. Nos. 5921/80 and 220/81) and G. L. Sanghi, Sr. Advocates, (in W. P. No. 1718/81), M/s. C. S. Vaidyanathan, Vineet Kumar, B. Parthasarathi, A. T. M. Sampath, Miss Lily Thomas, N. A. Subramaniam, Naresh Kumar, Mahabir Singh and S. Srinivasan, Advocates with them for Petitioners; Mr. Lal Narayan Sinha, Attorney General (in W. P. No. 5880/80), Mr. M. K. Banerjee, Addl. Solicitor General (in W. P. No. 6355/80), Mr. R. Krishnamurthy, Advocate General, Tamil Nadu (in W. P. Nos. 1718 and 6276/80), Mr. Y. S. Chitale, (in W. P. No. 6426/80), Mr. L. M. Singhvi, (in W. P. No. 6264/80) with Mr. Laxmi Kant Pandey and Mr. S. S. Ray, Sr. Advocates, (in W. P. No. 6212 of 1980), Mr. A. V. Rangam, Advocate (in all matters) with them, for Respondents.

E. S. VENKATARAMIAH, J. :— In these writ petitions, the petitioners who were holders of posts of part-time village officers in the State of Tamil Nadu or associations of such persons have questioned the constitutional validity of the Tamil Nadu Abolition of Posts of Part-time Village Officers Ordinance, 1980 (Tamil Nadu Ordinance No. 10 of 1980) (hereinafter referred to as 'the Ordinance') and the Tamil Nadu Aboli-

tion of Posts of Part-time Village Officers Act, 1981 (Tamil Nadu Act No. 3 of 1981) (hereinafter referred to as 'the Act') which replaced the Ordinance. The total number of posts abolished by the Act is 23,010.

2. In Tamil Nadu, as in other parts of India, the village has been the basic unit of revenue administration from the earliest times of which we have any record. The administration was being carried on at the lowest level by a chain of officers in regular gradation one above the other at the commencement of the Christian era. The same system has been in vogue up-till now. It was generally known as the barabaluti system ordinarily consisting of twelve functionaries. In Tamil Nadu, these functionaries were known as (1) headman, (2) karnam or accountant, (3) Shroff or notazari, (4) nirganti, (5) toty or taliary, (6) potter, (7) smith, (8) jeweller, (9) carpenter, (10) barber, (11) washerman and (12) astrologer. Of them, the first five only rendered service to Government.

3. The headman who goes by various names such as monigar, potail, naidoo, reddy, peddakapu etc. is an important officer. He represented the Government in the village, collected the revenue and had also magisterial and judicial powers of some minor nature. As a magistrate he could punish persons for petty offences and as a Judge could try suits for sums of money or other personal property up to Rs. 10/- in value, there being no appeal against his decision. With the consent of the parties, he could adjudicate civil claims up to Rs. 100/- in value. The headman has been generally one of the largest landholders in the village having considerable influence over its inhabitants. The karnam or the village accountant maintained all the village accounts, inspected all fields in the village for purposes of gathering agricultural statistics, fixation of assessment and prevention and penalisation of encroachments, irregular use of water and verification of tenancy and enjoyment. The nirgantis guarded the irrigation sources and regulated the use of water. The toty or taliary assisted the village accountant in his work. By the end of the nineteenth century, two Acts were brought into force in the Presidency of Madras for the purpose of regulating the work of some of the village officers. The Madras Proprietary Estates' Village Service Act, 1894 (Madras Act No. II of 1894) dealt with three classes of village officers viz, vil-

lage accountants, village headmen and village watchmen or police officers in permanently settled estates, in unsettled palaiyams and in inam villages. It provided for their appointment and remuneration and for the prevention and summary punishment of misconduct or neglect of duty on their part and generally for securing their efficiency. The Madras Hereditary Village Offices Act, 1895 (Madras Act No. III of 1895) regulated the succession to certain other hereditary village offices in the Presidency of Madras; for the hearing and disposal of claims to such offices or the emoluments annexed thereto; for the appointment of persons to hold such offices and the control of the holders thereof. The village officers dealt with by this Act were (i) village munsifs, (ii) potels, monigars and peddakapus, (iii) karnams, (iv) nirgantis, (v) vettis, totis and tar dalgars and (vi) talayaris in ryotwari villages or inam villages, which for the purpose of village administration, were grouped with ryotwari villages.

4. Under both these statutes, the village offices were considered as hereditary in character and the succession to all hereditary village offices devolved on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaris in Southern India. When the person who would otherwise be entitled to succeed to a hereditary village office was a minor, such minor was being registered as the heir of the last holder and some other person qualified under the statutes in question to discharge the duties of the office was being appointed to discharge the duties of the office until the person registered as heir on attaining majority or within three years thereafter was qualified to discharge the duties of the office himself when he would be appointed thereto. If the person registered as heir remained otherwise disqualified for three years after attaining majority, he would be deemed to have forfeited his right to the office and on such forfeiture or on his death, the vacancy had to be filled up in accordance with the provisions of the statutes as if he was the last holder of the office. It is stated that in cases to which the above two statutes were inapplicable, provision had been made by the Standing Orders promulgated by the Board of Revenue which were known as the Board's Standing Orders for appointing village officers again generally on a

hereditary basis. Some of the other distinct features of the service conditions of the village officers appointed under the Madras Act No. II of 1894 or the Madras Act No. III of 1895 or the Board's Standing Orders were that they were part time employees of the Government; that the records maintained by them were allowed to be retained in their houses; that there was no attendance register and no fixed hours of duty were prescribed in their case. They were appointed directly by the Revenue Divisional Officer and against his order, an appeal lay to the District Revenue Officer and then a revision to the Board of Revenue and a second revision to Government. They were not constituted into any distinct service. There was no provision for reservation of posts of village officers for Scheduled Castes/Scheduled Tribes and backward classes. There was no minimum general qualification prescribed prior to the year 1970 for persons to be appointed as village officers under the said statutes or the Board's Standing Orders. It was enough if they were able to read and to write. No period of probation was prescribed after they were appointed. The Fundamental Rules applicable to all other State Government servants, the Pension Rules and the Leave Rules were not applicable to these village officers. They could take up part-time work or occupation after securing necessary permission from the concerned Revenue Authorities. There was no age of superannuation fixed in their case and they were not entitled to retirement benefits such as gratuity and pension. All village headmen including those who belonged to Scheduled Castes and Scheduled Tribes had to furnish security in the form of property or cash the estimated value of which was not less than half the amount of land revenue and loan demand of the village. They could not be transferred outside their district. In fact very rarely they were transferred. During the period of leave, no honorarium was paid to them and during the period of suspension, no subsistence allowance was paid. The honorarium paid to them was a fixed amount with no element of dearness allowance.

5. In *M. Ramappa v. Sangappa*, 1959 SCR 1167: (AIR 1958 SC 937), where this Court had to consider whether the officers holding the hereditary village offices under the Mysore Village Offices Act, 1908 which contained provisions similar to the provisions of the two Madras Acts

referred to above were qualified for being chosen as members of the State Legislative Assembly, it was held that such officers who were appointed to their offices by the Government, though it might be that the Government had no option in certain cases but to appoint an heir of the last holder, held offices of profit under the State Government since they held their office by reason of appointment made by the Government and they worked under the control and supervision of the Government and that their remuneration was paid by the Government out of the Government funds and assets. Accordingly this Court came to the conclusion that such village officers were disqualified under Art. 191 (1) (a) of the Constitution from contesting at an election to the State Legislative Assembly.

6. In *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh*, (1961) 2 SCR 931: (AIR 1961 SC 564) this Court held that S. 6 (1) of the Madras Hereditary Village Offices Act, 1895 (Madras Act No. 3 of 1895) which provided that in choosing persons to fill the new village offices of an amalgamated village under that Act, the Collector should select the persons whom he considered to be the best qualified from among the families of the last holders of the offices in the villages which had been abolished as a consequence of such amalgamation was void as it contravened Art. 16 (2) of the Constitution. After the above decision, instructions were issued by the Madras Board of Revenue on March 12, 1962 to the effect that in respect of future vacancies in village offices governed by the Madras Act No. II of 1894 and the Madras Act No. III of 1895, the appointments should be made on temporary basis only following the procedure prescribed under the Board's Standing Order No. 156. Since it was felt that the above two Madras Acts which contained provisions providing for appointment to village offices on hereditary basis were violative of Art. 16 of the Constitution in view of the pronouncement of this Court in *Gazula Dasaratha Rama Rao's* case (supra), the State Legislature passed the Madras Proprietary Estates' Village Service and the Madras Hereditary Village Offices (Repeal) Act, 1968 (Madras Act No. 20 of 1968) repealing the above two statutes viz. the Madras Act No. II of 1894 and the Madras Act No. III of 1895. The said Act was brought into force with effect from December 1, 1968. It extended to the whole of the State of Madras, except the Kanya-

kumari district and the Shencottah taluk of the Tirunelveli district (vide S. 1 (2) of the Madras Act No. 20 of 1968). Sub-section (3) of S. 2 of that Act, however, provided that every holder of a village office, appointed under the Acts repealed by it would, notwithstanding the repeal continue to hold office subject to such rules as may be made under the proviso to Art. 309 of the Constitution. Section 3 of that Act directed that any vacancy arising after the date of the commencement of that Act in the village office referred to in sub-section (3) of Section 2 thereof should be filled up in accordance with the provisions of the Rules made under the proviso to Art. 309 of the Constitution. On December 1, 1968, the Governor of Tamil Nadu promulgated a Rule under the proviso to Art. 309 of the Constitution providing that "the Standing Orders of the Board of Revenue applicable to non-hereditary village offices shall apply to every holder of a village office to which the Madras Proprietary Estates Village Service Act, 1894 (Madras Act No. II of 1894) or the Madras Hereditary Village Offices Act, 1895 (Madras Act No. III of 1895) was applicable immediately before the 1st day of December, 1968" on which date the Madras Act No. 20 of 1968 came into force. Pursuant to S. 3 of the Madras Act No. 20 of 1968, the Governor of Tamil Nadu promulgated under the proviso to Art. 309 of the Constitution the Tamil Nadu Village Officers Service Rules, 1970 providing for the constitution of the Tamil Nadu Village Officers Service consisting of (i) village headman, additional village headman, (ii) village karnam, additional village karnam and (iii) talayari and nirganti and the method of recruitment to the said posts. The said Rules came into force on Dec. 16, 1970 and they extended to the whole of the State of Tamil Nadu except the Kanyakumari District and the Shencottah taluk of the Tirunelveli district and the city of Madras. Rule 18 of the said Rules, however, stated that nothing contained in them would apply to persons, who, on the date of coming into force of the said Rules, were holding the posts of village headman or additional village headman, village karnam or additional village karnam either temporarily or permanently. Consequently the said Rules were not applied to the holders of village offices who had been appointed temporarily or permanently under the two repealed Acts and under the Board's Standing Orders before the date on which the said Rules

came into force. These Rules prescribed that every person who made an application for appointment to the post of village headman or additional village headman or village karnam or additional village karnam should possess the following qualifications, namely (i) he should have completed the S.S.L.C. Examination held by the Government of Tamil Nadu and (ii) he should have secured a pass in the special tests specified in column (2) of the table given in Rule 5 thereof in respect of the posts specified in column (1) thereof. On the same date, the Tamil Nadu Village Officers (Classification, Control and Appeal) Rules, 1970 and the Tamil Nadu Village Officers Conduct Rules, 1970 promulgated under the proviso to Article 309 of the Constitution by the Governor of Tamil Nadu came into force. These Rules were applicable not merely to the village officers appointed after that date but also to those who had been appointed under the repealed Acts and under the Board's Standing Order prior to Dec. 16, 1970. The Tamil Nadu Civil Services (Classification, Control and Appeal) Rules dealt with the disciplinary proceedings that might be instituted against the village officers governed by them. The Tamil Nadu Village Officers Conduct Rules provided that the Tamil Nadu Government Servants Conduct Rules, 1960 as amended from time to time would apply to the village officers subject to the modification specified in Rule 3 thereof which provided that the village officers being part-time Govt servants might take up part-time work or occupation provided that (1) such part-time work or occupation did not interfere with their legitimate duties as village officers and (2) the previous permission in writing had been applied for and obtained from the Revenue Divisional Officer concerned if the work or occupation was confined to the charge village and from the District Collector concerned if the work or occupation extended beyond the charge village. From Nov. 15, 1973 all the three sets of Rules which came into force on Dec. 16, 1970, as stated above, became applicable to the village officers in the Kanyakumari district and the Shencottah taluk of the Tirunelveli district also. They, however, continued to be inapplicable to the city of Madras.

7. In the year 1973, the Administrative Reforms Commission headed by Mr. T. A. Verghese, I.C.S. recommended that the existing part-time village officers should be replaced by regular whole-time

transferable public servants and that they should form part of the Revenue hierarchy, disciplined in the tradition of that department and motivated by the incentive of career advancement available in that department. They also recommended that 16,585 survey villages in the State of Tamil Nadu should be grouped into 11,954 revenue groups. The Commission further recommended that the 11,954 revenue groups should be regrouped into larger village panchayats with a population of about 5,000 and the annual panchayat tax demand of the order of Rs. 5,000. The Commission envisaged that with some marginal adjustments the enlarged village panchayat would be of the order of 4,000 in the State of Tamil Nadu and that there should be a village officer, a village clerk and a village peon in respect of each such enlarged village panchayat and on appointment to these offices, the holders of village offices appointed under the two repealed statutes and the Board's Standing Orders should be removed and the former village offices should be abolished since the Commission felt that "the administration at the grass-root level, provided by the present generation of village officers with feudal traditions, is inconsistent with the egalitarian principles aimed at in our democratic Constitution". The Commission further felt that "the reform of village administration has high priority, as it would benefit the whole mass of rural population". The Commission, however, took note of the fact in paragraph 2.11 of its report that the Government had, in the recent years, attempted to remedy the situation by repealing the Madras Hereditary Village Officers Act, 1895 and by framing a set of new service rules for village establishment under Art. 309 of the Constitution. But it was of the opinion that the said Rules, however, did not go far enough as they were not applicable to the existing set of village officers. It was of the view that full-time officers could be expected to service a much larger area than the existing villages or groups of villages and such regrouping of villages into larger groups had to be done carefully taking into account local conditions such as compactness of the group, easy inter-communications, nature of land, number of holdings etc. The Commission, however, was of the view that such of those among the existing village headmen and karnams, who had passed the S.S.L.C. Examination might be considered for the posts of the village officers and village clerks on their past

performance. Similarly as regards village officers working in the Kanyakumari district and the Shencottah taluk of the Tirunelveli district which came over to the State of Tamil Nadu from Kerala in 1956 on the reorganisation of States, the Commission observed that most of the village officers of those transferred territories who were qualified and full-time Government servants should be absorbed in the new set up as envisaged by the Commission. On May 17, 1975, the Governor of Tamil Nadu promulgated the Tamil Nadu Village Officers (appointed under B.S.Os) Service Rules, 1974 under the proviso to Art. 309 of the Constitution in respect of the village officers appointed prior to Dec. 16, 1970. The above Rules were, however, kept in abeyance by an order made on July 1, 1975 on receipt of representations from the village officers in regard to the fixation of the age of superannuation at 55 years. On August 24, 1977, the Chief Minister of Tamil Nadu announced on the floor of the Legislative Assembly that the Government proposed to set up a Committee to examine whether the posts of karnam could be dispensed with. Thereafter on October 9, 1978, the Tamil Nadu Village Officers (appointed under B.S.Os) Service Rules, 1978 were issued fixing the age of retirement of the village officers at 60 years. Sub-rule (2) of Rule 1 of the said Rules stated that the said Rules would apply to all village officers holding the posts of village headman or additional village headman, village karnam or additional village karnam, talayari, vetti or nirganti either permanently or temporarily on Dec. 16, 1970 provided that at the time of their appointment, they were qualified under the Board's Standing Orders. The Government thought that the said Rules would be applicable to all village officers who were holding village offices on Dec. 16, 1970 referred to in Rule 1 (2). But some of the holders of the village offices who had been appointed under the Madras Act No. III of 1891 prior to the decision of this Court in *Gazula Dasaratha Rama Rao's case* (AIR 1961 SC 564) (supra) which was rendered on Dec. 6, 1960, filed writ petitions on the file of the High Court of Madras stating that the Tamil Nadu Village Officers (appointed under the B.S.Os) Service Rules, 1978 which fixed the age of superannuation of village officers at 60 years were not applicable to them since on a true construction of the said Rules, they were inapplicable to them. The High Court of Madras allowed the said writ

petitions by its judgment dated August 18, 1980 holding:— "We have already extracted sub-rule (2) of Rule 1 of the Rules. That rule expressly states that the Rules will apply to village officers, who, at the time of their appointment, were qualified under the Board's Standing Orders applicable to them and their appointment had been made by the authority competent under the Board's Standing Orders. In respect of these petitioners, who were appointed under the provisions of Madras Act 3 of 1895 before 6th Dec. 1960, there was no question of their being qualified to be appointed to the village office under the Board's Standing Orders applicable to them, and their qualifications and appointment rested solely on the provisions contained in Section 10 of the Act. Consequently the petitioners herein will not answer the description contained in sub-rule (2) of R. 1 of the Rules. If they do not answer the description contained in sub-rule (2) of Rule 1 of the Rules, the rules are not applicable to them and, therefore, they cannot be required to retire under Rule 4 (1) of the Rules."

8. It would appear that some of the other village officers to whom the said Rules had been made applicable had also filed writ petitions on the file of the High Court questioning the validity of the Rules on the ground that the said Rules made a discrimination between them and the village officers who were holding office prior to Dec. 16, 1970 to whom the said Rules were held to be inapplicable by the judgment of the High Court delivered on August 18, 1980 and those petitions were posted for hearing during the first week of Dec. 1980. Before the said petitions were taken up for hearing, the Governor of Tamil Nadu issued the Ordinance on Nov. 13, 1980 abolishing the posts of part-time village officers in the State of Tamil Nadu. Immediately after the promulgation of the Ordinance, steps were taken to take possession of all the records with the village officers who were holding offices on that day and to replace them by officers appointed under S. 14 of the Ordinance. Immediately after the promulgation of the said Ordinance, some of the village officers who were affected by it questioned its validity before this Court in Writ Petitions Nos. 5880-82 of 1980 and 5921 of 1980. The other connected writ petitions came to be filed thereafter. In the meanwhile the Tamil Nadu State Legislature passed the Act which is impugned in these petitions replacing

the Ordinance. The petitioners have challenged in these writ petitions the Act also by seeking appropriate amendment of their petitions.

9. The broad features of the Act are these: The object of the Act is set out in its preamble. Because the State Government was of the opinion that the system of part-time village officers was outmoded and did not fit in with the modern needs of village administration and the State Government had after careful consideration taken a policy decision to abolish all the posts of part-time village officers on grounds of administrative necessity and to introduce a system of whole-time officers to be in charge of village administration, the Act came to be enacted with effect from Nov. 14, 1980 in the place of the Ordinance. The Explanatory Statement attached to the Ordinance also contained a statement to the same effect indicating the object of the Ordinance. The expression 'part-time village officer' is defined in S. 2 (e) of the Act as village headman (including additional village headman) village karnam (including chief karnam and additional village karnam) or Triune officer (who was exercising functions of three different village officers) appointed under the Madras Act II of 1894, the Madras Act III of 1895, the Board's Standing Orders, the Tamil Nadu Village Officers Service Rules, 1970 or any other law but does not include Grama Kuvalar, Grama Paniyalar and Pasana Kavalars. Village Administrative Officer means an officer appointed under S. 4 (1) of the Act. By S. 3 of the Act, the posts of part-time village officers were abolished with effect from Nov. 14, 1980 and every officer holding a post so abolished ceased to hold such post. The Act provided for appointment of Village Administrative Officers. S. 5 of the Act provided for payment of compensation to those who ceased to be part-time village officers calculated in accordance with the formula mentioned in it. S. 10 of the Act provided that the Act would not apply to the posts of karnams which were held by whole-time Government servants in the city of Madras and the posts of village officers and village assistants which were held by the whole-time Government servants in the Kanyakumari district and Shencottah taluk of the Tirunelveli district.

10. Three principal points are urged before us by the petitioners in these petitions— (i) that the Ordinance and the Act are violative of Art. 19 (1) (g) of the Con-

stitution, (ii) that they are violative of Art. 311 (2) of the Constitution and (iii) that they contravene Art. 14 of the Constitution. The State Government contends that since by the Ordinance and the Act, certain posts have been abolished, the officials who were incumbents of the abolished posts cannot raise any of the grounds raised by them.

11. Entry 41 in List II of the Seventh Schedule to the Constitution confers the power on the State Legislature to make laws with respect to State public services subject to the provisions of the Constitution. Art. 309 of the Constitution provides that subject to the provisions of the Constitution, the State Legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State. Art. 311 (2) of the Constitution states that no person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the State shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Art. 14 of the Constitution guarantees equality before the law and equal protection of the laws. It is not disputed that any law that is passed in relation to a Government employee should not contravene any of these provisions— Art. 19 (1) (g), Art. 311 (2) and Art. 14 of the Constitution. We shall now proceed to examine the case with reference to each of them.

12. The power to abolish a civil post is inherent in the right to create it. The Government has always the power, subject, of course, to the constitutional provisions, to re-organise a department to provide efficiency and to bring about economy. It can abolish an office or post in good faith. The action to abolish a post should not be just a pretence taken to get rid of an inconvenient incumbent. We have the following statement of the law in American Jurisprudence 2d, Vol. 63 at pages 648-649:

"§ 37. Manner, sufficiency, validity, and effect.

It is not always easy to determine whether a public office has been abolished. It is not sufficient merely to declare that a particular office is abolished, if in fact it is not abolished, and the duties thereof are continued. An office is abolished when the act creating it is repealed. But the re-

peal of the statute creating an office, accompanied by the re-enactment of the substance of it, does not abolish the office. Abolition of an office may also be brought about by a constitutional provision, or by a new constitution or a constitutional amendment. A non-constitutional office may be indirectly abolished as by legislating away the duties and emoluments of the office.

The legislature may not evade constitutional provisions by a sham or pretended abolition of an office, as where there is a mere colorable abolition of the office for the purpose of getting rid of its incumbent. This may happen where an office is abolished in terms and promptly recreated under the same or a different name, provided the legislature does not attach duties and burdens to the new office of a character such as to make it in reality a different office.

Where an office is duly abolished by the legislature or the people, it ceases to exist and the incumbent is no longer entitled to exercise the functions thereof, or to claim compensation for so doing, unless he is under contract with the state so as to come within the protection of the constitutional inhibition against impairment of the obligation of contract. Since a *de jure* office is generally essential to the existence of a *de facto* officer, persons cannot act as *de facto* officers of an office which has been abolished."

13. H. Eliot Kaplan writes in his book entitled "The Law of Civil Service" at pages 214-215 thus:

"8. "Good faith" in Abolition of Positions.— There, of course, is no vested right to employment in the public service. The notion, much too prevalent, that any one who has been appointed after a competitive examination is entitled to be retained in the service is erroneous. Where there is any reasonable justification for eliminating positions in the public service, even where such abolition of positions may be subject to judicial review, the inclination of the courts is not to interfere, avoiding substitution of judicial wisdom or judgment for that of the administrator.

A position is not lawfully abolished solely because it has been left vacant for a short period of time and subsequently filled by another appointee than the one laid off and entitled to re-employment.

Good faith of a head of department in abolishing a position on alleged grounds of economy has often been challenged.

Most courts have held that the issue of good faith on the part of an administrative official is one of law solely for the court to pass on, and not an issue of facts which may be submitted to a jury for determination. The jury may determine the facts, which the court in turn may find as a matter of law constitute bad faith but a verdict by a jury that a departmental head had acted in bad faith in abolishing a position was set aside as a conclusion of law, and not properly finding of fact. What constitutes bad faith as a matter of law in abolishing positions must be determined by the precise facts in each case. As a general rule, where positions are purported to be eliminated and incumbents laid off, and thereafter identical or similar positions are re-established and the positions filled by others not entitled under the civil service law and rules to such employments, the courts will not hesitate to order re-employment of the laid off employees."

14. The above passages sum up the law on the question of abolition of posts in civil service as it prevails in United States of America.

15. In England too there is provision for compulsory premature retirement in the public interest on structural grounds, grounds of limited efficiency and redundancy. (Vide paragraph 1303, Vol. 8 Halsbury's Laws of England 4th Edn.).

16. In the instant case, the abolition of the posts of village officers is sought to be achieved by a piece of legislation passed by the State Legislature. Want of good faith or mala fides cannot be attributed to a Legislature. We have only to see whether the legislation is a colourable one lacking in legislative competence or whether it transgresses any other constitutional limitation.

17. So far as the argument based on Art. 19 (1) (g) of the Constitution is concerned, we are bound by the view expressed by the Constitution Bench of this Court in *Fertilizer Corporation Kamgar Union (Regd.) Sindri v. Union of India*, (1981) 2 SCR 52: (AIR 1981 SC 344), in which Chandrachud, C. J. has observed at pp. 60-61 (of SCR): (at p. 348 of AIR) thus:

"The right to pursue a calling or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment. If the workers are retrenched consequent upon and on account of the sale, it will be

open to them to pursue their rights and remedies under the Industrial Laws. But the point to be noted is that the closure of an establishment in which a workman is for the time being employed does not by itself infringe his fundamental right to carry on an occupation which is guaranteed by Article 19 (1) (g) of the Constitution. Supposing a law were passed preventing a certain category of workers from accepting employment in a fertilizer factory, it would be possible to contend then that the workers have been deprived of their right to carry on an occupation. Even assuming that some of the workers may eventually have to be retrenched in the instant case, it will not be possible to say that their right to carry on an occupation has been violated. It would be open to them, though undoubtedly it will not be easy, to find out other avenues of employment as industrial workers. Article 19 (1) (g) confers a broad and general right which is available to all persons to do work of any particular kind and of their choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice. Even under Article 311 of the Constitution, the right to continue in service falls with the abolition of the post in which the person is working. The workers in the instant case can no more complain of the infringement of their fundamental right under Article 19 (1) (g) than can a Government servant complain of the termination of his employment on the abolition of his post. The choice and freedom of the workers to work as industrial workers is not affected by the sale. The sale may at the highest affect their locus, but it does not affect their locus, to work as industrial workers. This is enough unto the day on Art. 19 (1) (g)."

18. In view of the above ruling, it is not possible to hold that the Act violates Art. 19 (1) (g) as it does not affect the right of any of the incumbent of the posts to carry on any occupation of their choice even though they may not be able to stick on to the posts which they were holding.

19. We shall next examine the argument based on Art. 311 (2) of the Constitution. We have already seen in the *Fertilizer Corporation Kamgar Union's case* (AIR 1981 SC 344) (supra) the observation to the effect: "Even under Art. 311 of the Constitution, the right to continue in service falls with the abolition of the post in which the person is working". It is said that the "act of removing a per-

son from a chair is different from the act of removal of the chair itself" although the incumbent loses the chair in both the cases. Since it is strenuously urged before us that there is some amount of contradiction in some of the rulings of this Court, we shall review the legal position to the extent necessary before reaching our own conclusion on the question.

20. The doctrine that the tenure of a holder of a civil post is dependent upon the pleasure of the Crown is peculiar to English law.

21. In India, Art. 310 of the Constitution of India provides :

"310 (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under the Constitution to hold such a post may, if the President or the Governor as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

22. While the doctrine of pleasure incorporated in Art. 310 cannot be controlled by any legislation, the exercise of that power by the President or the Governor, as the case may be, is however made subject to the other provisions of the Constitution, one of them being Article 311, which is not made subject to any other provision of the Constitution and is paramount in the field occupied by it. The contention urged before us is that every kind of termination of employment under Government would attract Art. 311 (2) of the Constitution and a termination on the abolition of the post cannot be an exception. While constru-

ing Art. 311 (2) of the Constitution, as it stood then, in *Parashotam Lal Dhingra v. Union of India*, 1958 SCR 828 at p. 841 : (AIR 1958 SC 36 at p. 42), Das, C. J. observed :

"The Government cannot terminate his service unless it is entitled to do so (1) by virtue of a special term of the contract of employment, e.g., by giving the requisite notice provided by the contract or (2) by the rules governing the conditions of his service, e.g., on attainment of the age of superannuation prescribed by the rules, or on the fulfilment of the conditions for compulsory retirement or, subject to certain safeguards, on the abolition of the post or on being found guilty, after a proper enquiry on notice to him, of misconduct, negligence, inefficiency or any other disqualification." (emphasis added)

23. Again at pages 857-858 (of SCR) : (at pp. 47 and 48 of AIR) in the same judgment, the learned Chief Justice observed :

"The foregoing conclusion, however, does not solve the entire problem, for it has yet to be ascertained as to when an order for the termination of service is inflicted as and by way of punishment and when it is not. It has already been said that where a person is appointed substantively to a permanent post in Govt. service, he normally acquires a right to hold the post until under the rules, he attains the age of superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the service rules read with Art. 311 (2)." (emphasis added)

24. It may be mentioned here that the words "subject to certain safeguards" found in the earlier extract are not used with reference to abolition of posts in the above extract. Later on, Das, C. J. observed that the Court should apply two tests namely (1) whether the servant had a right to the post or the rank or (2) whether he had been visited with evil consequences such as loss of pay and allowances, a stigma affecting his future career in order to determine whether the removal of an officer from a post attracted Art. 311 (2). The decision in *Parshotam Lal Dhingra's case* (AIR

1958 SC 36) (supra) was reviewed by a Bench of seven Judges of this Court in *Moti Ram Deka v. General Manager, N. E. F. Rly.*, (1964) 5 SCR 683 : (AIR 1964 SC 600). In that case the question which arose for consideration was whether Rules 148 (3) and 149 (3) of the Indian Railway Establishment Code violated either Art. 311 (2) or Art. 14 of the Constitution. Sub-rules (1) and (2) of Rule 148 dealt with temporary railway servants and apprentices respectively. The relevant part of Rule 148 (3) read thus :

"148 (3). Other (non-pensionable) railway servants.— The service of other (non-pensionable) railway servants shall be liable to termination on notice on either side for the periods shown below. Such notice is not however required in cases of dismissal or removal as a disciplinary measure after compliance with the provisions of Clause (2) of Art. 311 of the Constitution, retirement on attaining the age of superannuation, and termination of service due to mental or physical incapacity."

25. Rule 149 was brought into force in the place of Rule 148 in the case of pensionable servants in Nov. 1957. Here again, sub-rules (1) and (2) of Rule 149 dealt with temporary railway servants and apprentices. Rule 149 (3) read thus :

"149 (3). Other railway servants:— The services of other railway servants shall be liable to termination on notice on either side for the periods shown below. Such notice is not, however, required in cases of dismissal or removal as disciplinary measure after compliance with the provisions of clause (2) of Art. 311 of the Constitution, retirement on attaining the age of superannuation, and termination of service due to mental or physical incapacity."

26. The majority judgment in this case, however, observed that a Government servant on being appointed to a post permanently acquired a right to hold the post under the Rules until he attained the age of superannuation or was compulsorily retired or was found guilty of an act of misconduct in accordance with Art. 311 (2). It disapproved the statement found in *Parshotam Lal Dhingra's case* (1958 SCR 828) at pp. 857-858 : (AIR 1958 SC 36 at pp. 47 and 48) (supra) to the extent it recognised the removal of a permanent Government servant under a contract express or implied or a service rule. After referring to one passage at page 841 (of SCR) :

(at p. 42 of AIR) and another at p. 843 (of SCR) : (at pp. 42 and 43 of AIR) in *Parshotam Lal Dhingra's case*, *Gajendra-gadkar, J.* (as he then was), who delivered the majority judgment in *Moti Ram Deka's case* (1964-5 SCR 683) (supra) observed at pp. 718-719 : (AIR 1964 SC 600 at p. 614) thus :

"Reading these two observations together, there can be no doubt that with the exception of appointments held under special contract, the Court took the view that wherever a civil servant was appointed to a permanent post substantively, he had a right to hold that post until he reached the age of superannuation or was compulsorily retired, or the post was abolished. In all other cases, if the services of the said servant were terminated, they would have to be in conformity with the provisions of Art. 311 (2), because termination in such cases amounts to removal. The two statements of the law to which we have just referred do not leave any room for doubt on this point." (emphasis added)

27. It may be noticed that removal of a Government servant from a post on its abolition is recognised in the above passage as a circumstance not attracting Art. 311 (2) of the Constitution. The Court after a review of all the decisions before it including the decision in *Parshotam Lal Dhingra's case* (AIR 1958 SC 36) (supra) held that the above two Rules 148 (3) and 149 (3) which authorised the removal of officers holding the posts substantively by issuing a mere notice infringed Art. 311 (2) of the Constitution. The question of abolition of posts did not arise for consideration in this case. The validity of removal of a Government servant holding a permanent post on its abolition was considered by *Desai, J.* and *Chandrachud, J.* (as he then was) in *P. V. Naik v. State of Maharashtra*, AIR 1967 Bom 482. The learned Judges held that the termination of service of a Government servant consequent upon the abolition of posts did not involve punishment at all and therefore did not attract Art. 311 (2).

28. Since much reliance is placed by the petitioners on the decision of this Court in *State of Mysore v. H. Papanna Gowda*, (1971) 2 SCR 831 : (AIR 1971 SC 191), it is necessary to examine that case in some detail. The facts of that case were these : The respondent in that case was holding the post of a chemical assistant in the Agricultural Research Institute, Mandya in the Department of

Agriculture of the State of Mysore. Under the Mysore University of Agricultural Sciences Act, 1963 which came into force on April 24, 1964, the University of Agricultural Sciences was established. Sub-sec. (5) of S. 7 of that Act provided:

"7 (5). Every person employed in any of the colleges specified in sub-sec. (1) or in any of the institutions referred to in sub-sec. (4) immediately before the appointed day or the date specified in the order under sub-sec. (4), as the case may be, shall, as from the appointed day or the specified date, become an employee of the University on such terms and conditions as may be determined by the State Government in consultation with the Board."

29. The Board referred to in the above sub-section was the Board of Regents of the University. By a notification dated Sept. 29, 1965 issued under S. 7 (4) and (5) of that Act, the control and management of a number of research and educational institutions under the Department of Agriculture were transferred to the University. Along with them, the Institute in which the respondent was working was also transferred to the University. The result was that the respondent ceased to be an employee of the State Government and became an employee of the University. Thereupon he questioned the validity of sub-secs. (4) and (5) of S. 7 of the said Act on the ground that they contravened Art. 311 (2) of the Constitution before the High Court of Mysore, which upheld his plea. The State Government questioned the decision of the High Court before this Court in the above case. This court affirmed the decision of the High Court holding that Art. 311 (2) of the Constitution had been contravened as the prospects of the respondent in Government service were affected. In this case the parties proceeded on the basis that there was no abolition of post as such as can be seen from the judgment of the High Court. The only ground was whether when the post continued to exist though under a different master, in this case it being the University, it was open to the State Government to transfer its employee to the control of a new master without giving an option to him to state whether he would continue as a Government employee or not. The court was not concerned about the consequences of abolition of a post as such in this case. As can be seen from the judgment of the High Court in this case (vide

Papanna Gowda v. State of Mysore (1969 Serv LR 50 at p. 59 : (1969 Lab IC 730) one serious infirmity about the impugned provisions was that whoever was holding the post in any of the institutions transferred to the University automatically ceased to be the Government servant. Even if the case was one where abolition of the post was involved, the law should have made provision for the determination of the employees in the cadre in question who would cease to be Government employees with reference to either the principle of 'last come, first go' or any other reasonable principle and given them an option to join the service under the new master instead of just transferring all the employees who were then working in the institutions to the University. The impugned provisions were not rules dealing with the age of superannuation or compulsory retirement. Nor the case was dealt with on the principle of abolition of posts. The decision in this case takes its colour from the peculiar facts involved in it. One principle that may be deduced from this decision is that if a post is not a special post and its incumbent is a member of a cadre his rights as a member of the cadre should be considered before deciding whether he has ceased to be a government employee on the abolition of the post. It is likely that on such scrutiny the services of another member of the cadre may have to be terminated on its abolition or some other member of the cadre may have to be reverted to a lower post from which he may have been promoted to the cadre in question by the application of the principle of 'last come, first go'. If, however, where the post abolished is a special post or where an entire cadre is abolished and there is no lower cadre to which the members of the abolished cadre can reasonably be reverted, the application of this principle may not arise at all. In the circumstances, the petitioners cannot derive much assistance from this decision.

30. The question whether Art. 311 (2) would be contravened if a Government servant holding a civil post substantively lost his employment by reason of the abolition of the post held by him directly arose for consideration before this Court in Ramanatha Pillai v. State of Kerala (1974) 1 SCR 515 : (AIR 1973 SC 2641). Two points were examined in that case — (i) whether the Government had a right to abolish a post in a service and (ii) whether abolition of a post was dis-

missal or removal within the meaning of Art. 311 of the Constitution. The Court held that a post could be abolished in good faith but the order abolishing the post might lose its effective character if it was established to have been made arbitrarily, mala fide or as a mask of some penal action within the meaning of Art. 311 (2). After considering the effect of the decisions in Parashotam Lal Dhingra's case (AIR 1958 SC 36) (supra); Champaklal v. Union of India (1964) 5 SCR 190: (AIR 1964 SC 1854); Moti Ram Deka's case (AIR 1964 SC 600) (supra); Satish Chandra v. Union of India, 1953 SCR 655: (AIR 1953 SC 250) and Shyam Lal v. State of U. P. (1955) 1 SCR 26: (AIR 1954 SC 369), this Court observed in this case at page 526 (of SCR): (at p. 2649 of AIR) thus:

"The abolition of post may have the consequence of termination of service of a government servant. Such termination is not dismissal or removal within the meaning of Art. 311 of the Constitution. The opportunity of showing cause against the proposed penalty of dismissal or removal does not therefore arise in the case of abolition of post. The abolition of post is not a personal penalty against the government servant. The abolition of post is an executive policy decision. Whether after abolition of the post, the Government servant who was holding the post would or could be offered any employment under the State would therefore be a matter of policy decision of the Government because the abolition of post does not confer on the person holding the abolished post any right to hold the post."

31. The true effect of the decision in Moti Ram Deka's case (AIR 1964 SC 600) (supra) on the question of applicability of Art. 311 (2) of the Constitution to a case of abolition of post has been clearly explained in this case and we have very little to say anything further on it. Suffice it to say that the Moti Ram Deka's case (supra) is no authority for the proposition that Art. 311 (2) would be attracted in such a case.

32. The above view was followed by this Court in State of Haryana v. Des Raj (1976) 2 SCR 1034: (AIR 1976 SC 1199) to which one of us (Murtaza Fazal Ali, J.) was a party. Khanna, J. speaking for the Court observed at pp. 1037-38 (of SCR): (at p. 1202 of AIR) thus:

"Whether a post should be retained or abolished is essentially a matter for the

Government to decide. As long as such decision of the Government is taken in good faith, the same cannot be set aside by the court. It is not open to the court to go behind the wisdom of the decision and substitute its own opinion for that of the Government on the point as to whether a post should or should not be abolished. The decision to abolish the post should, however, as already mentioned, be taken in good faith and be not used as a cloak or pretence to terminate the services of a person holding that post. In case it is found on consideration of the facts of a case that the abolition of the post was only a device to terminate the services of an employee, the abolition of the post would suffer from a serious infirmity and would be liable to be set aside. The termination of a post in good faith and the consequent termination of the services of the incumbent of that post would not attract Art. 311."

33. Before concluding our discussion on this topic, it is necessary to refer to a decision of the Jammu and Kashmir High Court in Abdul Khalik v. State of Jammu and Kashmir, AIR 1965 J&K 15 (FB) to which one of us (Murtaza Fazal Ali, J. (as he then was)) was a party in which the validity of the abolition of posts constituting the special police squad of the State of Jammu and Kashmir was questioned. In that case, the High Court while recognising the power of the State Government to abolish the posts and to terminate the services of the incumbents of such posts held that such action could be validly taken only subject to certain safeguards and in the absence of any such safeguards the abolition was bad. The High Court did not clearly spell out the nature and extent of safeguards referred to therein. The High Court relied on the words 'subject to certain safeguards, on the abolition of posts' in the passage occurring at p. 841 (of SCR): (at p. 42 of AIR) in Parashotam Lal Dhingra's case (1958 SCR 828): (AIR 1958 SC 36) (supra) which is extracted above to reach the conclusion that unless the abolition of posts was accompanied by such safeguards, Art. 311 would be infringed. With respect, it should be stated that the High Court did not notice that in another passage at pages 857-858 (of SCR): (at pp. 47 and 48 of AIR) in the same decision, which is also extracted above, the abolition of posts referred to therein was unqualified. In this pas-

sage there is no reference to any safeguards at all. Probably the 'safeguards' referred to in the passage at page 841 (of SCR): (at p. 42 of AIR) in *Parshotam Lal Dhingra's case* (supra) meant an abolition of posts which was in good faith and not a pretence of abolition of a post resorted to in order to get rid of its incumbent and the creation of the same post with a different form or name with a new incumbent. The above view of the High Court of Jammu and Kashmir is, however, in conflict with the decision in *Ramanatha Pillai's case* (AIR 1973 SC 2641) (supra) and hence must be considered as having been overruled by this Court. In modern administrations, it is necessary to recognise the existence of the power with the Legislature or the Executive to create or abolish posts in the civil service of the State. The volume of administrative work, the measures of economy and the need for streamlining the administration to make it more efficient may induce the State Government to make alterations in the staffing patterns of the civil service necessitating either the increase or the decrease in the number of posts. This power is inherent in the very concept of governmental administration. To deny that power to the Government is to strike at the very roots of proper public administration. The power to abolish a post which may result in the holder thereof ceasing to be a Government servant has got to be recognised. But we may hasten to add that any action legislative or executive taken pursuant to that power is always subject to judicial review.

34. It is no doubt true that Art. 33 and Art. 43 of the Constitution insist that the State should endeavour to find sufficient work for the people so that they may put their capacity to work into economic use and earn a fairly good living. But these articles do not mean that everybody should be provided with a job in the civil service of the State and if a person is provided with one he should not be asked to leave it even for a just cause. If it were not so, there would be no justification for a small percentage of the population being in Government service and in receipt of regular income and a large majority of them remaining outside with no guaranteed means of living. It would certainly be an ideal state of affairs if work could be found for all the able bodied men and

women and everybody is guaranteed the right to participate in the production of national wealth and to enjoy the fruits thereof. But we are today far away from that goal. The question whether a person who ceases to be a Government servant according to law should be rehabilitated by giving an alternative employment is, as the law stands today, a matter of policy on which the Court has no voice.

35. On a fair construction of the provisions of Art. 311 (2) of the Constitution and a consideration of the judicial precedents having a bearing on the question, we are of the view that it is not possible to hold that the termination of service brought about by the abolition of a post effected in good faith attracts Art. 311 (2). An analysis of Art. 311 (2) shows that it guarantees to a person who is a member of a civil service of the Union or an All-India service or a civil service of a State or holds a civil post the right to defend himself in any proceeding leading to his dismissal, removal or reduction in rank. It requires that in such a case an inquiry should precede any such action. At that inquiry he should be informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Where it is proposed after such inquiry to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed. The second proviso to Art. 311 (2) of the Constitution sets out the circumstances when that clause would not apply. These provisions show that Art. 311 (2) deals with the dismissal, removal, or reduction in rank as a measure of penalty on proof of an act of misconduct on the part of the official concerned. This fact is emphasised by the introduction of the words 'an inquiry in which he has been informed of the charges against him' in Article 311 (2) when it was substituted in the place of the former clause (2) of Art. 311 by the Constitution (Fifteenth Amendment) Act, 1963 which came into force on Oct. 5, 1963. In the circumstances it is difficult to hold that either the decision in *Moti Ram Deka's case* (AIR 1964 SC 600) (supra) or the decision in *Papanna Gowda's case* (1969 Lab IC 730) (Mys) (supra) lays down that the provisions of Art. 311 (2) should be complied with before the services of a Government servant are terminated as a con-

sequence of the abolition of the post held by him for bona fide reasons. In view of the foregoing, it cannot be said that the Act impugned in these petitions by which the village offices in the State of Tamil Nadu were abolished contravenes Article 311 (2) of the Constitution.

36. We have now to consider the submission based on Art. 14 of the Constitution. This aspect of the case has to be examined from two angles — (i) whether the step taken by the Legislature to abolish the village offices in question is so arbitrary as to conflict with Art. 14 of the Constitution and (ii) whether unequals have been treated as equals by the Legislature.

37. While dealing with the first point it is to be observed that the posts of village officers which were governed by the Madras Act II of 1894, the Madras Act III of 1895 and the Board's Standing Orders were feudalistic in character and the appointments to those posts were governed by the law of primogeniture, the family in which the applicant was born, the village in which he was born, and the fact whether he owned any property in the village or not. These factors are alien to modern administrative service and are clearly opposed to Arts. 14 and 16 of the Constitution. No minimum educational qualifications had been prescribed. It was enough if the applicants knew reading and writing in the case of some of them. The posts were not governed by the regular service rules applicable generally to all officials in the State service. Rightly therefore, the Administrative Reforms Commission recommended their abolition and reorganisation of the village service. The relevant part of the Report of the Administrative Reforms Commission reads thus :

"The concept of service was conspicuously absent in this relationship. Village officers were part-time employees and not subject to normal civil service discipline. They do not function from public offices where they were expected to receive people and transact public business. All accounts, survey and registry records were in their private custody. Villagers had to go to the residences of village officers and await the latter's convenience for referring to public records or for getting extracts from them. This reduced the accessibility particularly of "high caste" village officers to the poor farmers of the "backward and untouchable" communities. Their em-

oluments for the part-time service, were meagre and appeared to be an honorarium rather than a living wage. Communications and living conditions in villages being difficult, subordinate inspecting officers were dependent on the private hospitality of village officers during their official visits. These factors led to the village officers developing an attitude of condescension in their dealings with villagers. Even though the hereditary principle was held to be unconstitutional recently, the members of their families still get preferential treatment, even if informally, in filling up vacant offices. In recent times, village officers have generally ceased to be leading and affluent ryots and are reduced to earn their livelihood largely through the misuse of their position."

38. The problems involved in the reorganisation of Revenue villages in Tamil Nadu were also discussed in the Report of Mr. S. P. Ambrose, I.A.S. submitted to the State Government in January, 1980. In the course of the Report, he observed :

"4.2. Re-organisation of Revenue Villages—4.2.1. In view of the considerable increases in the total beriz of villages, particularly those with extensive irrigated areas, new rules for the regulation and distribution of water in the project areas and in old ayacut areas, and the reduced work and responsibilities of the talayaris on account of the increase in the strength of the regular police establishments the norms, for determining the strength of the village establishment, as laid down in B. P. Ms. No. 324, dated the 9th Dec. 1910, read with B. P. Ms No. 231, dated the 23rd Feb. 1921, no longer hold good.

4.2.2. The size of the survey villages vary widely; 477 hectares is the extent of the smallest village and 20,947 hectares is the extent of the biggest village. In terms of population, the smallest has a population of 33, while the largest has a population of 12,777. Even though survey villages have been grouped to form convenient revenue groups for purposes of village administration, the size of revenue groups also vary widely. With the increases in the area cultivated, area irrigated (both from Government and private sources) and the number of patas the work load in most villages has increased considerably now. The question for consideration is whether a comprehensive exercise to reorganise the re-

venue villages into convenient and viable village administrative units with reference to the existing work load should be attempted, and thereafter to revise the strength of the village establishment by laying down fresh norms for determining its strength. This will be a major administrative exercise. If convenient village administrative units with, more or less, equal work load are to be constituted, several factors like area cultivated (gross and net), area irrigated, crop pattern, population, number of pattadars and beriz have to be taken into account. Before this is attempted, the major policy issue is whether to continue the present part-time system of village officers or to have regular, transferable Government servants as Village Officers in charge of bigger administrative units as recommended by the Administrative Reforms Commission."

39. Having regard to the abolition of similar village offices in the neighbouring States of Karnataka and Andhra Pradesh and the agitation in the State of Tamil Nadu for reorganisation of village service, it cannot be said that the decision to abolish the village offices which were feudalistic in character and anachronisms in the modern age was arbitrary or unreasonable. Another aspect of the same question is whether the impugned legislation is a colourable one passed with the object of treating the incumbents of village offices in an unjust way. A similar contention was rejected by this Court in *B. R. Shankaranarayana v. State of Mysore*, AIR 1966 SC 1571 in which the validity of the Mysore Village Offices Abolition Act (14 of 1961) which tried to achieve more or less a similar object arose for consideration, with the following observations at pages 1575-1576 (of AIR):

"(13) As pointed out by this Court in *Gajapati Narayan Deo's case*, AIR 1953 SC 375, the whole doctrine of colourable legislation resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. It is open to the Court to scrutinize the law to ascertain whether the legislature by device, purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it.

(14) Beyond attempting the argument that the impugned Act is a piece of colour-

able legislation, learned Counsel for the appellant has not succeeded in substantiating his contention that the Act and the Rules made thereunder are merely a device for removing the present incumbents from their office. The provisions of the Act and the rules made thereunder plainly provide for the abolition of hereditary village offices and make those offices stipendiary posts. The Act makes no secret of its intention to abolish the hereditary posts.

(15) It is argued that even after abolition, the same posts are sought to be continued. It is no doubt true that the names of the offices have not been changed but there is a basic structural difference between the posts that have been abolished and the posts that have been created. The posts created by the new Act are stipendiary posts. They carry salaries according to the grades created by the rules. The incumbents are transferable and their service is pensionable. Different qualifications are prescribed for the new posts. From a consideration of the incidents attaching to the new posts it is clear that the old posts have been abolished and new posts have been created and that the whole complexion of the posts has been changed.

(16) The result is that in our opinion the impugned Act cannot be held to be a piece of colourable legislation and as such invalid."

40. A learned discussion on all the points raised in the above case is found in the judgment of the High Court of Mysore in *Honnalige Gowda v. State of Mysore*, (AIR 1964 Mys 84). Hence the above contention has to be rejected.

41. The next contention of the petitioners which is of some substance and which is based again on Art. 14 needs to be examined here. It is seen from S. 2 (e) of the Act that the expression 'part-time village officer' is defined as follows:

"2.(e) 'part-time village officer' means Village Headman (including Additional Village Headman, Village Karnam (including Chief Karnam and Additional Village Karnam) or Triune Officer appointed under —

(i) the Madras Proprietary Estates' Village Service Act, 1894 (Madras Act II of 1894) or the Madras Hereditary Village Offices Act, 1895 (Madras Act III of 1895);

(ii) the Board's Standing Orders;

(iii) the Tamil Nadu Village Officers Service Rules, 1970 or any other rules made under the proviso to Article 309 of the Constitution; or

(iv) any other law, but does not include Grama Kuvalar, Grama Paniyalar and Pasana Kavalars."

42. By S. 3 of the Act, the posts held by the part-time village officers, as defined above, are abolished. As a consequence of the above provision not merely posts of officers appointed under the Madras Act No. II of 1894, the Madras Act No. III of 1895 and the Board's Standing Orders prior to Dec. 16, 1970 but also the posts held by officers appointed after that date under the Rules made under the proviso to Art. 309 of the Constitution i.e. The Tamil Nadu Village Officers Service Rules, 1970 or any other rule made by the Governor have been abolished. It is argued that the abolition of posts of officials appointed after Dec. 16, 1970 under the Rules made under the proviso to Art. 309 of the Constitution is violative of Art. 14 of the Constitution. We have given our anxious consideration to this submission. Any classification should satisfy two tests—(i) that there exists an intelligible differentiation between those who are grouped together and those who are not included in the group and (ii) that there exists a reasonable nexus between the differentiation and the object for which classification is made. As stated earlier the object of the impugned legislation is to abolish posts which were part-time in nature and which had come into existence under laws which were feudalistic in character and to replace them by posts held by new incumbents who are recruited under it. The question for consideration is whether the grouping together of the part-time posts mentioned in Section 2 (e) of the Act is unconstitutional. There is no dispute that up to Dec. 16, 1970 all appointments to village offices were being made under the two Madras Acts referred to above and the Board's Standing Orders on the basis of factors dealt with above. But after Dec. 16, 1970, recruitment was being made in accordance with the Tamil Nadu Village Officers Service Rules, 1970. By the said Rules a new service of part-time village officers was constituted. R. 5 thereof prescribed the minimum educational qualification and the tests which an applicant had to pass to be eligible for being appointed. The Rules fixed the age of superannuation at 55 years. But even under these Rules, the persons who were appointed were part-time village officers who were paid a fixed amount every month by way of remuneration. The nature of duties performed by them

and the responsibilities they had to discharge were also the same. The posts held by them were non-pensionable posts. Under the Act and the Rules framed thereunder, the village administrative officers to be appointed are to be recruited directly. No person shall be eligible for appointment to the post of a village administrative officer unless he possesses the minimum general educational qualification referred to in R. 12 (a) (i) of Part II of the Tamil Nadu State Subordinate Services Rules and prescribed in Schedule I to the said Part II. Every person appointed to the post has within a period of one year from the date on which he joins duty to undergo the training and pass the tests prescribed by Rule 9 of the Rules made under the Act. Every person appointed as a village administrative officer is liable to be transferred from one place to another. The age of superannuation is fixed at 58 years. The said posts are no longer part-time posts and the holders thereof are full-time Government officials entitled to draw salary every month in the scale of Rs. 350-10-420-15-600 and other allowances and these posts are pensionable posts. It is also to be seen from the recommendations of the Administrative Reforms Commission and other material placed before us that the revenue villages will be reorganised so as to form viable administrative units which would require the services of a whole time village administrative officer. The area under a village administrative officer is much larger than many of the existing revenue villages. When such reorganisation of the village administration is contemplated, it would not be possible to allow charges of diverse sizes to continue to remain in any part of the State of Tamil Nadu. In these circumstances, even though the village officers appointed after Dec. 16, 1970 are in a way different from the village officials appointed prior to that date, they too cannot be equated with the new village administrative officers who will be appointed under the Act and the Rules made thereunder. It cannot, therefore, be held that Art. 14 of the Constitution has been violated in abolishing the posts held by those appointed after Dec. 16, 1970.

43. The petitioners in Writ Petitions Nos. 6191, 6355 and 6356 of 1980 who are holders of village offices in Tiruttani Taluk and Pallipatu area have questioned the impugned Act on the ground that the State Legislature could not pass the law without the previous approval of the Central Government as required by the pro-

viso to sub-section (4) of S. 43 of the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 (Central Act 56 of 1959). The area in which these petitioners were working as village officials forms part of the transferred territories transferred from Andhra Pradesh to Tamil Nadu under the aforesaid Act. Their contention is that since they were working as village officials in the said area prior to the commencement of the abovesaid Act, the conditions of their service could not be altered to their prejudice without obtaining the previous approval of the Central Government. Section 43 of the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 reads:

"43. Provisions relating to services—

(1) Every person, who immediately before the appointed day, is serving in connection with the affairs of Andhra Pradesh or Madras shall, as from that day, continue so to serve, unless he is required by general or special order of the Central Government to serve provisionally in connection with the affairs of the other State.

(2) As soon as may be after the appointed day, the Central Government shall, by general or special order, determine the State to which every person provisionally allotted to Andhra Pradesh or Madras shall be finally allotted for service and the date from which such allotment shall take effect or be deemed to have taken effect.

(3) Every person who is finally allotted under the provisions of sub-section (2) to Andhra Pradesh or Madras shall, if he is not already serving therein, be made available for serving in that State from such date as may be agreed upon between the two State Governments or in default of such agreement, as may be determined by the Central Government.

(4) Nothing in this section shall be deemed to affect, after the appointed day, the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to the determination of the conditions of service of persons serving in connection with the affairs of Andhra Pradesh or Madras.

Provided that the conditions of service applicable immediately before the appointed day to the case of any person provisionally or finally allotted to Andhra Pradesh or Madras under this section shall not be varied to his disadvantage except with the previous approval of the Central Government.

(5) The Central Government may at any time before or after the appointed day give such directions to either State Government as may appear to it to be necessary for the purpose of giving effect to the foregoing provisions of this section and the State Government shall comply with such directions."

44. The answer of the State Government to the above contention is that the petitioners in these petitions are not allotted under S. 43 (2) of the abovesaid Act to the State of Tamil Nadu and hence the proviso to sub-sec. (4) of S. 43 is not applicable. The petitioners have not shown any such order of allotment under S. 43 (2). Hence the proviso to sub-sec. (4) of S. 43 is not attracted. Under S. 43 (4) of the abovesaid Act, the State Government is entitled to deal with all the officials in the areas transferred to them in accordance with Chapter I of Part XIV of the Constitution. The above contention is, therefore, rejected.

45. In the course of the hearing on a suggestion made by the Court, the learned Attorney General filed a memorandum which reads as follows:

"All the erstwhile Village Officers who possess the minimum general educational qualification as required under the Abolition Act and irrespective of their age (but subject to the rule of retirement framed under the Abolition Act and the Rules framed thereunder) will be screened by a Committee to be appointed by the Government. They need not make any application and they need not also appear for any test conducted by the Tamil Nadu Public Service Commission for the post of Village Administrative Officer. Guidelines to the Committee will be as follows:—

(1) Punishment

(2) Physical condition.

All the persons selected by the Committee will be appointed by the competent authorities and relaxation in respect of age will be given. They will be new appointees under the Abolition Act and will be governed by the provisions of the Act and the rules made thereunder. Compensation will not be available to those who are so appointed.

The remaining vacancies will be filled up from among the candidates already selected by the Tamil Nadu Public Service Commission."

46. After the above petitions were filed under the interim orders passed in these cases all the officials involved in these cases are being paid the honorarium by the State Government. Those who

fail in these petitions would have become liable to repay the amount which they have thus drawn in excess of the compensation, if any, they may be entitled to. It is submitted by the learned counsel for the State of Tamil Nadu that the State Government will not take steps to recover such excess amount. The above statement is recorded.

47. The attitude displayed by the State Government in filing the memorandum referred to above and in making a statement to the effect that the amount paid pursuant to the interim orders in excess of the compensation payable to the village officials concerned will not be recovered is a highly commendable one and we record our deep appreciation for the laudable stand taken by the Government.

48. It was, however, strenuously urged by Shri R. K. Garg that those who have to vacate the posts would be without any work and some of them have large families and that compensation, if any, payable to them is very inadequate. He urged that it was the duty of the State Government to make adequate provision pursuant to Art. 38 and Art. 43 of the Constitution. These Articles are in Part IV of the Constitution. They are not enforceable by the courts but they are still fundamental in the governance of the country.

49. The nature of the relationship that exists or ought to exist between the Government and the people in India is different from the relationship between the ruler and his subjects in the West. A study of the history of the fight for liberty that has been going on in the West shows that it has been a continuous agitation of the subjects for more and more freedom from a king or the ruler who had once acquired complete control over the destinies of his subjects. The Indian tradition or history is entirely different. The attitude of an Indian ruler is depicted in the statement of Sri Rama in the Ramayana thus:

क्षत्रियैर्घायिते चापो नार्तशब्दो भवेदिति

(Ramayana III-10-3)

(Kshatriyas (the kings) bear the bow (wield the power) in order to see that there is no cry of distress (from any quarter)).

50. The duty of the administrator, therefore, is that he should promptly take all necessary steps to alleviate the sufferings of the people even without being asked to do so. While attending to his duties an administrator should always

remember the great saying of the Tamil saint Tiruvalluvar:*

Do nought that soul repenting must deplore,
If thou hast sinned, 'tis well if thou dost
sin no more.'

(Let a minister never do acts of which he would have to grieve saying. "What is this I have done, (but) should he do (them), it were good that he grieved not.) (No. 655 in Tirukkural: Translation by Rev. Dr. G. U. Pope and others (Reprint 1970) p. 175).

51. An administrator's actions should be such as he is not driven to repent for the mistakes he may have committed. But if he has committed any mistakes in the past he should try to avoid a repetition of such mistakes. It is significant that in Tamil language the equivalent of the word 'people' is 'Makkal' which is also sometimes used as the equivalent of 'children'. It is for the State Government to consider what can be done to those who fail in the petitions. This observation is made particularly in regard to those who were recruited after Dec. 16, 1970 under the Rules made under the proviso to Art. 309 of the Constitution in view of the fact that their recruitment was not made on the hereditary principle. Those who have passed S.S.L.C. examination amongst them come within the scope of the statement made by the learned Attorney General. But those who have merely completed S.S.L.C. examination but not passed it fall outside the scope of that statement even though they have gained experience while they were in office. We hope and trust that the State Government will look into this matter purely from a humanitarian point of view. This is only a suggestion and not a direction.

52. In the result the petitions are dismissed subject to the following:

(i) The State Government will give effect to the memorandum filed on its behalf which is incorporated in this judgment in the case of those who possess the minimum general qualifications prescribed under the Act and the Rules made thereunder and who were holding the posts of part-time village officers immediately before the Act came into force. The State Government shall re-employ all such persons who have not crossed the age of superannuation and who are selected as per the memorandum in the new cadre within four months from today. Until they are so selected, they will

* (Matter in Tamil, omitted.—Ed.)

not be paid any remuneration. Even if they are re-employed, the amount paid to them pursuant to the interim orders will not be recovered from them.

(ii) The compensation, if any, payable by the State Government under S. 5 of the Act to those who cease to be village officers shall be adjusted against the amount paid pursuant to the interim orders passed in these cases. The State Government will not recover from them any amount paid to them pursuant to the interim orders passed in these cases in excess of the compensation, if any, payable to them.

(iii) The interim orders stand vacated with effect from April 15, 1982.

(iv) No costs.

Petitions dismissed.

AIR 1982 SUPREME COURT 1126

= 1982 Lab. I. C. 161

A. C. GUPTA, R. S. PATHAK AND
O. CHINNAPPA REDDY, JJ.*

Writ Petns. Nos. 501, 643-44, 645, 649 and 1866 of 1981, D/- 28-12-1981.

A. V. Nachane and another, Petitioner v. Union of India and another, Respondents.

S. N. Bhowmik and another, Petitioners v. Union of India and another, Respondents.

S. S. Jain and another, Petitioners v. Union of India and another, Respondents.

B. S. Dogra and another, Petitioners v. Union of India and another, Respondents.

T. N. Krishnan and another, Petitioners v. Union of India and another, Respondents.

(A) Life Insurance Corporation Act (1956), S. 48 (2) (cc) and S. 48 (2C), as inserted by Amendment Act (1981) — Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules (1981), R. 3 — Taking away of advantages regarding bonus enjoyed by employees of Corporation — Denial of protection of Industrial Disputes Act — Amendment Act and Rules challenged on ground of discrimination — Burden to establish hostile discrimination held was on employees — In absence of any material, Act and Rules could not be said to be violative of Article 14. (Constitution of India, Arts. 14, 32).

*The judgments are printed in the order in which they are given in the certified copy — Ed.

Held, that the material produced on behalf of the Union of India and the Corporation to show that the terms and conditions of service of the employees in several other undertakings in the public sector compared unfavourably to those of the Corporation employees was not conclusive. But the burden of establishing hostile discrimination was on the petitioners who challenged the Amendment Act and the rules. It was for them to show that the employees of the Life Insurance Corporation and the employees of the other establishments to whom the provisions of the Industrial Disputes Act were applicable were similarly circumstanced to justify the contention that by excluding the employees of the Corporation from the purview of the Industrial Disputes Act they had been discriminated against.

In absence of any relevant material the Amendment Act of 1981 and the Rules made on 2-2-1981 could not be said to have infringed Art. 14. AIR 1958 SC 578 and AIR 1964 SC 600, Distinguished. (Para 8)

(B) Life Insurance Corporation Act (1956), S. 48 (2C) (as added by Amendment Act 1981) — Rules made under Section 48 (2) (cc) by Central Government do not repeal I. D. Act or other laws — Subsec. (2C) of Amendment Act is not invalid on ground of excessive delegation of legislative functions. (i) Constitution of India, Art. 245 (ii) Life Insurance Corporation (Amendment) Act (1981), Preamble).

The Life Insurance Corporation Amendment Act (1981) is not invalid on the ground of excessive delegation of legislative functions. (Para 11)

Section 48 (2C) read with S. 48 (2) (cc) authorises the Central Government to make rules to carry out the purposes of the Act notwithstanding the Industrial Disputes Act or any other law. This means that in respect of the matters covered by the rules the provisions of the Industrial Disputes Act or any other law will not be operative. Sub-sec. (2C) of S. 48 of the Life Insurance Corporation Act in so far as it authorises the Central Government to make rules by-passing the existing laws, does not either expressly or by implication repeal any of the provisions of pre-existing laws; neither does it abrogate them. By-passing a certain law does not necessarily amount to repeal or abrogation of that law. (Paras 9, 10)

Further, the policy as stated in the preamble of the Amendment Act is that "for securing the interests of the Life

Insurance Corporation of India and its Policy-holders and to control the cost of administration, it is necessary that revision of the terms and conditions of service applicable to the employees and agents of the Corporation should be undertaken expeditiously". The policy stated is as clear as offering sufficient guidance to the Central Government in exercising its powers under that Act. AIR 1954 SC 465 and AIR 1959 SC 512, Rel. on. (Para 11)

(C) Life Insurance Corporation Act (1956), S. 48 (2C) as added by Amendment Act (1981) — Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules (1981), R. 3 — Rule taking away advantages of employees regarding bonus — Rule can operate only prospectively — Cannot nullify effect of Writ issued by Court earlier.

Rule 3 operating retrospectively cannot nullify the effect of the writ issued in D. J. Bahadur's case— (AIR 1980 SC 2181) which directed the Life Insurance Corporation to give effect to the terms of the 1974 settlements relating to bonus until superseded by a fresh settlement, an industrial award or relevant legislation. The Life Insurance Corporation (Amendment) Act 1981 and the Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981 are relevant legislation. However, these rules, in so far as they seek to abrogate the terms of the 1974 settlements relating to bonus, can operate only prospectively, that is, from Feb. 2, 1981, the date of publication of the rules. (Para 13)

Held that the attempt made by the 1981 amending Act and the rules thereunder to scuttle the payment of bonus with effect from a date anterior to the date of enactment was liable to fail. The employees were entitled to be paid the bonus earned by them before the date of publication of the Life Insurance Corporation Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981. AIR 1978 SC 803, Rel. on. (Para 19)

(D) Life Insurance Corporation (Amendment) Act (1981), Pre. — Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules (1981), R. 3 — Act and Rules do not violate Art. 19 (1) (g) — Settlement between L.I.C. and its Class III and Class IV employees regarding payment of bonus dt. 24-1-1974 and 6-2-1973 — Claim based on settlement is not

a fundamental right — Cannot be enforced through writ jurisdiction Court. (i) Constitution of India, Arts. 19 (1) (g), 32 and 226; (ii) Industrial Disputes Act (1947), Ss. 2 (p) and 18). (Para 7)

(E) Life Insurance Corporation (Amendment) Act (1981), Pre. — Life Insurance Corporation — India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules (1981), R. 3 — Act and Rules do not violate Art. 21 — Word 'life' — Does not include livelihood. (Constitution of India, Art. 21). AIR 1960 SC 932, Rel. on. (Para 7)

Cases Referred: Chronological Paras
 AIR 1980 SC 2181: (1981) 1 SCR 1083: 9
 1980 Lab IC 1218 3, 7, 12, 13, 16, 18, 19
 AIR 1978 SC 803: (1978) 3 SCR 334: 1978
 Lab IC 612 2, 12, 13, 17, 19
 AIR 1974 SC 1660: (1974) 2 SCR 879: 9
 1974 Tax LR 2017 9
 AIR 1968 SC 1232: (1968) 3 SCR 251 9
 AIR 1964 SC 600: (1964) 5 SCR 683 8
 AIR 1960 SC 932: (1960) 3 SCR 499 7
 AIR 1959 SC 512: (1959) Supp (1) SCR 792 9, 11
 AIR 1958 SC 578: 1959 SCR 12 8
 AIR 1954 SC 465: (1955) 1 SCR 380 10, 11
 AIR 1954 SC 569: (1955) 1 SCR 290 9
 AIR 1951 SC 332: 1951 SCR 747 9

Mr. R. K. Garg, Sr. Advocate, Mr. V. J. Francis, Mr. Sunil Kumar Jain & Mr. D. K. Garg, Advocates with him for Petitioners in WP. 501/81; Mr. M. K. Ramamurthi, Sr. Advocate, Mr. J. Ramamurthi & Miss R. Vajai, Advocates with him for Petitioners in WPs. 643-44/81; Mr. Vimal Dave and Miss Kailash Mehta, Advs., for Petitioners in WP. No. 645/81; Mr. A. K. Goel, Advocate, for Petitioners in W.P. 649/81, Mr. Dalveer Bhandari & Mr. H. M. Singh, Advocates, for Petitioners in WP. 1866/81; Mr. L. N. Sinha, Attorney General, Mr. M. K. Banerjee, Solicitor General, Miss A. Subhashini & Mr. R. P. Singh, Advocates with them for Respondent No. 1 in all the matters; Mr. L. N. Sinha, Attorney General, M/s. O. C. Mathur & Sri Narain, Advocates with him for Respondent No. 2 in all the matters; Mr. P. H. Parekh, Advocate for Intervener in WP. 501/81; Mr. Somnath Chatterjee, Sr. Advocate, Mr. J. Ramamurthi & Miss R. Vaigai, Advocates with him, for Intervener; Mr. Ajay Kumar Banerjee, in WPs. 643-44/81.

— GUPTA, J. (For himself and on behalf of R. S. Pathak, J.):— The validity of the provisions of the Life Insurance Corporation (Amendment) Act, 1981 and the Life Insurance Corporation (Amendment) Ordinance, 1981 which preceded it is chal-

lenged in this batch of writ petitions. The writ petitions have a history behind them which can be conveniently divided into three chapters. However, it will be easier to follow this history if we refer to some of the provisions of the Life Insurance Corporation Act, 1956 first. The Life Insurance Corporation was constituted under the Life Insurance Corporation Act, 1956 to provide for the nationalisation of life insurance business in India by transferring all such business to the Life Insurance Corporation of India. Under S. 11 (1) of the Act the services of the employees of insurers whose business has vested in the Corporation are transferred to the Corporation. Sub-sec. (2) of S. 11 provides:

"Where the Central Government is satisfied that for the purpose of securing uniformity in the scales of remuneration and the other terms and conditions of service applicable to employees of insurers whose controlled business has been transferred to and vested in, the Corporation it is necessary so to do, or that, in the interests of the Corporation and its policyholders, a reduction in the remuneration payable, or a revision of the other terms and conditions of service applicable to employees or any class of them is called for, the Central Government may, notwithstanding anything contained in sub-sec. (1), or in the Industrial Disputes Act, 1947, or in any other law for the time being in force, or in any award, settlement or agreement for the time being in force, alter (whether by way of reduction or otherwise) the remuneration and the other terms and conditions of service to such extent and in such manner as it thinks fit; and if the alteration is not acceptable to any employee, the Corporation may terminate his employment by giving him compensation equivalent to three months' remuneration unless the contract of service with such employee provides for a shorter notice of termination."

There is an explanation to this sub-section which is not relevant for the present purpose. S. 48 of the Act empowers the Central Government to make rules to carry out the purposes of the Act. Sub-sec. (2) of S. 48 in Cls. (a) to (m) specifies some of the matters that the rules may provide for. Sub-sec. (3) of S. 48 states:

"Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or

in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

S. 49 (1) empowers the Life Insurance Corporation of India to make regulations to provide for all matters for which provision is expedient for the purpose of giving effect to the provisions of the Act. Cls. (a) to (m) of sub-sec. (2) of S. 49 specify some of the matters the regulations may provide for. The matter referred to in cl. (b) of sub-sec. (2) is "the method of recruitment of employees and agents of the Corporation and the terms and conditions of service of such employees or agents." Cl. (bb) speaks of the terms and conditions of service of persons who have become employees of the Corporation under sub-sec. (1) of S. 11.

2. Turning now to the history of the litigation, the first chapter begins with two settlements reached on Jan. 24, 1974 and Feb. 6, 1974 between the Life Insurance Corporation and its Class III and Class IV employees. These were settlements under S. 18 read with S. 2 (p) of the Industrial Disputes Act, 1947. The settlements were identical in terms; four of the five unions of workmen subscribed to the first settlement while the remaining union was a signatory to the second. The settlements cover a large ground including the claim for bonus. Cl. 8 of each of the settlements was as follows:—

"Bonus:

(i) No profit sharing bonus shall be paid. However, the Corporation may, subject to such directions as the Central Government may issue from time to time, grant any other kind of bonus to its Class III and IV employees.

(ii) An annual cash bonus will be paid to all Class III and Class IV employees at the rate of 15% of the annual salary (i.e. basic pay inclusive of special pay, if any, and dearness allowance and additional dearness allowance) actually drawn by an employee in respect of the financial year to which the bonus relates.

(iii) Save as provided herein all other terms and conditions attached to the

admissibility and payment of bonus shall be as laid down in the settlement on bonus dated the 26th June, 1972."

Cl. 12 of the settlement inter alia provides:

"This settlement shall be effective from 1st April, 1973 and shall be for a period of four years, i.e. from 1st April 1973 to 31st March 1977."

In 1975 an Ordinance was promulgated called the Payment of Bonus (Amendment) Ordinance which was subsequently replaced by the Payment of Bonus (Amendment) Act, 1976. The reference to this ordinance and the Act would not have been relevant because S. 32 (i) of the original Payment of Bonus Act, 1965 made the said Act not applicable to the employees of the Life Insurance Corporation, but the Central Government appears to have decided also that the employees of establishments not covered by the Payment of Bonus Act would not be eligible to get bonus and ex-gratia cash payment in lieu of bonus would be made. Accordingly payment of bonus for the year 1975-76 to the employees of the Corporation was stopped under instructions from the Central Government. On a writ petition filed by the employees of the Corporation in the Calcutta High Court, a single Judge of that court issued a writ of mandamus directing the Corporation to act in accordance with the terms of the settlement. Thereafter the Life Insurance Corporation (Modification of Settlement) Act, 1976 was passed. Some of the employees of the Corporation challenged the constitutional validity of the Act by filing writ petition in this Court. In *Madan Mohan Pathak v. Union of India*, (1978) 3 SCR 334: (AIR 1978 SC 803). This court held that the 1976 Act offended Art. 31 (2) of the Constitution and was as such void and issued a writ of mandamus directing the Union of India and the Life Insurance Corporation to forbear from implementing or enforcing the provisions of the 1976 Act and to pay annual cash bonus for the years 1st April 1975 to 31st March 1976 and 1st April 1976 to 31st March 1977 to Class III and Class IV employees in accordance with the terms of the settlements.

3. The second chapter began on Mar. 31, 1978 when the Corporation issued a notice under S. 19 (2) of the Industrial Disputes Act declaring its intention to terminate the settlements on the expiry of the period of two months from the date the notice was served. On the same day another notice was issued by

the Corporation under S. 9A of the Industrial Disputes Act stating that it proposed to effect a change in the conditions of service applicable to the workmen. The change proposed was set out in the annexure to the notice which reads:

"AND WHEREAS for economic and other reasons it would not be possible for the Life Insurance Corporation of India to continue to pay bonus on the aforesaid basis;

Now, therefore, it is our intention to pay bonus to the employees of the Corporation in terms reproduced hereunder:

"No employee of the Corporation shall be entitled to profit sharing bonus. However, the Corporation may, having regard to the financial condition of the Corporation in respect of any year and subject to the previous approval of the Central Government, grant non-profit sharing bonus to its employees in respect of that year at such rate as the Corporation may think fit and on such terms and conditions as it may specify as regards the eligibility of such bonus."

The notices were followed by a notification issued by the Corporation under S. 49 of the Life Insurance Corporation Act on May 26, 1978 substituting a new regulation for the existing Reg. No. 58 of the Staff Regulations. Simultaneously the Life Insurance Corporation (Alteration of Remuneration and other Terms and Conditions of Service of Employees) Order, 1957, called the Standardisation Order, made by the Central Government in exercise of the powers conferred on it by S. 11 (2) of the Life Insurance Corporation Act was amended with effect from June 1, 1978 substituting a new cl. (9) for the original clause concerning bonus. Cl. (9) of the Standardisation Order and Reg. 58 of the Staff Regulations after amendment read as follows:

"No employee of the Corporation shall be entitled to profit-sharing bonus. However, the Corporation may, having regard to the financial condition of the Corporation in respect of any year and subject to the previous approval of the Central Government grant non-profit sharing bonus to its employees in respect of that year at such rate as the Corporation may think fit and on such terms and conditions as it may specify as regards the eligibility for such bonus."

The validity of the said two notices and the notification issued for the purpose of nullifying any further claim of the workmen to annual cash bonus in terms of the Settlements of 1974 was challenged by the workmen by filing a writ petition in

the Allahabad High Court. The High Court allowed the writ petition and the Corporation preferred an appeal to this court. Another writ petition which had been filed in the Calcutta High Court challenging the said notices and the notification was transferred to this court, and the appeal and this writ petition were heard and disposed of by a common judgment. The two cases were Civil Appeal No. 2275 of 1978: (Life Insurance Corporation of India v. D. J. Bahadur, (1981) 1 SCR 1083: (AIR 1980 SC 2181)) and Transfer Case No. 1 of 1979: (Chandrashekhhar Bose v. Union of India, (1981) 1 SCR 1083: (AIR 1980 SC 2181)). By a majority the appeal preferred by the Corporation was dismissed and the transfer petition was allowed and a writ was issued by this court to the Life Insurance Corporation directing it "to give effect to the terms of the settlements of 1974 relating to bonus until superseded by a fresh settlement, an industrial award or relevant legislation." The second chapter closed with this decision.

4. The third chapter begins with the promulgation of the Life Insurance Corporation (Amendment) Ordinance, 1981 on Jan. 31, 1981. The following changes made in the principal Act by the Ordinance are material. In sub-sec. (2) of S. 48 of the principal Act a new sub-cl. (cc) was inserted with retrospective effect from June 20, 1979. Cl. (cc) relates to "the terms and conditions of service of the employees and agents of the Corporation including those who became employees and agents of the Corporation on the appointed day under this Act." Three new sub-secs. (2A), (2B) and (2C) were added to S. 48. Sub-sec. (2A) says that the regulations and other provisions as in force immediately before the commencement of the Ordinance with respect to the terms and conditions of service of the employees and agents of the Corporation shall be deemed to be rules made under cl. (cc) of sub-sec. (2). Sub-sec. (2B) provides that the power to make rules under cl. (cc) of sub-sec. (2) shall include (i) the power to give retrospective effect to such rules, and (ii) the power to amend by way of addition, variation or repeal the regulations and other provisions referred to in sub-sec. (2A) with retrospective effect, but not from a date earlier than June 20, 1979. Sub-sec. (2C) reads as follows:

"The provisions of cl. (cc) of sub-sec. (2) and sub-sec. (2B) and any rules made under the said cl. (cc) shall have effect,

and any such rule made with retrospective effect from any date shall also be deemed to have had effect from that date, notwithstanding any judgment, decree or order of any court, tribunal or other authority and notwithstanding anything contained in the Industrial Disputes Act, 1947 or any other law or any agreement, settlement, award or other instrument for the time being in force."

Certain consequential changes were also made in S. 49 of the Act. In cl. (b) of S. 49 (2) which has been quoted above, the words "and the terms and conditions of service of such employees or agents" were omitted. This was necessary because the terms and conditions of service of the employees and the agents with regard to which the Corporation was empowered to make regulations by S. 49 (1) of the principal Act is now a matter included in cl. (cc) of S. 48 (2) as one of the matters covered by the rule making authority of the Central Government under S. 48 (1) of the Act. The ordinance also omits cl. (bb) from S. 49 (2). Cl. (bb) also quoted earlier included the terms and conditions of the service of the persons who had become employees of the Corporation under S. 11 (1) of the Act. The terms and conditions of service of such persons are now included in the new cl. (cc) of S. 48 (2).

5. By notification dated Feb. 2, 1981 the Central Government in exercise of the powers conferred by Sec. 48 of the Life Insurance Corporation Act, 1956 made the rules called the Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981. The relevant rule is R. 3 which has been given retrospective operation from July 1, 1979. Sub-r. (1) of R. 3 provides: "No Class III or Class IV employee of the Corporation shall be entitled to the payment of any profit sharing bonus or any other kind of cash bonus." Sub-r. (2) of R. 3 states that notwithstanding what sub-r. (1) provides every Class III and Class IV employee shall be entitled to a payment in lieu of bonus — (a) for the period commencing from July 1, 1979 and ending on Mar. 31, 1980 at the rate of 15 per cent of his salary; and (b) thereafter for every year commencing on the 1st April and ending on the 31st day of March of the following year, at such rate and subject to such conditions as the Central Government may determine having regard to the wage level, the financial circumstances and other relevant factors. There is a proviso

to this sub-rule which says that (i) no payment in lieu of bonus shall be made to any employee drawing a salary exceeding Rs. 1,600/- per month; and (ii) where the salary of an employee exceeds Rs. 750/- per month but does not exceed Rs. 1,600/- per month, the maximum payment to him in lieu of bonus shall be calculated as if his salary were Rs. 750/- per month. For the purposes of this sub-rule, "salary" was explained as meaning basic pay, special pay, if any, and dearness allowance. Sub-rule (3) of R. 3 rescinds Reg. 58 of the Staff Regulations and all other provisions relating to the payment of bonus to the employee to the extent they are inconsistent with R. 3.

6. Writ Petition No. 501 of 1981 under Art. 32 of the Constitution was filed in this court on Feb. 5, 1981 by Shri A. V. Nachane and the All India Life Insurance Corporation Employees Federation, Bombay, challenging the validity of the Ordinance and the aforesaid rules. Similar writ petitions by other associations of the employees of the Corporation followed. In the meantime the ordinance was repealed and replaced on March 17, 1981 by the Life Insurance Corporation (Amendment) Act, 1981 which received the assent of the President of India on the same day. The writ petitions were suitably amended after the Amendment Act came into force. The provisions of the Act are similar to those of the Ordinance except that the Amendment Act adds a new sub-section, sub-sec. (3), to S. 49 of the principal Act. The new sub-sec. (3) which provides that the regulations made under S. 49 shall be laid before each House of Parliament are similar in terms to sub-s. (3) of S. 48 requiring the rules made by the Central Government under the Act to be laid before each House of Parliament. Sec. 4 of the Amendment Act repeals the Ordinance but provides that "notwithstanding such repeal, anything done or any action taken under the principal Act as amended by the said Ordinance shall be deemed to have been done or taken under the principal Act as amended by this Act."

7. The validity of the Amendment Act and the Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981 have been challenged on several grounds. It was argued that the Act and the rules were violative of Arts. 14, 19 (1) (g) and 21 of the Constitution. It was further contended that the said Act was

invalid on the ground of excessive delegation of legislative functions. Another contention raised was that in any event sub-s. (2C) of S. 48 was invalid to the extent it permitted retrospective operation to R. 3 to override the order of this court disposing of D. J. Bahadur's case (AIR 1980 SC 2181). The challenge based on Art. 19 (1) (g) and Art. 21 does not appear to have any substance. Apart from anything else, a claim based on the 1974 settlements is certainly not a fundamental right that could be enforced through this court. As regards Art. 21, the first premise of the argument that the word 'life' in that Article includes livelihood was considered and rejected in *In re: Sant Ram* (1960) 3 SCR 499: (AIR 1960 SC 932).

8. The contention that Art. 14 is infringed arises on the provision of sub-sec. (2C) of Sec. 48 that any rule made under cl. (cc) of sub-sec. (2) of that section touching the terms and conditions of service of the employees of the Corporation shall have effect notwithstanding anything contained in the Industrial Disputes Act, 1947. It is true that after rules are made regarding the terms and conditions of service, the right to raise an industrial dispute in respect of matters dealt with by the rules will be taken away and to that extent the provisions of the Industrial Disputes Act will cease to be applicable. It was argued that there was no basis on which the employees of the Corporation could be said to form a separate class for denying to them the protection of the Industrial Disputes Act. The reply on behalf of the Union of India and the Life Insurance Corporation was that the remuneration that was being paid to class III and class IV employees of the Corporation was far in excess of what was paid to similarly situated employees in other establishments in the public sector. Some material was also furnished to support this claim though they were certainly not conclusive. The need for amending the Life Insurance Corporation Act, 1956 as appearing from the preamble of the Amendment Act and the Ordinance is as follows: "..... for securing the interests of the Life Insurance Corporation of India and its policy-holders and to control the cost of administration, it is necessary that revision of the terms and conditions of service applicable to the employees and agents of the Corporation should be undertaken expeditiously." Referring to the preamble of the Act the Attorney-General appearing for the Union of India

and the Corporation submitted that the problem of mounting cost of administration led to the making of the impugned law. He added that it was felt that no improvement in the situation was possible by the process of adjudication and a policy decision was taken that in the circumstances the proper course was legislation and that is why the Amendment Act was passed and the impugned rules were framed. The learned Attorney General submitted that it was for Parliament to decide whether the situation was remediable by adjudication or required legislation. According to him the Life Insurance Corporation Act as amended and the rules made after amendment placed the Corporation in the same position as other undertakings, that the advantages being enjoyed by the employees of the Corporation which were not available to similarly situated employees of other undertakings have been taken away removing what he described as discrimination in favour of the employees of the Life Insurance Corporation. We have already said that the material produced on behalf of the Union of India and the Corporation to show that the terms and conditions of service of the employees in several other undertakings in the public sector compared unfavourably to those of the Corporation employees was not conclusive. But the burden of establishing hostile discrimination was on the petitioners who challenged the Amendment Act and the rules. It was for them to show that the employees of the Life Insurance Corporation and the employees of the other establishments to whom the provisions of the Industrial Disputes Act were applicable were similarly circumstanced to justify the contention that by excluding the employees of the Corporation from the purview of the Industrial Disputes Act they had been discriminated against. There is no material before us on the basis of which we can hold that the Amendment Act of 1981 and the rules made on Feb. 2, 1981 infringe Article 14. We do not think that on the facts of this case *Express Newspapers Ltd. v. Union of India*, 1959 SCR 12: (AIR 1958 SC 578), and *Moti Ram Deka v. General Manager, N. E. F. Railways, Maligaon, Pandu* (1964) 5 SCR 683: (AIR 1964 SC 600), relied on by the petitioners, have any application.

9. It was contended that sub-sec. (2C) added to S. 48 of the Life Insurance Corporation Act, 1956 by the Amendment Act of 1981 was invalid because of excessive delegation of legislative functions

and that if sub-sec. (2C) which is an integral part of the Amendment Act was ultra vires, the entire Amendment Act would be unconstitutional. The Amendment Act introduced cl. (cc) in S. 48 (2) authorising the Central Government to make rules in respect of the terms and conditions of service of the employees and agents of the Corporation. Sub-section (2C) of S. 48 provides inter alia that rules made under cl. (cc) shall have effect notwithstanding anything contained in the Industrial Disputes Act, 1947 or any other law for the time being in force. The argument is that the rules made under S. 48 (2) (cc) can virtually repeal the Industrial Disputes Act and other laws to the extent they are inconsistent with these rules. Repealing a law, it was submitted on the authority of *In re Delhi Laws Act* 1951 SCR 747: (AIR 1951 SC 332), was an essential legislative function which had been delegated to the Central Government and that the delegation was therefore excessive. It is now well settled that it is competent for the legislature to delegate to other authorities the power to frame rules to carry out the purposes of the law made by it (see *In re Delhi Laws Act*, *Raj Narain Singh v. The Chairman, Patna Administration Committee*, Patna (1955) 1 SCR 290: (AIR 1954 SC 569), and *D. S. Garewal v. State of Punjab* (1959) Supp (1) SCR 792: (AIR 1959 SC 512)) but the essential legislative functions cannot be delegated. What is essential legislative function has been explained by Mukerjee, J., in the *Delhi Laws* case (AIR 1951 SC 332 at p. 400) as follows:

"The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy." In *Raj Narain Singh v. Chairman, Patna Administration Committee*, Patna, a Bench of five Judges of this court held that an executive authority can be empowered by a statute to modify either existing or future laws but not in any essential feature. In the instant case S. 48 (2C) read with S. 48 (2) (cc) authorises the Central Government to make rules to carry out the purposes of the Act notwithstanding the Industrial Disputes Act or any other

law. This means that in respect of the matters covered by the rules the provisions of the Industrial Disputes Act or any other law will not be operative. The argument is that sub-sec. (2C) or any other provision introduced in the principal Act by the Amendment Act does not lay down any legislative policy nor supply any guidelines as to the extent to which the rule-making authority would be competent to override the provisions of the Industrial Disputes Act or other laws. Reference was made to *Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills, Delhi* (1968) 3 SCR 251 : (AIR 1968 SC 1232) and *Gwalior Rayon Silk Manufacturing (Weaving) Company Limited v. Assistant Commissioner of Sales Tax* (1974) 2 SCR 879 : (AIR 1974 SC 1660) for the proposition that unlimited right of delegation is not inherent in the legislative power itself.

10. The question therefore is, does the Amendment Act of 1981 lay down no legislative policy or furnish no guidance to indicate the nature and extent of the modifications that the rules will be permitted to make in the existing laws to carry out the purposes of the Life Insurance Corporation Act, 1956 as amended in 1981? Learned Attorney General relied on the decision of this court in *Harishankar Bagla v. State of Madh Pra* (1955) 1 SCR 380 : (AIR 1954 SC 465). This was a case under the Essential Supplies (Temporary Powers) Act, 1946. S. 3 (1) of that Act says that the Central Government for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub-sec. (2) of S. 3 states that without prejudice to the generality of the powers conferred by sub-sec. (1), such an order may provide inter alia for regulating by licences or permits or otherwise the production or manufacture and transport, distribution, disposal, acquisition, use or consumption of any essential commodity. S. 6 of that Act provides inter alia that any order made under S. 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than that Act. In exercise of the powers conferred by S. 3 of that Act the Central Government made the Cotton Textiles (Control of Movement) Order, 1948. cl. 3 of the said Order requires a person to take a

permit from the Textile Commissioner to enable him to transport cotton textiles. One of the questions that arose in *Harishankar Bagla's* case (AIR 1954 SC 465) was whether S. 6 of the Essential Supplies (Temporary Powers) Act permitted rules to be made by the Central Government repealing by implication an existing law, which was an essential legislative function and could not validly be delegated. Mahajan, C. J., speaking for the court said (at p. 469) :

"Section 6 does not either expressly or by implication repeal any of the provisions of pre-existing laws neither does it abrogate them. Those laws remain untouched and unaffected so far as the statute book is concerned. The repeal of a statute means as if the repealed statute was never on the statute book. It is wiped out from the statute book. The effect of S. 6 certainly is not to repeal any one of those laws or abrogate them. Its object is simply to by-pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act, 1946, or the orders made thereunder. In other words, the orders made under S. 3 would be operative in regard to the essential commodity covered by the Textile Control Order wherever there is repugnancy in this Order with the existing laws and to that extent the existing laws with regard to those commodities will not operate. By-passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the Order made under S. 3 it does not operate in that field for the time being."

We think the Attorney General was right in his submission that what has been said of S. 6 of the Essential Supplies (Temporary Powers) Act should hold good for sub-sec. (2C) of S. 48 of the Life Insurance Corporation Act which is similar in terms in so far as it authorises the Central Government to make rules by-passing the existing laws. Mahajan, C. J., also holds that assuming that the rules framed under the Act had the effect of repealing the existing laws, the power to repeal is exercised not by the delegate but by the Act itself. This is what he says on those points (at p. 469) :—

"Conceding, however, for the sake of argument that to the extent of a repugnancy between an order made under Section 3 and the provisions of an existing law, to the extent of the repugnancy, the existing law stands repealed by implica-

tion, it seems to us that the repeal is not by any Act of the delegate, but the repeal is by the legislative Act of the Parliament itself. By enacting S. 6 Parliament itself has declared that an order made under S. 3 shall have effect notwithstanding any inconsistency in this order with any enactment other than this Act. This is not a declaration made by the delegate but the Legislature itself has declared its will that way in S. 6. The abrogation or the implied repeal is by force of the legislative declaration contained in S. 6 and is not by force of the order made by the delegate under S. 3. The power of the delegation is only to make an order under S. 3. Once the delegate has made that order its power is exhausted. S. 6 then steps in wherein the Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act, Parliament being supreme, it certainly could make a law abrogating or repealing by implication provisions of any pre-existing law and no exception could be taken on the ground of excessive delegation to the Act of the Parliament itself."

The Attorney General relied strongly on these observations in submitting that it is not really the rules framed by the Central Government in exercise of the delegated authority that override the Industrial Disputes Act or any other existing law but the power of abrogating the existing laws is in sub-sec. (2C) of S. 48 enacted by Parliament itself. The observations quoted above from Harishanker Bagla's case which was decided by a bench of five Judges appear to support the Attorney General's contention.

11. The question however remains to be answered, does the Life Insurance Corporation Act, 1956 as amended in 1981 state any policy to guide the rule-making authority? We have earlier referred to the observations of Mukerjee, J., in the Delhi Laws case that the legislature can formulate a policy as broadly and with as little or as much details as it thinks proper and may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of the policy. In Harishanker Bagla's case (AIR 1954 SC 465) one of the questions for decision was whether S. 3 of the Essential Supplies (Temporary Powers) Act, 1946 amounts to delegation of legislative power outside the permissible limits. It was held that legislature had laid down

a legislative principle which was "maintaining or increasing supplies of any essential commodity," and "securing their equitable distribution and availability at fair prices." That statement was held as offering sufficient guidance to the Central Government in exercising its powers under S. 3. In the instant case the policy as stated in the preamble of the Amendment Act is that "for securing the interests of the Life Insurance Corporation of India and its policy-holders and to control the cost of administration, it is necessary that revision of the terms and conditions of service applicable to the employees and agents of the Corporation should be undertaken expeditiously". The policy stated here is at least as clear as the one held in Harishanker Bagla's case offering sufficient guidance to the Central Government in exercising its powers under that Act. We have referred to S. 48 (3) of the Life Insurance Corporation Act which requires that every rule made by the Central Government under this Act shall be laid before each House of Parliament and that if both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be. This court in *D. S. Garewal v. State of Punjab*, (AIR 1953 SC 512) observed as follows in respect of a similar provision requiring the rules made by the delegated authority to be laid on the table of Parliament and making the rules subject to modification, whether by way of repeal or amendment on a motion made by Parliament (at p. 518) :

"This makes it perfectly clear that Parliament has in no way abdicated its authority, but is keeping strict vigilance and control over its delegate." In view of what has been held in Harishanker Bagla and *D. S. Garewal*, both of which were decided by a larger bench, we do not find it possible to accept the contention that the Act is invalid on the ground of excessive delegation of legislative functions.

12. It was contended on behalf of the petitioners that in any event the provisions of the Amendment Act of 1981 could not nullify the effect of the writ issued by this court in *D. J. Bahadur's* case, (AIR 1980 SC 2181). In our opinion this contention has substance. Cl. (cc) of S. 48 (2) empowers the Central Government to make rules with regard to the terms and conditions of service of the

employees and agents of the Corporation. Sub-sec. (2A) of S. 48 provides that the regulations made under S. 49 of the Act and "other provisions" as in force before the commencement of the Amendment Act with respect to the said terms and conditions are to be deemed as rules made under cl. (cc) of S. 48 (2). Sub-section (2B) of S. 48 says that the power to make rules conferred by cl. (cc) of sub-sec. (2) shall include the power to add, vary or repeal the regulations and "other provisions" referred to in sub-sec. (2A) with retrospective effect from a date not earlier than June 20, 1979. Clearly a writ issued by this court is not a regulation nor can it be described as 'other provision' which expression possibly includes circulars and administrative directions. Sub-sec. (2C) of S. 48 however provides inter alia that any rules made under cl. (cc) with retrospective effect from any date shall be deemed to have had effect from that date notwithstanding any judgment, decree or order of any court, tribunal or other authority. The order disposing of D. J. Bahadur's case made on Nov. 10, 1980 reads :

"In view of the opinion expressed by the majority, the appeal is dismissed with costs to the first, second and third respondents, and the Transfer Petition No. 1 of 1979 stands allowed insofar that a writ will issue to the Life Insurance Corporation directing it to give effect to the terms of the settlements of 1974 relating to bonus until superseded by a fresh settlement, an industrial award or relevant legislation. Costs in respect of the Transfer Petition will be paid to the petitioners by the second respondent."

The Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981 were made by the Central Government on Feb. 2, 1981 in exercise of the powers conferred by S. 48 of the Life Insurance Corporation Act, 1956 as amended by the Life Insurance Corporation (Amendment) Ordinance, 1981. R. 3 of these rules relates to the subject of bonus concerning Class III and Class IV employees of the Corporation. The substance of this rule has been set out earlier in this judgment. Clearly R. 3 seeks to supersede the terms of the 1974 settlements relating to bonus. By virtue of Rule 1 (2), Rule 3 "shall be deemed to have come into force on the 1st day of July, 1979". The question is, can R. 3 read with R. 1 (2) nullify the effect of the writ issued by this court on Nov. 10, 1980 in D. J. Bahadur's case?

It seems to us R. 3 cannot make the writ issued by this Court nugatory in view of the decision of the majority in Madan Mohan Pathak v. Union of India, (AIR 1978 SC 803), to which reference has been made earlier. In Madan Mohan Pathak's case it was contended that since the Calcutta High Court had by its judgment dated May 21, 1976 issued a writ of mandamus directing the Life Insurance Corporation to pay annual cash bonus to Class III and Class IV employees for the year April, 1, 1975 to March 31, 1976 as provided by the 1974 settlements and this judgment had become final, the Life Insurance Corporation was bound to obey the writ of mandamus and pay as ordered by the High Court. The court was dealing with the Life Insurance Corporation (Modification of Settlement) Act, 1976 in that case. Section 3 of that Act provided that the terms of the settlements in so far as they related to the payment of annual cash bonus to Class III and Class IV employees would not have any force or effect and be deemed not to have had any force or effect from April, 1975. Bhagwati, J., speaking also for Iyer and Desai, JJ., observed (at p. 817) :

"Here, the judgment given by the Calcutta High Court, which is relied upon by the petitioners, is not a mere declaratory judgment holding an impost or tax to be invalid, so that a validation statute can remove the defect pointed out by the judgment amending the law with retrospective effect and validate such impost or tax. But it is a judgment giving effect to the right of the petitioners to annual cash bonus under the Settlement by issuing a writ of Mandamus directing the Life Insurance Corporation to pay the amount of such bonus. If by reason of retrospective alteration of the factual or legal situation, the judgment is rendered erroneous, the remedy may be by way of appeal or review, but so long as the judgment stands, it cannot be disregarded or ignored and it must be obeyed by the Life Insurance Corporation. We are, therefore, of the view that, in any event, irrespective of whether the impugned Act is constitutionally valid or not, the Life Insurance Corporation is bound to obey the writ of Mandamus issued by the Calcutta High Court....."

Beg, C. J., who delivered a separate but concurring judgment, after pointing out the "hurdle in the way" of the petitioner's claim based on Art. 19 (1) (f) of the Constitution, which was that the Act (Life Insurance Corporation (Modification

of Settlement) Act, 1976) was passed during the emergency, observed (at pp. 809, 810 of AIR):

"The object of the Act was, in effect, to take away the force of the judgment of the Calcutta High Court recognising the settlements in favour of Class III and Class IV employees of the Corporation. Rights under that judgment could be said to arise independently of Art. 19 of the Constitution. I find myself in complete agreement with my learned brother Bhagwati, J. that to give effect to the judgment of the Calcutta High Court is not the same thing as enforcing a right under Art. 19 of the Constitution. It may be that a right under Art. 19 of the Constitution becomes linked up with the enforceability of the judgment. Nevertheless, the two could be viewed as separable sets of rights. If the right conferred by the judgment independently is sought to be set aside, S. 3 of the Act, would, in my opinion, be invalid for trenching upon the judicial power.

I may, however, observe that even though the real object of the Act may be to set aside the result of the mandamus issued by the Calcutta High Court, yet, the section does not mention this object at all. Probably this was so because the jurisdiction of a High Court and the effectiveness of its orders derived their force from Article 226 of the Constitution itself. These could not be touched by an ordinary act of Parliament. Even if Section 3 of the Act seeks to take away the basis of the judgment of the Calcutta High Court, without mentioning it, by enacting what may appear to be a law, yet, I think that where the rights of the citizen against the State are concerned, we should adopt an interpretation which upholds those rights. Therefore, according to the interpretation I prefer to adopt the rights which had passed into those embodied in a judgment and become the basis of a Mandamus from the High Court could not be taken away in this indirect fashion."

13. The Attorney General referred to a number of earlier decisions of this court wanting us to infer that the observations quoted above from the judgment in Madan Mohan Pathak's case (AIR 1978 SC 803) did not state the correct law in view of the said decisions. But these observations expressed the majority view of a bench of seven Judges bearing directly on the point that arises for decision in the instant case and are binding on us. We therefore hold that R. 3 operating retro-

spectively cannot nullify the effect of the writ issued in D. J. Bahadur's case, (AIR 1980 SC 2181) which directed the Life Insurance Corporation to give effect to the terms of the 1974 settlements relating to bonus until superseded by a fresh settlement, an industrial award or relevant legislation. The Life Insurance Corporation (Amendment) Act, 1981 and the Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981 are relevant legislations. However in view of the decision in Madan Mohan Pathak's case, these rules, in so far as they seek to abrogate the terms of the 1974 settlements relating to bonus, can operate only prospectively, that is, from Feb. 2, 1981, the date of publication of the rules. The petitions are allowed to this extent only.

14. In the circumstances of the case we make no order as to costs.

CHINNAPPA REDDY, J. (Concurring):— 15. I have had the advantage of perusing the opinion of my brother Gupta, J. I agree with his conclusion that the Life Insurance Corporation (Amendment) Act I of 1981 can operate but prospectively in so far as it seeks to nullify, the terms of the 1974 settlements in regard to the payment of bonus. On some of the other questions I have certain reservations. I do not, however, desire to express any opinion on those questions as my brother Pathak, J., has indicated that he is inclined to agree with Gupta, J., on those questions. Perhaps I will do well to add a few words of my own on the question of retrospectivity. I am spared the necessity of stating the facts as those that are necessary have been stated by my brother Gupta, J.

16. The 1974 settlements provided, among various other matters, for the payment of annual cash bonus (not a profit sharing bonus) to their Class III and Class IV employees at the rate of 15 per cent of the annual salary. The settlements were to be operative from 1st Apr., 1973 to 31st Mar., 1977. That the settlements were to be operative from 1st Apr., 1973 to 31st Mar., 1977 did not mean that the settlements would cease to be effective peremptorily from 1-4-1977 and, therefore, the annual cash bonus stipulated under the settlements would cease to be payable from that date onwards. The settlements would continue to be binding even after 31-3-1977 and would not be liable to be terminated by the issuance of a unilateral notice by the employer purporting to terminate the

settlements. The settlements would cease to be effective only when they were replaced by 'a fresh settlement, an industrial award or relevant legislation'. This is the law and this was what the law was pronounced to be in *Life Insurance Corporation of India v. D. J. Bahadur*, (AIR 1980 SC 2181) on a consideration of the relevant provisions and precedents.

17. The attempt made to supersede the settlements, in so far as they related to the payment of bonus, by enacting the *Life Insurance Corporation (Modification of Settlement) Act 1976* failed, firstly because the Act was held to violate the provisions of Art. 31 (2) of the Constitution and secondly because the Act could not have retrospective effect so as to absolve the Life Insurance Corporation from obeying the writ of mandamus issued by the Calcutta High Court, which had become final and binding on the parties. This was the decision of this Court in *Madan Mohan Pathak v. Union of India*, (1978) 3 SCR 334 : (AIR 1978 SC 803), all the seven judges who constituted the Bench agreeing that the Act violated the provisions of Art. 31 (2) and four out of the seven Judges, namely, Beg, C. J., Bhagwati, Krishna Iyer and Desai, JJ., taking the view that the Act did not have the effect of nullifying the writ of mandamus issued by the Calcutta High Court and the other three Judges, Chandrachud, Fazal Ali and Shinghal, JJ., preferring not to express any view on that question.

18. The second attempt to nullify the 1974 settlements in regard to payment of bonus, by issuing notices under S. 19 (2) and S. 9-A of the Industrial Disputes Act and by amending the Standardisation Order and the Staff Regulations, was frustrated by the judgment of this Court in *Life Insurance Corporation of India v. D. J. Bahadur*, (AIR 1980 SC 2181), the Court taking the view that the two settlements could only be superseded by 'a fresh settlement, an industrial award or relevant legislation'. In this case, the Court issued a writ to the Life Insurance Corporation "to give effect to the terms of the settlements of 1974 relating to bonus until superseded by a fresh settlement, an industrial award or relevant legislation."

19. The effect of the two judgments in *Madan Mohan Pathak's case* (AIR 1978 SC 803) and *D. J. Bahadur's case*, (AIR 1980 SC 2181), was clear: the settlements of 1974, in so far as they related to bonus,

could only be superseded by a fresh settlement, an industrial award or relevant legislation. But any such supersession could only have future effect, but not retrospective effect so as to disentitle the Class III and Class IV employees of the Life Insurance Corporation from receiving the cash bonus which had been earned by them, day by day, and which the Life Insurance Corporation of India was under an obligation to pay in terms of the writ issued in *D. J. Bahadur's case*. The present attempt made by the 1981 amending Act and the rules thereunder to scuttle the payment of bonus with effect from a date anterior to the date of the enactment must, therefore, fail. The employees are entitled to be paid the bonus earned by them before the date of publication of the Life Insurance Corporation of India, Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981.

Petitions partly allowed.

AIR 1982 SUPREME COURT 1137

Y. V. CHANDRACHUD, C. J.,
V. D. TULZAPURKAR, D. A. DESAI,
O. CHINNAPPA REDDY
AND BAHARUL ISLAM, JJ.

Writ Petns. Nos. 528-529, 1645, 288, 293, 362, 363, 374, 388, 404-406, 510, 512-14, 644-46, 647, 663-65, 707, 710, 720-22, 745, 793, 1037 of 1979, 341-43, 344-47, 5257, 519, 5293, 3531-35, 4322 of 1980, 4824, 4825, 5246, 3236, 2963, 3472-74, 3415-17, 3420, 1363-65, 1327-28, 1337-41, 4101-2, 5326, 4949-50 of 1981 and 311 of 1982, D/- 7-5-1982.

Trade Links Limited, New Delhi and another etc. etc., Petitioners v. State of Uttar Pradesh and another etc. etc., Respondents.

(A) U. P. Excise Act (4 of 1910) (as amended by U. P. Amending (Re-enactment and Validation) Act (5 of 1976), Section 30 (2) — "Or otherwise" — Interpretation — Grant of FL-2 Licence — Determination of licence fee — Methods available for.

The consideration for the grant of FL-2 licence could be determined either by auction or by calling tenders or otherwise. The phrase "or otherwise" in Section 30 (2) was sufficiently wide and con-

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ferred on its plain grammatical construction power on the State Government or the Excise Commissioner to grant the licence either by auction or by tenders or partly by auction and partly by tenders or even by adopting yet other methods than by auction or by inviting tenders. In other words, the phrase "or otherwise" enabled the State Government or the Excise Commissioner to adopt a combination of one or more methods for granting the FL-2 licence and determine the licence fee accordingly. Having regard to the phrase "or otherwise" occurring in the provision it is impossible to accept the contention that only one method to the exclusion of the others could be adopted by the respondents for granting the licence or that one type of fee appropriate to that method could alone be charged. (Para 12)

(B) U. P. Excise Act (4 of 1910) (as amended by U. P. Amending (Re-enactment and Validation) Act 5 of 1976) Sections 24B (c) and 41 (c) — Notification by Excise Commissioner inserting condition for payment of "assessed fee" — Legality.

The notification D/- 14-4-1976 issued by the Excise Commissioner adding condition in FL-2 licence, which states that the assessed fee "at such scales of surcharge fee as may be prescribed by the Government" shall also be payable by the licensee, is not open to challenge on the ground that the scales of surcharge fee ought to have been prescribed by the Government. The Excise Commissioner has been statutorily declared to be the agent of the State Government and "while determining such fee" by framing the amended Rule 642 of U. P. Excise Manual he acted for and on behalf of the State Government. In other words, scales of "assessed fee" under Rule 642 must be deemed to have been prescribed by the State Government. (Para 14)

TULZAPURKAR, J.:— There is no substance in this group of writ petitions filed under Art. 32 of the Constitution whereby the petitioners, who carry on business, inter alia, of the wholesale vend of beer and Indian Made Foreign Liquor at various places in the State of U. P. on the strength of licences granted to them in Form FL-2 under the U. P. Excise Act, 1910, have challenged the constitutional validity of Ss. 1 (2), 3 and 5 of U. P. Excise (Amendment) Ordinance No. 4 of 1979 as also the constitutional validity of Ss. 1 (2), 3 and 5 of U. P. Excise (Amendment) Act No. 13 of

1979 (which replaced the said Ordinance No. 4 of 1979) as being violative of their fundamental rights under Arts. 14, 19 and 31 of the Constitution; the petitioners have also sought a declaration that S. 30 (2), Proviso to cl. (c) of S. 41 and Explanations I and II to cl. (c) of Sec. 41 of the U. P. Excise Act 1910 as amended by Ss. 3 and 5 of the said Ordinance No. 4 of 1979 as well as by Ss. 3 and 5 of the said Act No. 13 of 1979 and the provisions of sub-sec. (2) of S. 1 of the said Ordinance (No. 4 of 1979) as well as of the said Act (No. 13 of 1979) are ultra vires the Constitution and have prayed for the issuance of an appropriate writ, order or direction restraining the respondents (the State of U. P., the Excise Commissioner and other officers) either directly or through their agents, servants or otherwise from giving effect to the amended provision.

2. It may be stated that the aforesaid challenge to the U. P. Ordinance No. 4 of 1979, the U. P. Act No. 13 of 1979 and the concerned amended provisions of the U. P. Excise Act, 1910 has been made solely with a view to avoid the payment of the "assessed fee" which the respondents are seeking to recover from the petitioners in addition to the "fixed fee" (auction money) as and by way of consideration for the grant of licences in Form FL-2 for the wholesale vend of beer and Indian Made Foreign Liquor. However, as it became clear during the hearing that even without the amendments effected in the U. P. Excise Act, 1910 (being the Principal Act) by the said Ordinance No. 4 of 1979 and by the said Act No. 13 of 1979 the "assessed fee" in addition to the "fixed fee" (auction money) could be and was being recovered under the Principal Act of 1910 as amended by the U. P. Amending (Re-enactment and Validation) Act 5 of 1976 and the Rules framed thereunder, the aforesaid challenge was given up and no arguments in support thereof were at all advanced by any of the counsel for the petitioners and the contentions centred round the question whether such "assessed fee" in addition to the "fixed fee" (auction money) could be levied and recovered under the Principal Act of 1910 as amended by Act 5 of 1976.

3. It was not disputed before us that the grant of exclusive privilege of manufacture, supply or sale by wholesale or by retail of liquor was always governed by the provisions of the Principal Act of 1910 and the Rules framed thereunder

and that licences for wholesale vend of beer and Indian Made Foreign Liquor were granted in Form FL-2 which contained the terms and conditions on which sales by wholesale of the said commodities could be effected by the grantees thereof. It appears that prior to April 1976 these FL-2 licences were not settled under any auction system but were renewable from year to year and the licence fee was based on the quantity of beer and Indian Made Foreign Liquor actually sold from the concerned shop and was assessed and charged at the rate of Rs. 5/- per quart bottle on spirits and 60 p. per quart bottle on beers. But from April 1976 auction system was introduced whereunder FL-2 licences were auctioned under the provisions of paragraph 373 of the U. P. Excise Manual Vol. I and "fixed fee" being the highest bid (auction money) accepted at such auction came to be charged for the grant of FL-2 licences and this system was introduced on the strength of the amendments that were made in the Principal Act of 1910 by the Amending (Re-enactment and Validation) Act 5 of 1976. Three or four amendments made by Act 5 of 1976 are material and we shall refer to these presently :

4. A new S. 24A dealing with the grant of exclusive or other privilege in respect of foreign liquor was introduced in the Principal Act, which reads as under:—

"24-A. Grant of exclusive or other privilege in respect of foreign liquor.—

(1) Subject to the provisions of S. 31, the Excise Commissioner may grant to any person a licence or licences for the exclusive or other privilege,—

(a) of manufacturing or of supply by wholesale, or of both; or

(b) of manufacturing or of supplying by wholesale, or of both and selling by retail; or

(c) of selling by wholesale (to wholesale or retail vendors); or

(d) of selling by retail at shops (for consumption 'off' the premises); any foreign liquor in any locality.

(2) The grant of licence or licences under clause (d) of sub-sec. (1) in relation to any locality shall be without prejudice to the grant of licences for the retail sale of foreign liquor in the same locality in hotels and restaurants for consumption in their premises.

(3) Where more licences than one are proposed to be granted under clause (d) of sub-sec. (1) in relation to any locality for the same period, advance intimation

of the proposal shall be given to the prospective applicants for every such licence.

(4) The provisions of S. 25, and proviso to S. 39 shall apply in relation to grant of a licence for an exclusive or other privilege under this section as they apply in respect of the grant of a licence for an exclusive privilege under S. 24." Section 24-B which was also introduced by Act 5 of 1976 in the Principal Act reads thus :

"24-B. Removal of doubts.— For the removal of doubts, it is hereby declared—

(a) that the State Government has an exclusive right or privilege of manufacture and sale of country liquor and foreign liquor.

(b) that the amount described as licence fee in clause (c) of S. 41 is in its essence the rental or consideration for the grant of such right or privilege by the State Government;

(c) that the Excise Commissioner as the head of the Excise Department of the State shall be deemed, while determining or realising such fee, to act for and on behalf of the State Government."

5. By the same Act S. 30 of the Principal Act was amended and the amended S. 30 read thus :

"30. (1) Instead of or in addition to any duty leviable under the Chapter the State Government or on its behalf the Excise Commissioner may accept payment of a sum in consideration of the grant of licence for any exclusive or other privilege under S. 24 or S. 24-A.

(2) The sum payable under sub-sec. (1) may be determined either by auction or by calling tenders or otherwise."

6. Sec. 41 of the Principal Act which confers power on the Excise Commissioner to make Rules subject to the previous sanction of the State Government touching the matters or topics specified therein was amended by Act 5 of 1976 by substituting cl. (c) thereby conferring power on the Excise Commissioner to frame Rules on the substituted matter or topic and the amended cl. (c) runs thus:

"(c) Prescribing the scale of fees or manner of fixing the fees payable for any licence, permit or pass including any consideration for the grant of any exclusive or other privilege granted under S. 24 or S. 24-A or for storing of any intoxicant."

7. In exercise of the power so conferred upon him under the amended cl. (c)

of S. 41, the Excise Commissioner with the previous sanction of the State Government framed Rules called the U. P. Excise (Wholesale and Retail Vend of Foreign Liquor) (2nd Amendment) Rules, 1976 by issuing the Notification No. 27/Licence-3 dated 14th April, 1976, which were brought into force with effect from the date of publication in the Gazette, namely, 14th April, 1976; by this Notification the existing Rules 639, 641 and 642 as appearing in Excise Manual Vol. I (1962 Edn.) were amended; Rule 639 (2) as amended provides that "licences in form FL-2 shall be settled by public auction" while Rule 641 as amended provides that "the fee for a licence in form FL-2 shall be the amount of money accepted at the auction of the licence as 'fixed fee' together with an 'assessed fee' charged on the basis of the scales of surcharge fee prescribed in the next paragraph following and Rule 642 as amended runs thus:

"642. The scales of licence fee applicable to wholesale licences for the vend of foreign liquor shall be as follows :

(i) For a licence in Form FL-1.....

(ii) For a licence in Form FL-2 — The fixed fee obtained for the licence at the auction in addition to the assessed fees according to the following scales :—

- | | |
|--|--|
| (a) Spirits, wines, liquors etc. of all kinds. | Rs. 5.00 per reputed quart bottle on sale to licensed vendors. |
| (b) Beer, Stout and other fermented liquors. | Re. 0.60 per reputed quart bottle on sale to licensed vendors. |

Note : The fixed fee in respect of licence FL-2: one fourth of the licence fee as obtained in the auction shall be payable in advance immediately on the acceptance of the bid and the balance by such instalments as may be specified in the licence to be granted."

8. By the very notification dated 14th of April, 1976 the Excise Commissioner added one more condition in the form of a proviso to the terms and conditions of FL-2 Licence and the said addition made after condition No. 1 (c), runs thus :

"Provided that the assessment fee on the sales made on the licence in the prescribed manner at such scales of surcharge fee as may be prescribed by the Government and announced at the time

of the auction, shall also be payable by the licensee."

9. Obviously relying upon the afore-said amendments made in the Principal Act of 1910 by Act 5 of 1976 (some of which were given retrospective effect from the date of the commencement of the Principal Act and others from 16th August 1972) and the said amended Rules 639, 641 and 642 and the insertion of the new condition in the FL-2 Licence (all of which came into force from 14th April, 1976), the respondents introduced the auction system for the grant of licences in Form FL-2 for wholesale vend of beer and Indian Made Foreign Liquor and started levying and recovering the "assessed fee" in addition to the "fixed fee" (auction money) from the grantees of the licences. Question raised is whether such levy and recovery are legal and valid?

10. Before we deal with the question it will be desirable to set out the facts giving rise to it that lie in a narrow compass and it will suffice if the facts obtaining in Writ Petition No. 528 of 1979, being typically representative of the group, are stated. The petitioners in that petition are liquor dealers and carry on business inter alia of wholesale vend of beer and Indian Made Foreign Liquor and for that purpose have wholesale depots in various districts in the State of U. P. For the financial years 1976-77 and 1977-78 they acquired by auction bids wholesale vending rights in respect of Indian Made Foreign Liquor at Agra, Meerut, Varanasi, Kanpur, Bareilly and Dehradun; for the financial year 1978-79 they similarly acquired wholesale vending rights in Indian Made Foreign Liquor at Agra, Meerut and Varanasi and for the financial year 1979-80 they acquired by auction similar rights at Agra, Meerut, Ghaziabad and Pilibhit. In other words being the highest bidder at these places for these years licences for the wholesale vend of Indian Made Foreign Liquor in Form FL-2 were granted to them. At the time of acceptance of their bids at these auctions the petitioners deposited the entire auction money called the "fixed fee" in respect of each of the said years with the respondents. The petitioners' case is that thereafter the respondents are seeking to levy and recover from them the "assessed fee" at the rate of Rs. 5/- per quart bottle on spirits and 60 p. per quart bottle on beer actually sold during each of the financial years by their concerned shops

or depots in addition the "fixed fee". Such levy and recovery of the "assessed fee" by the respondents is challenged on two or three grounds indicated hereunder.

11. In the first place counsel for the petitioners have contended that under Sec. 30 (2) of the Principal Act of 1910 prior to its amendment by U. P. Ordinance No. 4 of 1979 and U. P. Act 13 of 1979 it was open to the respondents to adopt either one or the other method of granting FL-2 licences and determine the licence fee payable by the grantee accordingly, that is to say the respondents could grant the licence "either by auction or by calling tenders" and once a particular mode was adopted it was incumbent upon them to apply the same for the purpose of determining the sum payable by the grantee; in other words the contention has been that it was not open to them to adopt a combination of two or more methods and claim "assessed fee" in addition to "fixed fee" and therefore the instant attempt on the part of the respondents to levy and recover the "assessed fee" in addition to "fixed fee" would be illegal and without authority of law. According to the petitioners a combination of two or more methods became available to the respondents only under Sec. 30 (2) as amended by U. P. Ordinance No. 4 of 1979 and by U. P. Act 13 of 1979. Secondly, the petitioners have averred that at the time of the said auctions held for each of the said financial years the bidders were not informed that any "assessed fee" had been fixed by the State Government which would be payable by the successful bidder and therefore the persons who gave their bids including the petitioners whose highest bids were accepted were led to believe that no fee over and above the auction money would be charged and that the successful bidder would be granted FL-2 licence merely on payment of the auction money. Counsel for the petitioners have therefore contended that the respondents' attempt to levy and recover the "assessed fee" over and above the "fixed fee" (auction money) is unwarranted and illegal inasmuch as the respondents cannot enhance the petitioners' contractual liability which was limited to the payment of the auction money. Yet another contention raised by counsel for the petitioners has been that as per the newly inserted condition in FL-2 licence the "assessed fee" was required to be "prescribed by Government

and announced at the time of auction" but in the instant case such "assessed fee" has been prescribed by the Excise Commissioner and not by the State Government and was not announced at the time of the auction and for this reason also the same would not be recoverable. As will be shown presently none of these contentions has any merit and each one is liable to be rejected.

12. As regards the first contention a plain reading of S. 30 (2) prior to its amendment by U. P. Ordinance No. 4 of 1979 and by U. P. Act No. 13 of 1979 will show that there is no substance in it. The said provision ran thus :

"2. The sum payable under sub-sec. (1) may be determined either by auction or by calling tenders or otherwise."

In other words, the consideration for the grant of FL-2 licence could be determined either by auction or by calling tenders or otherwise. The phrase "or otherwise" was sufficiently wide and conferred on its plain grammatical construction power on the State Government or the Excise Commissioner to grant the licence either by auction or by tenders or partly by auction and partly by tenders or even by adopting yet other methods than by auction or by inviting tenders. In other words, the phrase "or otherwise" enabled the State Government or the Excise Commissioner to adopt a combination of one or more methods for granting the FL-2 licence and determine the licence fee accordingly. Having regard to the phrase "or otherwise" occurring in the provision it is impossible to accept the contention that only one method to the exclusion of the others could be adopted by the respondents for granting the licence or that one type of fee appropriate to that method could alone be charged. It is true that sub-sec. (2) of S. 30 as amended by U. P. Ordinance No. 4 of 1979 or by U. P. Act No. 13 of 1979 runs thus :

"2. The sum payable under sub-sec. (1) may either be fixed by auction or inviting tenders or otherwise or be assessed on the basis of the sales made or quota lifted under the licence or partly fixed and partly assessed in the aforesaid manner."

But in our view it is manifestly clear that the aforesaid amended provision is clarificatory of the legal position which obtained under S. 30 (2) that was operative prior to the said amendment. In this view of the matter the first contention has to be rejected.

13. The second contention has been that since at the time of holding the concerned auctions the bidders were not informed that any "assessed fee" had been prescribed by the State Government which would be payable by the successful bidder and since bids were offered on the representation that the successful bidder would be granted FL-2 licence merely on payment of the "fixed fee" (auction money) the respondents' attempt to levy and recover the "assessed fee" over and above the "fixed fee" would be unwarranted and illegal because the respondents cannot enhance the contractual liability of the successful bidder which was limited to payment of the auction money. There are two answers to this contention. In the first place it was not disputed before us that to the knowledge of all the bidders these auctions for the grant of FL-2 licences were held under the provisions of the Principal Act of 1910 as amended by Act 5 of 1976 and the Rules framed thereunder which were then in force. We have already referred to the provisions of the amended Rr. 639 (2), 641 and 642 which were published in the Gazette and brought into force with effect from 14th of April, 1976 and admittedly all auctions for the financial year 1976-77 were held subsequent to that date. Under the amended Rule 641 it was clearly provided that the fee for the FL-2 licence shall be the amount of money accepted at the auction of the licence as "fixed fee" together with the "assessed fee" charged on the basis of the scales of surcharge-fee prescribed in the next following Rule and the amended Rule 642 prescribed the scales at which the "assessed fee" would be so charged. In other words, the bidders who gave their bids must be deemed to have knowledge of the provisions of the aforesaid Rules subject to which the auctions were held and therefore it is difficult to accept the contention that the bidders including the successful bidder whose highest bid was accepted offered their bids believing that only "fixed fee" would be charged. Secondly, the averment of the petitioners that at the time of these auctions the bidders were not informed that any "assessed fee" had been fixed or prescribed which would be payable by the successful bidder is not quite correct. It has been admitted by the petitioners that at the time of these auctions the new condition that was inserted by the Excise Commissioner in the FL-2 licence by his Notification dated

14th April, 1976 was read out and this newly inserted condition runs thus :

"Provided that the assessment fee on the sales made on the licence in the prescribed manner at such scales of surcharge fee as may be prescribed by the Government and announced at the time of the auction, shall also be payable by the licensee."

If admittedly the aforesaid condition inserted in FL-2 licence was read out at the time of the auction then it is clear that the fact that "assessed fee" on the sales made on the licence was also payable by the licensee was announced at the time of the auction. The only grievance made by the petitioners has been that the prescribed scales of surcharge fee (under Rule 642) were not announced but that is neither here nor there, for, if once it was announced at the time of the auction that "assessed fee" on sales effected on the licence at the prescribed scales shall also be payable by the licensee then obviously the bidders were put on enquiry to find out what scales of surcharge fee had been prescribed under the relevant Rule. In other words the bidders present at these auctions had full knowledge that "assessed fee" at prescribed rates will also be charged and it was with full knowledge of this position that they gave their bids. If that be so, there is no question of the respondents' attempting to enhance the contractual liability of the successful bidder. It will be interesting to mention in this context that the respondents have stated in their counter-affidavit that not only did the bidders know that "assessed fee" would be charged over and above the "fixed fee" (auction money) but many of the successful bidders to whom FL-2 licences were granted have actually passed on the "assessed fee" at the prescribed rates to and recovered the same from the retailers to whom they have effected sales of beer and Indian Made Foreign Liquor. At least in the case of those petitioners before us who have done so the aforesaid plea put forward on their behalf cannot be regarded as honest. The second contention therefore fails and is rejected.

14. The last contention is merely required to be stated to be rejected. In support of that contention reliance was placed on the newly inserted condition in FL-2 licence which states that the assessed fee "at such scales of surcharge fee as may be prescribed by the Government" shall also be payable by the

licensee, while actually the scales of surcharge fee have been prescribed by the Excise Commissioner by framing the amended Rule 642 in exercise of the powers conferred upon him by cl. (c) of S. 41 of the Principal Act. Counsel urged that scales of surcharge fee ought to have been prescribed by the Government. In this connection we might refer to S. 24B (c) which expressly declares that "the Excise Commissioner as the head of the Excise Department of the State shall be deemed, while determining or realising such fee, to act for and on behalf of the State Government." It is thus clear that the Excise Commissioner has been statutorily declared to be the agent of the State Government; and "while determining such fee" by framing the amended Rule 642 he acted for and on behalf of the State Government. In other words, scales of "assessed fee" under Rule 642 must be deemed to have been prescribed by the State Government.

15. As regards the alleged non-announcement at the time of the auctions we have already dealt with that aspect of the matter while dealing with and disposing of the second contention.

16. No other point was raised. It is therefore clear that the levy and recovery of the "assessed fee" over and above the "fixed fee" by the respondents for granting FL-2 licences to all the petitioners would be legal and valid under the Principal Act of 1910 as amended by Act 5 of 1976 and the amended Rules framed thereunder and all the petitions are liable to be dismissed. We accordingly dismiss all the writ petitions with costs and quantify the costs payable by each of the petitioners separately at Rs. 5,000/-.

Petitions dismissed.

AIR 1982 SUPREME COURT 1143

A. P. SEN; E. S. VENKATARAMIAH
AND R. B. MISRA, JJ.

Criminal Writ Petn. No. 8061 of 1981,
D/- 5-5-1982.

Ashok Kumar, Petitioner v. Delhi
Administration and others, Respondents.

(A) National Security Act (65 of
1980), Ss. 3 (2) and 8 — Grounds of
detention supplied two days late — De-
tention order is not rendered invalid —

EZ/EZ/C73/82/SSG

Expression "as soon as may be" —
Means "as soon as practicable" — (i)
Constitution of India, Art. 22 (5) — (ii)
Words and Phrases — Expression "as
soon as may be").

Merely because the detenu was not "simultaneously" furnished with the grounds of detention along with the order of detention it cannot be said that the detenu was thereby deprived of the right of being afforded "the earliest opportunity of making a representation against the order of detention" as enjoined by Art. 22 (5) read with S. 8 of the Act. When the detenu does not allege that his detention was for non-existent grounds, nor does he attribute any mala fide on the part of the detaining authority, the order of detention is not rendered invalid merely because the grounds of detention were furnished two days later. (Paras 4, 7)

Under Indian constitutional system, it is not the law that no person shall be detained in pursuance of an order made under a law providing for preventive detention without being informed of the grounds for such detention. The law is that the detaining authority must, as soon as may be, i.e. as soon as practicable, communicate to the detenu the grounds on which the order of detention has been made. That period has been specified by S. 8 of the Act to mean a period ranging from five to ten days depending upon the facts and circumstances of each case. AIR 1982 SC 710 Foll. (Para 6)

(B) National Security Act (65 of
1980), S. 3 — Detention order — Specifi-
cation of period of detention — Not
mandatory.

The majority decision in A. K. Roy's case AIR 1982 SC 710 has not laid down that the detaining authority making an order of detention under sub-sec. (1) or sub-sec. (2) of S. 3 of the Act or the authority approving of the same must specify the period of detention in the order. (Paras 9, 11)

(C) National Security Act (65 of
1980), S. 3 — "Public order" and "law
and order" — Distinction — Potentiality
of act to disturb even tempo of commu-
nity life — Prejudicial to maintenance
of public order — Preventive measure
even involving hardship upon individual
— Not in nature of punishment.

The true distinction between the areas of "public order" and "law and order" lies not in the nature or quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of "law and order" and "public order" is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order. (Para 13)

Those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires. Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it and to prevent him from doing. Justification for such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. Thus, any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. There is no reason why the Executive cannot take recourse to its power of preventive detention in those cases where the Court is genuinely satisfied that no prosecution could possibly succeed against the detenu because he is a dangerous person who has overawed witnesses or against whom no one is prepared to depose. (Para 14)

What Essentially is a problem relating to law and order may due to sudden sporadic and intermittent acts of physical violence on innocent victims in the metropolitan city result in serious public disorder. It is the length, magnitude and intensity of the terror wave unleashed by a particular act or violence creating disorder that distinguishes it as an act affecting public order from that

concerning law and order. Some offences primarily injure specific individuals and only secondarily the public interest, while others directly injure the public interest and affect individuals only remotely. The question is of the survival of the society and the problem is the method of control. Whenever there is an armed hold-up by gangsters in an exclusive residential area of the city and persons are deprived of their belongings like a car, wrist-watch or cash, or ladies relieved of their gold-chains or ornaments at the point of a knife or revolver, they become victims of organised crime. Such particular acts when enumerated in the grounds of detention clearly show that the activities of the detenu cover a wide field and fall within the contours of the concept of public order. (Para 17)

Cases Referred: Chronological Paras
AIR 1982 SC 710: (1982) 1 SCC 271:
1982 Cri LJ 340 5, 8, 9

SEN, J.:— By this petition under Art. 32 of the Constitution, one Ashok Kumar seeks issuance of a writ of habeas corpus challenging the validity of the order of detention dated August 11, 1981, passed by the Commissioner of Police, Delhi under sub-s. (2) of S. 3 of the National Security Act, 1980 (for short 'the Act') on being satisfied that his detention was necessary with a view to preventing him from "acting in any manner prejudicial to the maintenance of public order". The main issue is as to whether the activities of the petitioner fall within the realm of 'public order' or 'law and order'.

2. It appears that on Aug. 12, 1981 while the detenu was held at the Central Jail, Tihar in connection with some of the offences committed by him, he was served with the aforesaid order of detention passed a day earlier i.e. on Aug. 11, 1981. Two days later i.e. on August 14, 1981 he was furnished with the grounds of detention as well as with copies of documents and statements relied upon in the grounds of detention. It seems that the Commissioner of Police forthwith made a report to the Administrator about the passing of the detention order together with the grounds of detention and all other particulars bearing on the same. The said report and the other particulars were considered by the Administrator and he, by his order

dated Aug. 20, 1981, approved of the detention order under sub-s. (4) and sent a report to the Central Government as required under sub-s. (5) of S. 3 of the Act. The Administrator by his order dated Aug. 20, 1981 informed the petitioner that his order of detention had been approved by him and that he had a right to make a representation. The case of the petitioner was placed before the Advisory Board who was of the opinion that there was sufficient cause for the detention of the petitioner and accordingly the Administrator by his order dated Sept. 15, 1981 confirmed the aforesaid detention order under sub-s. (1) of S. 12 and further directed under S. 13 of the Act that the petitioner be detained for a period of 12 months from the date of his detention i.e. w.e.f. Aug. 12, 1981.

3. In support of the petition, four points are canvassed. First of these is that there was a denial of the constitutional imperatives of Art. 22 (5) read with S. 8 of the Act which cast a duty on the detaining authority to afford the detenu "the earliest opportunity of making a representation against the order of detention" inasmuch as there was unexplained delay of two days in furnishing the grounds of detention; secondly, there was a failure on the part of the Commissioner of Police as well as the Administrator to apply their mind and specify the period of detention while making the order of detention under sub-s. (2) of S. 3 of the Act and therefore the impugned order of detention is invalid; thirdly, the grounds of detention served on the detenu are not connected with "maintenance of public order", but they relate to "maintenance of law and order" and fourthly, the facts as set out in the grounds of detention did not furnish sufficient nexus for forming the subjective satisfaction of the detaining authority and further they were vague, irrelevant and lacking in particulars. We are afraid, none of these contentions can prevail.

4. There is no substance in the contention that there was denial of the constitutional imperatives of Art. 22 (5) read with S. 8 of the Act, because there was unexplained delay of two days in furnishing the grounds of detention and it was imperative that the detenu should

be furnished with the grounds of detention along with the order of detention. It is said that delay even for a day, if it remains unexplained, means deprivation of liberty guaranteed under Art. 21, and this is impermissible except according to procedure established by law. The contention that the constitutional safeguards in Art. 22 (5) were not complied with merely because the detenu was not 'simultaneously' furnished with the grounds of detention along with the order of detention and was thereby deprived of the right of being afforded 'the earliest opportunity of making a representation against the order of detention' as enjoined by Art. 22 (5) read with S. 8 of the Act, cannot be accepted. The language of Art. 22 (5) itself provides that where a person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, "as soon as may be", communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. Sub-s. (1) of S. 8 of the Act which is in conformity with Art. 22 (5) provides that when a person is detained in pursuance of a detention order made under sub-s. (1) or sub-s. (2) of S. 3 of the Act, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention, communicate to him the grounds on which the order has been made. Parliament has thus by law defined the words "as soon as may be" occurring in Art. 22 (5) as meaning normally a period of five days.

5. The matter is no longer res integra. Chandrachud, C.J. in *A. K. Roy v Union of India* (1982) 1 SCC 271 : (AIR 1982 SC 710 at Pp. 740, 741) observed:

"This argument overlooks that the primary requirement of S. 8 (1) is that the authority making the order of detention shall communicate the grounds of detention to the detenu "as soon as may be". The normal rule therefore is that the grounds of detention must be communicated to the detenu without avoidable delay. It is only in order to

meet the practical exigencies of administrative affairs that the detaining authority is permitted to communicate the grounds of detention not later than five days ordinarily, and not later than 10 days if there are exceptional circumstances. If there are any such circumstances, the detaining authority is required by S. 8 (1) to record its reason in writing. We do not think that this provision is open to any objection."

6. Under our constitutional system, therefore, it is not the law that no person shall be detained in pursuance of an order made under a law providing for preventive detention without being informed of the grounds for such detention. The law is that the detaining authority must, as soon as may be, i.e. as soon as practicable, communicate to the detenu the grounds on which the order of detention has been made. That period has been specified by S. 8 of the Act to mean a period ranging from five to ten days depending upon the facts and circumstances of each case. Admittedly, the detenu here was served with the grounds of detention within a period of two days i.e. within the period allowed by S. 8 of the Act and that was "as soon as practicable".

7. This is not a case where the detenu alleges that his detention was for non-existent grounds. Nor does he attribute any mala fides on the part of the detaining authority in making the order. The order of detention is therefore not rendered invalid merely because the grounds of detention were furnished two days later.

8. We find it difficult to conceive of any discernible principle for the second submission. It is submitted by learned counsel appearing for the detenu that the right to make a representation under Art. 22 (5) of the Constitution read with S. 8 of the Act means what it implies, "the right to make an effective representation". It is urged that unless the period of detention is specified, there can be no meaningful representation inasmuch as the detenu has not only the right of making a representation against the order for his detention but also the period of detention. On this hypothesis, the contention is that the impugned order of detention is rendered invalid. The entire submission rests on the following observations of Chandra-

chud, C.J. in A. K. Roy's case, (AIR 1982 SC 710, Para 78) (supra):

"We should have thought that it would have been wrong to fix a minimum period of detention, regardless of the nature and seriousness of the grounds of detention. The fact that a person can be detained for the maximum period of 12 months does not place upon the detaining authority the obligation to direct that he shall be detained for the maximum period. The detaining authority can always exercise its discretion regarding the length of the period of detention."

9. The majority decision in A. K. Roy's case, (AIR 1982 SC 710) (supra), as pronounced by Chandrachud, C.J. is not an authority for the proposition that there is a duty cast on the detaining authority while making an order of detention under sub-s. (1) or (2) to specify the period of detention. The learned Chief Justice made the aforesaid observations while repelling the contention advanced by learned counsel for the petitioner that S. 13 of the Act was violative of the fundamental right guaranteed under Art. 21 read with Art. 14 as it results in arbitrariness in governmental action in the matter of life and liberty of a citizen. The challenge to the validity of S. 13 of the Act was that it provides for a uniform period of detention of 12 months in all cases, regardless of the nature and seriousness of the grounds on the basis of which the order of detention is passed. In repelling the contention, the learned Chief Justice observed that there was no substance in that grievance because, any law of preventive detention has to provide for the maximum period of detention, just as any punitive law like the Penal Code has to provide for the maximum sentence which can be imposed for any offence. In upholding the validity of S. 13 the learned Chief Justice observed: (Para 78)

"We should have thought that it would have been wrong to fix a minimum period of detention, regardless of the grounds of detention".

And then went on to say: (Para 78)

"It must also be mentioned that under the proviso to S. 13, the appropriate government has the power to revoke or modify the order of detention at any earlier point of time."

10. It would thus be clear that the Court was there concerned with the validity of S. 13 of the Act and it is not proper to build up an argument or by reading out of context just a sentence or two. There is no doubt in our mind that the Court has not laid down that the detaining authority making an order of detention under sub-s. (1) or sub-s. (2) of S. 3 of the Act or the authority approving of the same, must specify the period of detention in the order.

11. It is plain from a reading of S. 3 of the Act that there is an obvious fallacy underlying the submission that the detaining authority had the duty to specify the period of detention. It will be noticed that sub-s. (1) of S. 3 stops with the words "make an order directing that such person be detained", and does not go further and prescribe that the detaining authority shall also specify the period of detention. Otherwise, there should have been the following words added at the end of this subsection "and shall specify the period of such detention". What is true of sub-s. (1) of S. 3 is also true of sub-s. (2) thereof. It is not permissible for the courts, by a process of judicial construction, to alter or vary the terms of a section. Under the scheme of the Act, the period of detention must necessarily vary according to the exigencies of each case i.e. the nature of the prejudicial activity complained of. It is not that the period of detention must in all circumstances extend to the maximum period of 12 months as laid down in S. 13 of the Act.

12. The most crucial question on which the decision must turn is whether the activities of the deenu fall within the domain of 'public order' or 'law and order'. The contention is that the grounds of detention served on the detenu are not connected with 'maintenance of public order' but they relate to 'maintenance of law and order' and therefore the impugned order of detention purported to have been passed by the detaining authority in exercise of his powers under sub-s. (2) of S. 3 of the Act is liable to be struck down. It is urged that the facts alleged in the grounds of detention tend to show that he is engaged in criminal activities and it is an apparent nullification of the

judicial process if, in every case where there is a failure of the prosecution to proceed with a trial or where the case ends with an order of discharge or acquittal, the Executive could fall back on its power of detention because the verdict of the Court goes against it. Put differently, the contention is that resort cannot be had to the Act to direct preventive detention of a person under sub-s. (2) of S. 3 of the Act for the Act is not a law for the preventive detention of gangsters and notorious bad characters. The detention here, it is said, is not so much for the "maintenance of public order" but as a measure for the past criminal activities of the detenu. It is further urged that the grounds of detention have no rational connection with the object mentioned in the Act for which a person may be detained. Further, that there is no sufficient nexus between the preventive action and the past activities of the detenu which are not proximate in point of time but are too remote. There is no substance in any of these contentions advanced.

13. The true distinction between the areas of 'public order' and 'law and order' lies not in the nature or quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order. That test is clearly fulfilled in the facts and circumstances of the present case.

14. Those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires. Preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but

to intercept before he does it and to prevent him from doing it justification for such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence. It follows that any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. It is a matter of grave concern that in urbanised areas like cities and towns and particularly in the metropolitan city of Delhi the law and order situation is worsening everyday and the use of knives and firearms has given rise to a new violence. There is a constant struggle to control the criminal activities of the persons engaged in such organised crimes for the maintenance of public order. It is difficult to appreciate the argument that the detention here is with a view to punish the detenu for a series of crimes that he is alleged to have committed, but which the law enforcement agency is not able to substantiate. There is no reason why the Executive cannot take recourse to its power of preventive detention in those cases where the Court is genuinely satisfied that no prosecution could possibly succeed against the detenu because he is a dangerous person who has overawed witnesses or against whom no one is prepared to depose.

15. The prejudicial activities of the detenu leading to public disorder, as revealed in the grounds of detention, consist of a consistent course of criminal record. Although the criminal activities of the detenu in the past pertained mostly to breaches of law and order, they have now taken a turn for the worse. From the facts alleged it appears that the detenu has taken to a life of crime and become a notorious character. His main activities are theft, robbery and snatching of ornaments by the use of knives and firearms. The area of operation is limited to South Delhi, such as Greater Kailash, Kalkaji and Lajpat Nagar. A perusal of the F.I.Rs. shows that the petitioner is a person of desperate and dangerous character. This is not a case of a single activity directed against a single individual. There have been a series of criminal activities on the part of the detenu and his associates

during a span of four years which have made him a menace to the society. It is true that they are facing trial or the matters are still under investigation. That only shows that they are such dangerous characters that people are afraid of giving evidence against them.

16. To bring out the gravity of the crimes committed by the detenu, we would just mention four instances. On Nov. 19, 1979 Smt. Anupam Chander of B-5/10, Safdarjang Enclave reported that she was robbed of her gold-chain near East of Kailash and on investigation the petitioner along with his associates was arrested for this high-handed robbery and there is a case registered against them which is pending trial. Just a month after i.e. on Dec. 11, 1979, one Murna of Lajpat Nagar reported that he was robbed of his wrist-watch and cash by three persons who were travelling in a three-wheeler. On investigation, the petitioner and his associate Rajendra Kumar were arrested and the police recovered the stolen property. They are facing trial in these cases. On July 18, 1981 Kumari G. Radha reported that she had been robbed of her gold-chain and a pair of tops in Lajpat Nagar at the point of knife by persons in the age group of 21/22 years. On investigation, the petitioner and his associate Rajendra Kumar were arrested and the entire booty was recovered. The case is still under investigation. It appears that the detenu was enlarged on bail and two days after i.e. on July 20, 1981, he was again arrested on the report of Smt. Ozha that she was robbed of her gold-chain near Shanti Bazar, Khokha Market, Lajpat Nagar by two persons in the age group of 21-25 years at the point of knife. On investigation, the petitioner and his companion Rajendra Kumar were arrested and she identified them to be the culprits and the booty was recovered from them. The case is under investigation. There have been similar incidents of a like nature.

17. What essentially is a problem relating to law and order may due to sudden sporadic and intermittent acts of physical violence on innocent victims in the metropolitan city of Delhi result in serious public disorder. It is the length, magnitude and intensity of the terror wave unleashed by a particular

act of violence creating disorder that distinguishes it as an act affecting public order from that concerning law and order. Some offences primarily injure specific individuals and only secondarily the public interest, while others directly injure the public interest and affect individuals only remotely. The question is of the survival of the society and the problem is the method of control. Whenever there is an armed hold-up by gangsters in an exclusive residential area like Greater Kailash, Kalkaji or Lajpat Nagar and persons are deprived of their belongings like a car, wrist-watch or cash, or ladies relieved of their gold-chains or ornaments at the point of a knife or revolver, they become victims of organised crime. There is very little that the police can do about it except to keep a constant vigil over the movements of such persons. The particular acts enumerated in the grounds of detention clearly show that the activities of the detenu cover a wide field and fall within the contours of the concept of public order.

18. The contention that the facts alleged in the grounds of detention did not furnish sufficient nexus for forming the subjective satisfaction of the detaining authority and further that they were vague, irrelevant or lacking in particulars, cannot be accepted. A bare perusal of the grounds of detention along with the particulars of the 36 cases, furnished in the accompanying chart, shows that the grounds furnished were not vague or irrelevant or lacking in particulars or were not adequate or sufficient for the subjective satisfaction of the detaining authority.

19. In the result, the petition must fail and is dismissed.

Petition dismissed.

AIR 1982 SUPREME COURT 1149

(From: Jammu & Kashmir)

Y. V. CHANDRACHUD, C. J.,

A. VARADARAJAN AND

AMARENDRA NATH SEN, JJ.

Civil Appeal No. 3155 of 1979, D/- 18-11-1981.

G. S. Broca, Appellant v. State of Jammu & Kashmir and another, Respondents.

EZ/EZ/F723/81/CWM

Constitution of Jammu and Kashmir, Ss. 26, 35 and 43 — Communications Dt. 3-4-1958 and Dt. 15-1-1963 from Secretary, Home Dept. J. and K. to Inspector General of Police J. and K. — They are not in the nature of orders passed by the Govt. but they are merely in the nature of recommendation — Order regarding promotion, held, not vitiated as the Govt. did not feel itself bound by the communications. (Para 6)

Cases Referred: Chronological Paras 1977 Lab IC NOC 117: 1976 J & K LR 356

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CHANDRACHUD, C. J.:— This case has a chequered history. The appellant started his career way back in 1934 as a Constable in the Police Department of the State of Jammu and Kashmir when he was about 18 years of age. He was promoted as a Head Constable in 1946, as an Assistant Sub-Inspector in 1953 and as a Sub-Inspector of Police in 1959. He retired in that post on December 16, 1971 on superannuation at the age of 55.

2. The grievance of the appellant is that he was wrongly denied promotions to higher posts in the Police Department and that his juniors were promoted to those posts over his head not only without justification but in the teeth of orders passed by the Home Secretary on April 3, 1958 and January 15, 1963.

3. We have considered the appellant's grievance carefully but we find no merit in it.

4. The appellant had filed three petitions in the High Court of Jammu and Kashmir, namely, Writ Petitions Nos. 255 of 1971, 257 of 1971 and 303 of 1972. Writ Petition No. 255 of 1971 was filed against a punishment imposed upon him with which we are not concerned. Writ Petition No. 257 of 1971 is the one out of which this appeal arises. While that writ petition was pending in the High Court, the appellant filed writ petition No. 303 of 1972 which was allowed by a learned single Judge of the High Court who, by his order dated November 29, 1972, directed the State Government to consider the appellant's case for seniority and consequent promotion to the higher posts. The Government rejected the appellant's case on reconsideration and being aggrieved thereby, the appellant filed yet another writ petition (No. 122 of 1973), the judgment in which is reported in 1976 J & K LR 356: (1977 Lab IC NOC 117).

5. The appellant, in our opinion, cannot have his case examined and re-

examined over and over again. He filed Writ Petition No. 303 of 1972 while his earlier Writ Petition No. 257 of 1971, out of which this appeal arises, was pending in the High Court in respect of the very same relief. He succeeded in Writ Petition No. 303 of 1972 and though the High Court did not direct in terms that as a result of the judgment therein, Writ Petition No. 257 of 1971 would stand disposed of, that would be the plain effect of the disposal of Writ Petition No. 303 of 1972. In other words, Writ Petition No. 257 of 1971, out of which this appeal arises, must be deemed to have merged in Writ Petition No. 303 of 1972 and disposed of by the judgment in that writ petition. The appellant filed Writ Petition No. 122 of 1973 because the Government, according to him, did not implement the orders passed by the High Court in Writ Petition No. 303 of 1972. He was granted all the reliefs he was entitled to in that writ petition. He cannot now turn around and hark back to Writ Petition No. 257 of 1971. This appeal has therefore in a sense become infructuous. The reliefs granted to the appellant in Writ Petition No. 122 of 1973 ought to meet his just and reasonable expectations in regard to his career in the Police Department of the State. We may mention that the claim of the appellant is that he should have been promoted as an Assistant Sub-Inspector in 1948, as a Sub-Inspector of Police in 1950, as an Inspector in 1954, as a DSP in 1958, as an SP in 1963 and as a DIG in 1968. By the judgment of the High Court dated April 30, 1976 in Writ Petition No. 122 of 1973, the Government was directed to promote the appellant as an Assistant Sub-Inspector of Police from 1953, as a Sub-Inspector of Police from December 1, 1959, as an Inspector from May 11, 1963 and as a DSP from September 12, 1966. These reliefs admittedly have been granted to the appellant and the aforesaid judgment of the High Court dated April 30, 1976 has been fully implemented.

6. Apart from this consideration, the High Court, in its judgment in the Letters Patent Appeal which is under appeal before us is, in our opinion, right in taking the view that the communications dated April 3, 1958 and January 15, 1963 which formed the basis of the present writ petition are not in the nature of orders passed by the Government; they are merely in the nature of recommendations made by the Secretary, Home Department to the Inspector-General of Police. There-

fore, the fact that the Government did not feel itself bound thereby while passing the impugned order cannot vitiate that order.

7. There is one more aspect of the matter which needs to be mentioned. The appellant is asking for promotion to higher posts in the Police Department right from the year 1948 as if he was entitled to the higher posts on the basis of seniority alone. As stated by the Inspector-General of Police, Lt. Col. B. S. Samyal, in his order dated June 23, 1955 while disposing of the appeal filed by the appellant against the orders of DIG. Jammu, dated April 13, 1947 and June 11, 1948, the question of promotion to the higher ranks did not depend upon seniority alone; the suitability of the candidate for promotion had to be judged in each individual case on the basis of the reports made by the DIG in regard to his efficiency, integrity and general reputation. It is therefore not possible for us to entertain the grievance of the appellant that, at this distant date, he should be granted a declaration by which he will be carried forward as high as to the post of the Deputy Inspector General of Police.

8. For these reasons we affirm the judgment of the High Court and dismiss the appeal. There will be no order as to costs.

Appeal dismissed.

AIR 1982 SUPREME COURT 1150

D. A. DESAI AND R. B. MISRA, JJ.

Civil Misc. Petn. No. 6170 of 1980 in Civil Appeal No. 1903 of 1970, D/- 17-8-1981.

Delhi Cloth and General Mills Ltd., Appellant v. Shambhu Nath Mukherjee, Respondent.

Industrial Disputes Act (14 of 1947), Sch. 2, Item 3 — Respondent's name struck off rolls by appellant by order Dt. 24-8-1965 — Such termination held illegal and the award directing reinstatement upheld by the Supreme Court on 3-10-1977 — Appellant contending that prescribed age of superannuation being 58 years and respondent having attained age of superannuation in July 1973 physical reinstatement of respondent was impermissible — Matter remanded to Labour Court for decision regarding whether there was valid rule of retirement

EZ/EZ/D944/81/CWM

on superannuation at the age of 58 years.
(Para 9)

DESAI, J.:— Frustration generated by lengthening shadows of interminable Court processes in the fall of one's life, has been the primary and root cause of our failure to end this unending proceeding. And it has introduced such cynicism in the respondent that even though the Court offered him Rs. 46151.60 deposited in this Court by the appellant pursuant to Court's order dated January 27, 1981, keeping all his contentions open, the respondent declined to withdraw the amount and walked away from the Court. The sense of guilt is further accentuated by the fact that the respondent would not accept any legal assistance, presumably his faith in the legal profession has suffered total erosion. Add to this that he is completely hard of hearing so that any dialogue at the Court hearing is an exercise in futility. To depict our agony in no uncertain terms, we requested Dr. Y. S. Chitale, senior counsel of this Court to assist the respondent who brusquely turned down the same. We requested learned advocates sitting in the Court to transmit our inquiry into the ears of the respondent but unless something is written down it is impossible to communicate with him. Out of sheer exasperation and faced with a blind alley yet in our total anxiety to avoid even a remote impression of injustice being done to a low paid employee of the appellant mills, choice and option being curtailed, we are forced to the conclusion to which we were otherwise unwilling to reach.

2. As graphically described by this Court in its judgment dated October 3, 1977 (reported in AIR 1978 SC 8), namely, "it is a fight between a Goliath and a dwarf", and therefore, the path chalked out though far from legitimate satisfaction, we are left with no alternative and that is the *raison d'être* for this order.

3. Respondent Shambhu Nath Mukherjee was serving with the appellant till his name was struck off rolls by the appellant by its order dated August 24, 1965. An industrial dispute was raised consequent upon the termination of service of the respondent which ultimately landed in this Court in Civil Appeal No. 1903 of 1970. This Court held that striking off the name of the workman from the rolls by the management is termination of his service and this termination constitutes retrenchment within the meaning of Section 2 (oo) of the Industrial Disputes Act

and as there was failure to comply with the mandatory pre-conditions for valid retrenchment, the termination was ab initio void and illegal. Accordingly this Court, affirming the Award of the Labour Court, held that the respondent continues to be in service of the appellant. By the time the Court disposed of the appeal on October 3, 1977, according to the appellant, the respondent had retired on superannuation under the rules applicable to him and, therefore, it was not possible to reinstate him but he would be entitled to the wages and other retirement benefits. Adopting this stance, the appellant did not permit the respondent to join service. The respondent thereupon filed this petition, inter alia, contending that this Court should enforce its order and judgment and direct the appellant to reinstate the respondent and to pay him all the back wages. On this Civil Miscellaneous Petition being moved, a notice of motion was taken out in response to which the appellant appeared and filed its affidavit in reply.

4. The contention put in the forefront is that the age of superannuation in respect of the category of employees to which the respondent belonged was 58 years and this age was prescribed pursuant to a settlement dated June 16, 1969. According to the appellant the respondent had declared his age as 36 years on July 7, 1951, in his application seeking employment with Swatantra Bharat Mills and also in the declaration-nomination form provided under the Employees' Provident Funds Act, 1952. Taking cue from these two declarations of the respondent, the appellant worked out the completion of the age of 58 years for retirement on superannuation in July 1973, and, therefore, according to the appellant, physical reinstatement of the respondent in service is impermissible.

5. It would be necessary in view of the contention of the appellant to determine whether there are rules relevant to the age of superannuation applicable to the category of employees to which the respondent belonged either by way of award, settlement, standing orders or legally enforceable conditions of service and if so, what is their effect on the direction for reinstatement given by this Court. Unfortunately, the lapse of the appellant is compounded by the fact that when the appeal was heard in 1977 it was not pointed out to the Court that by that time the respondent had retired on superannua-

tion and if it was so stated appropriate direction could have been given.

6. In order to mitigate the hardship of the respondent arising out of this protracted litigation and to test the bona fides of the appellant, this Court directed by its order dated January 27, 1981, that the appellant shall deposit in this Court within a fortnight from the date of order, all amounts due and payable to the respondent in pursuance of the Court's order of reinstatement with interest at 8% from the date this Court disposed of the appeal till the date of the order. Learned counsel for the appellant informed us that the order has been complied with and that the amount is lying in deposit with the Registrar of this Court.

7. On April 6, 1981, Mr. S. C. Malik, learned counsel who appeared for the appellant made a statement to the Court which was recorded by the Court in its order of even date that the appellant had no objection to the respondent withdrawing the amount of Rs. 46151.60 without furnishing any security. This was also communicated to the respondent. When the petition was set down for hearing the respondent gave his submissions in writing and the same were read out to the Court.

8. The Court informed the respondent about the amount deposited in the Court and gave a further direction that the respondent should withdraw that amount and the withdrawal of the amount would not in any manner preclude him from raising any contention in this Court or before any other tribunal. The respondent was, however, in no mood to listen to this suggestion.

9. Undoubtedly there is an Award directing reinstatement of the respondent and further unquestionably that Award has been upheld by this Court on October 3, 1977. If no other intervening circumstance had cropped up, this Order should have been promptly complied with by the appellant or the same could be enforced against it on the pain of prosecution also. But the inevitable albeit undesirable consequence of a long, protracted, unending, interminable litigative process is that during the intervening period situations arise which have a bearing on the pending litigation itself. This case itself illustrates the point beyond controversy. The service of the appellant was terminated in 1965. The appeal was finally disposed of by this Court in 1977. Within the span of 12 years the involuntary process of growing in age

continues in an unceasing manner. The respondent has grown in age by 12 years. As alleged by the appellant, respondent was aged 36 years on July 7, 1951. On this reckoning he would attain the age of 58 years in July 1973. If there is a valid rule of superannuation on reaching a certain age it has to be given effect despite the fact that that situation was not noticed by the Court while disposing of the appeal. Maybe, there may not be any such rule or maybe, there may be such a rule. In view of the pleading we would be required to investigate the same and that necessitates production of evidence. It is open to us to examine the evidence and record a finding but that would encroach upon the very precious time of this Court when there is a tribunal set up for this very purpose and can conveniently undertake the assignment. It may as well be difficult for the respondent to produce all evidence before this Court. We are, therefore, of the opinion that while retaining the matter before us, we must remit the following two issues to the Labour Court before which the reference initially came up for hearing:

(i) Whether the appellant proves to the satisfaction of the Labour Court that there is a valid rule of retirement on superannuation at the age of 58 years for the employees of the category to which the respondent belonged;

(ii) If issue (i) is answered in the affirmative, what amount including wages, and all other benefits such as bonus, etc. as if he is in service, the appellant is liable to pay to the respondent from the date of termination of service on August 24, 1965, till the date of his superannuation.

10. The Labour Court should admit the matter and after giving an opportunity to both the sides, should certify the findings to this Court within a period of three months from the date of receipt of this order.

11. The Labour Court may also try to persuade the respondent to withdraw the amount of Rs. 46151.60 deposited by the appellant in this Court keeping open all his contentions and objections and if the respondent is inclined to withdraw the amount, the Labour Court is at liberty to write to the Registrar of this Court for remitting the amount to the Labour Court.

Orders accordingly.

AIR 1982 SUPREME COURT 1153

(From: Patna)

**V. D. TULZAPURKAR, R. S. PATHAK
AND AMARENDRA NATH SEN, JJ.**Civil Appeals Nos. 739-740 of 1971, D/-
17-3-1982.

Controller of Estate Duty, Bihar, Appellant v. Mahant Umesh Narain Puri (dead) represented by Mahant Sher Nandan Puri, Respondent.

Estate Duty Act (34 of 1953), Ss. 64, 6, 7 and 2 (16) — Properties belonging to Math — Properties granted to Math by Moghul Emperor — Mahant in charge of properties as trustee — On death of Mahant properties do not pass and as such are not liable to estate duty — Reference — High Court can interfere with finding on mixed question of law and fact.

The estate which is said to have passed on the death of the Mahant consisted of properties which were granted by Shah Alam II by a Farman. The nature of the grant and also the nature of the interest of the parties and also of the Math came to be considered in a Title Suit in the Court of District Judge who came to the conclusion that the properties were not the personal properties of the Mahant and belonged to the Math and in that sense they were the subject of a trust. The further finding was that under the Farman by which the grant had been made, the properties could not be disposed of, sold or transferred. On the basis of the Farman and the judgment of the District Judge, the High Court was of the opinion that the properties in question were trust properties which did not pass by succession or inheritance and the properties came under the charge as trustee of the Mahant, elected according to custom, and as no estate passed on his death, no estate duty could be levied. It was contended that there was a finding by the Central Board of the Revenue that the properties were the personal properties of the deceased Mahant. This finding was a finding of fact by the ultimate fact finding body and the High Court was not justified in taking the view that the properties were not the personal properties of the deceased Mahant and were trust properties, particularly in the absence of any specific question raised challenging the validity of the finding.

Held, that the High Court had come to the correct conclusion that the properties belonged to the Math and were trust properties. (Para 12)

It is true that in the absence of a specific question raised with regard to the correctness of any finding of fact, the High Court in a reference is not to interfere with the finding of fact by the tribunal and it has to proceed to answer the question on the facts found by the tribunal. The finding of the Central Board of Revenue in the instant case that the properties are the personal properties of the deceased Mahant, cannot in the facts and circumstances of this case, be considered to be a finding of fact. The Central Board of Revenue in coming to its conclusion that the properties were the personal properties of the deceased Mahant had considered the nature of the grant by the Farman and also the judgment of the District Judge in the Title Suit. The conclusion of the Board of Revenue that the properties are the personal properties of the Mahant on interpretation of the grant and on consideration of the judgment of the District Judge is not a pure finding of fact but is a finding on a mixed question of law and fact. The mere fact that the deceased Mahant had disposed of some of the properties does not in any way materially affect the question of consideration of the true nature and character of the properties and does not, in any way, affect the true nature or character thereof. AIR 1972 SC 2315 and AIR 1973 SC 515, Ref. (Para 12)

In the instant case, the interest of the Mahant who is elected to be the in charge of the property and who is in enjoyment of the property in common with the disciples of the math comes to an end on his death and his interest of enjoyment in common with other disciples whatever may be nature of such interest does not pass at any point of time to any other person. After the death of the Mahant duly elected, the right to be the in charge of the property vests in the person who is thereafter elected as Mahant and the right of the deceased Mahant to enjoy the property in common with the other disciples of the Math completely ceases and does not pass to anybody else. Therefore, no interest of the Mahant passes to anybody else and the provisions of the Act are, therefore, not attracted.

(Paras 14, 16)

Cases Referred: Chronological Paras
 AIR 1973 SC 515: 86 ITR 29: 1973 Tax
 LR 362 12
 AIR 1972 SC 2315: 82 ITR 547: 1972 Tax
 LR 356 12

AMARENDRA NATH SEN, J.:— These two appeals by certificate granted by the Patna High Court are against the common judgment and order of the High Court passed on 12-8-1969. The common judgment was passed by the High Court in a reference under S. 64 (1) of the Estate Duty Act (being tax Case No. 73 of 1966) and also in the writ petition filed by the assessee in the High Court (bearing No. C.W.J.C. No. 104 of 1967). The question which was referred to the High Court in the reference under S. 64 (1) of the Estate Duty Act, hereinafter referred to as the Act, is as follows:—

“Whether, on the facts and in the circumstances of the case, the properties comprised in the estate known as Madra Math properties have rightly been assessed to Estate Duty under the provisions of the Estate Duty Act, 1953.”
 In the writ petition, the validity of imposition of penalty was challenged.

2. The principal question which falls for consideration in these two appeals is whether on the death of Mahant Surinder Nath Puri, any estate duty could be levied on the properties comprised in the estate known as Madra Math properties.

3. On the determination of this question, naturally hangs the fate of the writ petition.

4. As both the matters were disposed of by the High Court by a common judgment, and these two appeals have been preferred with certificate granted by the High Court against the common judgment, this judgment will dispose of both the appeals.

5. On the death of Mahant Surinder Nath Puri of Madra Math on 4th June, 1954, the Assistant Controller of Estate Duty, Patna finding that no accountable person had filed any return, prepared a draft computation of the estate duty leviable in respect of what he considered to be the estate of the deceased Mahant and he called upon the accountable person to file objections, if any. The reply given by the accountable person was that Mahant Surinder Nath Puri was a mere trustee in respect of the estate which belonged to the Math and in the reply the valuation was also disputed. Since the accountable person who happened to be Mahant, elected by the disciples of the deceased Mahant, did not produce any material in

respect of his claim after opportunities given to him, the Assistant Controller finalised the assessment on the 19th June, 1958 holding that the deceased Mahant was not a mere trustee of the properties of the Math and the deceased Mahant was the sole proprietor of the properties. Against the order of the Assistant Controller, the accountable person Mahant Omesh Narain Puri preferred an appeal to the Central Board of Revenue. In the appeal it was contended on behalf of the accountable person that the deceased Mahant Surinder Nath Puri was merely a trustee of the properties of the Math and no estate duty could, therefore, be levied on the properties of the Math of which the deceased Mahant was only in-charge as trustee. The Board came to the conclusion that the status of the deceased Mahant had already been declared by the District Judge of Gaya in Title Suit No. 1 of 1932. The Board further held that in view of the said decision of the District Judge in Title Suit No. 1 of 1932 and in view of the further fact that the deceased Mahant had disposed of some of the properties during his lifetime, the estate duty was leviable on the properties and the Board dismissed the appeal. On the question of computation of Estate Duty, the Board held that there were no justifiable grounds for interfering with the order of the Assistant Controller. Thereupon the accountable person filed a petition before the Board for referring a number of questions of law for the opinion of the High Court. None of the questions suggested by the accountable person were accepted by the Board as legitimate. The Board, however, referred the question which we have earlier set out, to the High Court.

6. The High Court on a consideration of the various arguments advanced and the materials on record held that the properties comprised in the estate known as Madra Math were trust properties and no estate duty could be levied on the said properties on the death of Mahant Surinder Nath Puri.

7. The correctness of the said decision of the High Court in the Tax Reference has been challenged by the Controller of Estate Duty. In view of the decision of the High Court in the Tax Reference, the writ petition was also allowed by the High Court and the order imposing the penalty was also quashed. Hence the other appeal has been filed and the fate of this appeal from the order in the writ petition will naturally depend on the

result of the appeal from the judgment in the Tax Appeal.

8. The learned counsel for the appellant has very properly addressed his arguments in the appeal from the judgment in the Tax Reference.

9. Before we proceed to consider the arguments advanced by the learned counsel for the appellant, it will be appropriate to state certain facts relevant for the purposes of this appeal and material for proper appreciation of the arguments advanced.

10. The estate which is said to have passed on the death of Mahant Surinder Nath Puri, consists of properties which were granted by Emperor Shah Alam II by a Farman. The grant was by way of Maded mash to Mahant Ayodhya Puri. The nature of the grant and also the nature of the interest of the parties and also of the Math came to be considered in Civil Suit being Title Suit No. 1 of 1932 in the Court of District Judge, Gaya. The District Judge came to the conclusion that the properties were not the personal properties of the Mahant and the properties belonged to the Math and in that sense they are the subject of a trust. The further finding is that under the farman by which the grant has been made, the properties cannot be disposed of, sold or transferred. The High Court in its judgment has referred to the grant and the findings of the District Judge. It further appears that some of these properties had been disposed of by the deceased Mahant. The other important fact to be noticed is that the properties which are found to be the properties of the Math do not pass to the heirs of the Mahant and the person who is to become the Mahant to hold charge of the Math and the properties, is selected by election to the office of the Mahant, according to the custom of the Asthal.

11. On the basis of the Farman and the judgment of the District Judge, the High Court was of the opinion that the properties in question were trust properties which did not pass by succession or inheritance and the properties came under the charge as trustee of the Mahant, elected according to custom; and no estate could be said to pass on the death of the Mahant and as no estate passed on his death, no estate duty could be levied.

12. Mr. Manchanda, learned counsel for the appellant, has raised two principal contentions. The first contention urged by him is that there is a finding by the Central Board of Revenue that the

properties were the personal properties of the deceased Mahant. It is his contention that this finding is a finding of fact by the ultimate fact finding body and the High Court was not justified in taking the view that the properties were not the personal properties of the deceased Mahant and were trust properties, particularly in the absence of any specific question raised challenging the validity of the finding. He has argued that in view of the nature of the question referred to the High Court, the High Court was not competent to go into the findings of fact and could not interfere with the same. It is his argument that when the question referred speaks of "facts and circumstances of the case" it means the facts and circumstances found by the tribunal and not facts that may be found by the High Court on a reappraisal of the evidence. In support of this argument Mr. Manchanda has relied on the decisions of this Court in the case of Karnani Properties Ltd. v. Commr. of Income-tax, West Bengal, (1971) 82 ITR 547: (AIR 1972 SC 2315), and also in the case of Commr. of Income-tax, Poona v. Manna Ramji & Co., (1972) 86 ITR 29: (AIR 1973 SC 515). We are not impressed by this argument of the learned counsel. It is true that in the absence of a specific question raised with regard to the correctness of any finding of fact, the High Court in a reference is not to interfere with the finding of fact by the tribunal and the High Court has to proceed to answer the question on the facts found by the tribunal. The finding of the Central Board of Revenue in the instant case that the properties are the personal properties of the deceased Mahant, cannot in the facts and circumstances of this case, be considered to be a finding of fact. The Central Board of Revenue in coming to its conclusion that the properties were the personal properties of the deceased Mahant has considered the nature of the grant by the Farman and also the judgment of the District Judge in the Title Suit. The conclusion of the Board of Revenue that the properties are the personal properties of the Mahant on interpretation of the grant and on consideration of the judgment of the District Judge is not a pure finding of fact. Any conclusion as to the true character or nature of the properties on the interpretation of the Farman and on taking into consideration the judgment of the District Judge in the Title Suit is a finding on a mixed question of law and fact. The mere fact that the deceased Mahant had

disposed of some of the properties does not in any way materially affect the question of consideration of the true nature and character of the properties and does not, in any way, affect the true nature or character thereof. It may, in this connection, be noted that it is not known under what circumstances any of the properties came to be disposed of by the deceased Mahant. There is no sale deed on record and no sale deed was made available to the High Court or to this Court. The true nature and the character of the properties have to be determined on a proper interpretation of the Farman. In our opinion, the High Court in the instant case has correctly come to the conclusion that the properties belonged to the Math and are trust properties relying on the Farman and the judgment of the District Judge in Civil Suit.

13. The next contention urged by Mr. Manchanda is that even assuming that the properties were trust properties, the deceased had a beneficial life interest in the properties and the beneficial interest of the deceased Mahant must be deemed to have passed on to the next disciple or issue or farzand by virtue of the provisions contained in S. 7 of the Act.

14. This argument has no merit. Section 6 and S. 7 of the Act are in the following terms:—

"S. 6. Property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death."

"S. 7. (1) Subject to the provisions of this Section, property in which the deceased or any other person had an interest ceasing on the death of the deceased shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cesser of such interest, including, in particular a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakhattayam or Aliyasantana law.

(2) If a member of a Hindu coparcenary governed by the Mitakshara School of Law dies, then the provisions of sub-section (1) shall apply with respect to the interest of the deceased in the coparcenary property only—

(a) if the deceased had completed his eighteenth year at the time of his death, or

(b) where he had not completed his eighteenth year at the time of his death,

if his father or other male ascendant in the male line was not a coparcener of the same family at the time of his death.

Explanation.— Where the deceased was also a member of a sub-coparcenary (within the coparcenary) possessing separate property of its own, the provisions of this sub-sec. shall have effect separately in respect of the coparcenary and the sub-coparcenary.

(3) If a member of any tarwad or tavazhi governed by the Marumakhattayam rule of inheritance or a member of a kutumba or kavaru governed by the aliyasantana rule of inheritance dies, then the provisions of sub-section (1) shall not apply with respect to the interest of the deceased in the property of the tarwad, tavazhi, kutumba or kavaru, as the case may be, unless the deceased had completed his eighteenth year.

(4) The provisions of sub-section (1) shall not apply to the property in which the deceased or any other person had an interest only as holder of an office or recipient of the benefit of a charity, or as a corporation sole.

Explanation.— For the removal of doubts, it is hereby declared that the holder of a Sthanam is neither the holder of an office nor a corporation sole within the meaning of this sub-section."

On a consideration of the facts and circumstances of this case including the Farman and the judgment of the District Judge, the High Court has correctly come to the conclusion that the Mahant had no property which he was competent to dispose of and the only interest the Mahant had was common enjoyment of the trust properties of the Math, with the disciple of the Math. The deceased Mahant had no particular or specific beneficial interest in the property and no benefit would accrue or arise to any one by the cesser of the interest of common enjoyment of the property by the deceased Mahant to any other person, as the deceased Mahant had no property at the time of his death which he was competent to dispose of; and no benefit accrued or arose to the Mahant who came to be elected as Mahant according to custom on the demise of the Mahant or to any other disciple of the Math on the death of the Mahant. No interest, therefore, could be deemed to have passed on the death of the Mahant.

15. Section 2 (16) of the Act provides—

"Property passing on the death" includes property passing either immedi-

ately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and "on the death" includes "at a period ascertainable only by reference to the death".

16. In the instant case, the interest of the Mahant who is elected to be the in-charge of the property and who is in enjoyment of the property in common with the disciples of the Math comes to an end on his death and his interest of enjoyment in common with other disciples whatever may be nature of such interest does not pass at any point of time to any other person. After the death of the Mahant duly elected, the right to be the in charge of the property vests in the person who is thereafter elected as Mahant and the right of the deceased Mahant to enjoy the property in common with the other disciples of the Math completely ceases and does not pass to anybody else. In the instant case, therefore, no interest of the Mahant passes to anybody else and the provisions of the Act are, therefore, not attracted.

17. We are, therefore, of the opinion that the High Court in the instant case was right in its answer to the question referred to it. The appeal against the judgment in the Tax Reference, therefore, fails. The appeal from the orders in the writ petition, therefore, necessarily fails. The appeals are, hereby dismissed.

18. As nobody has appeared on behalf of the respondent in the appeals before us, we do not make any order as to costs.
Appeals dismissed.

AIR 1982 SUPREME COURT 1157

(From : Bombay)

O. CHINNAPPA REDDY
AND R. B. MISRA, JJ.

Criminal Appeal No. 746 of 1980, D/- 15-4-1982.

Gambhir, Appellant v. State of Maharashtra, Respondent.

Penal Code (45 of 1860), Ss. 299, 300 and 302 — Murder — Appreciation of evidence — Case based on circumstantial evidence — Tests to be satisfied — Approach of High Court in appreciating evidence and convicting accused not satisfactory — Conviction and sentence set aside. Decision of Bombay High Court D/- 19th/25th June, 1979, Reversed. (Evidence Act (1872), Ss. 3 and 45).

EZ/EZ/B909/82/MVJ

The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests : (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (Para 9)

The accused appellant was tried and convicted for murder of deceased and her two children. It was proved that the accused used to visit the house of the deceased in the absence of her husband but there was evidence that some other persons also visited her house. The accused was also found in the house of the deceased on the day of occurrence. It was alleged that the accused was seen in her company when they left the house in the night but the version was belied by witnesses. The doctors opined that it was not possible to give the probable time of death. The witness called during panchanama, for number of times, was inimical towards the accused. It was also alleged that recoveries of number of articles were made on the accused's disclosing them. The motive alleged by the prosecution was of robbery or theft of cash and ornaments but not a single item was touched by the accused.

Held, that the three conditions which were necessary to be satisfied before circumstantial evidence could be made the basis for conviction had not been fulfilled. There might be suspicion against the accused but it could not take the place of evidence. The approach of the High Court in the appraisal of evidence was not at all satisfactory. The evidence on the record fell short of proving the guilt of the accused beyond all reasonable doubt. Decision of Bombay High Court dt. 19th/25th June, 1979, Reversed. (Para 32)

The High Court came to its opinion when the doctors failed to give opinion

about the probable time of death. The Court had to draw its conclusion on the basis of the materials supplied by the expert opinion. The High Court tried to usurp the functions of an expert. Accepting that the accused was seen in the evening of the day of occurrence in the company of deceased, in the absence of any positive evidence about the probable time of death, it is difficult to connect the accused with the crime as there might be a long gap between the accused being seen in deceased's company and the time of the death of the three deceased. Many more persons might have come in between. Besides there was evidence on the record to show that other persons also used to visit deceased's house. (Para 30)

MISRA, J.:— The present appeal is directed against the judgment of the Bombay High Court at Nagpur dated 19th/25th of June, 1979, convicting the appellant under S. 302 of the Penal Code and sentencing him to death for the murder of Laxmi and her two children.

2. One Namdeo Gopal, resident of Shelgaon-Jahagir, was in the employment of Shankarrao Shewale, resident of the same village, as an agricultural labourer. Shankarrao Shewale had also land in another village Andrul at a distance of 15 miles from Shelgaon-Jahagir. Shankarrao had deputed Namdeo to cultivate his fields at Andrul about three weeks prior to the date of occurrence on 26th of Feb. 1975. He accordingly went to village Andrul leaving his wife Laxmi and daughter Manda aged about 10 years and his son Samadhan aged about 4 years at his residence in a locality known as Tagwale locality. During his absence Gambhir the appellant used to visit the house of Laxmi off and on.

3. The prosecution story as unfolded in evidence is that on 26th of Feb. 1975 Gambhir was seen in the house of Laxmi in the evening. He was also seen in the company of Laxmi at about 10.00 p.m. at night on the same day under a Neem tree. Thereafter neither Laxmi nor her children were seen alive. Next morning that is on 27th of Feb. the neighbours found that the thatched door of the house of Namdeo was open and household utensils and other goods in the house were lying in disorder. Laxmi and her children were not found there. The news spread in the village about the disappearance of Laxmi and her children. When Shankarrao Shewale, the employer of Namdeo got the news, he proceeded to

village Andrul and brought Namdeo back in the evening of 27th of Feb. 1975.

4. Namdeo along with Shankarrao Shewale and certain other persons proceeded to police station, Chikhli, at a distance of 8 miles from village Shelgaon-Jahagir for making a report. Shri Chaudhari in-charge of the police station recorded the first information report and proceeded to village Shelgaon-Jahagir. He also sent a requisition for the assistance of a dog squad to the authority concerned at Aurangabad. Shri Chaudhary for some time waited for the arrival of the dog squad, but when the dog squad did not arrive, he commenced preliminary investigation. He tried to open the lock of the inner living room. The lock, however, could not be opened so he pulled-up and seized the same under a Panchanama. He peeped into the room through the shutters and found things lying in disorder. He, however, did not enter the room so that the effectiveness of the dog squad might not be lost by the entry of other persons in the house. He closed the door and locked the room with another lock.

5. The dog squad did not arrive till the evening of 28th Feb. 1975. The Investigating Officer lost his patience and he along with the Panches climbed on the roof of the house and pushed aside the tin sheets covering the room. He peeped into the room with the help of a torch light and found foul smell coming from the room. He also sought to remove the clothes covering a corn-bin with the help of an iron bar and on removing the clothes he found legs of human being. He thereafter set right the tin sheets on the roof as before.

6. At long last the dog squad arrived on the 1st of March, 1975, and the police with the Panches entered the house. One broken trunk lying inside the house and the lock which was broken open was shown to the dog, which took its smell and started moving about searching the area and locality around. Eventually the dog went to the house of the appellant and stopped there. The appellant was arrested and at the time of his arrest some injuries were found on his person. The shirt and the dhoti put on by him at the time of his arrest were also found to contain stains of blood. On interrogation, the accused offered to point out the well where the dead bodies of Laxmi and her daughter Manda were lying. Many more articles are alleged to have been recovered on his pointing out in various instalments during the course of three to four days.

7. The accused was, therefore, sent up to the Court of Session to stand his trial for an alleged offence under S. 302 of the Penal Code. The accused pleaded not guilty to the charge. Apart from making the statement under S. 313 of the Criminal P. C., he also filed a written statement and produced some documents. His defence was that Kisan Govinda, the Surpanch of the Gram Panchayat bore enmity against him and other members of his family. He had quarrel with his father and uncles. Kisan Govinda has claimed passage through the field of Sahebrao, uncle of the accused. When he refused to grant him the way he filed a suit in the Court. Kisan had again made a complaint to the police on the allegation that he had obstructed 400 labourers. There was again a theft in the house of Patilbua, another uncle of the accused. Kisan made a false charge of theft against his another uncle Rajaram. He had also given evidence against Rajaram. On account of this long standing enmity between Kisan Govinda Rao and the family of the accused, he had sought to implicate the accused falsely in the case. Other neighbours who gave evidence against the accused are all relations of one another and they deposed against the accused at the instance of Kisan Govinda.

8. There is no eye witness of the occurrence and the case proceeded only on the basis of circumstantial evidence. The Sessions Judge, however, convicted the appellant under S. 302, Penal Code and sentenced the accused to life imprisonment. The accused went up in appeal to the High Court. The State also filed a criminal revision for enhancement of the sentence. The High Court allowed the revision of the State and dismissed the appeal of the appellant and enhanced the sentence of the appellant from life imprisonment to death. The appellant has now come to challenge the judgment of the High Court by the present appeal.

9. It has already been pointed out that there is no direct evidence of eye witness in this case and the case is based only on circumstantial evidence. The law regarding circumstantial evidence is well-settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards

guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. In the light of the legal position about the circumstantial evidence, we have to examine whether the circumstantial evidence in the instant case satisfies the requirements of law. The circumstantial evidence in the instant case may be broadly classified into three parts; (1) oral evidence to prove that in the absence of Namdeo, the accused used to visit the house of Laxmi regularly and he was seen in the evening of 26th of Feb. 1975 in the company of Laxmi and her children. He was also seen at about 10.00 p.m. the same night in the company of Laxmi under a neem tree in the village. At mid-night he was again seen going along the way near the house of Babulal, (2) the various recoveries most of them at the instance of the accused and (3) medical evidence.

10. Dwarka, PW 2 and her husband Babulal PW 6 are next door neighbours. They deposed that the accused used to visit the house of Laxmi during the absence of Namdeo from the village. He generally, came to the house of Laxmi in the evening and chatted with her and her children. On 26th Feb. also he was seen in the company of Laxmi and her children. At mid-night they heard some noise from the house of Namdeo. They woke up and opened their door. They found accused coming out from the house of Namdeo in white Dhoti, full sleeves Shirt with a cap on his head. In cross-examination both of them admitted that they could identify the accused in the dark night from behind from a distance of 20 to 24 feet when the accused turned his face towards the back. They did not question him. They did not report to anybody in the village nor did they give this information even to the police when it came to the village. Although they were the next door neighbours they did not go to the house of Laxmi even when they found that the household utensils were lying scattered.

11. At the face of it, it looks rather improbable that they would recognise the accused at the dead of night from behind during the twinkling of an eye when the accused turned his face back. Further the conduct of these witnesses in not informing the police what they had heard or seen at mid-night and their omission to report about it to anybody in the village are also significant. In the circumstances it is unsafe to rely on their testimony.

12. Mathurabai PW 3, also deposed that in the evening of 26th Feb, she saw the accused going to the house of Namdeo twice or thrice. She again saw the accused and Laxmi going towards the village from the house of Laxmi. At that time she asked Laxmi as to where she was going. She answered that her daughter had gone to the house of Himmatrao Patil for fetching milk but she had not turned back so far. She also deposed that her daughter Vimal used to go to the house of Laxmi in the night for sleeping as Laxmi used to call her for a company in the absence of Namdeo. Thus she is a witness of seeing the accused going in the company of Laxmi at dinner time. But in cross-examination she admitted that he went away near dinner time and thereafter she talked to Laxmi for about half an hour. Thus from her own admission she belies the prosecution story of the accused going in the company of Laxmi at dinner time.

13. She further admitted in cross-examination that besides the accused other persons also used to come to the house of Laxmi in the absence of her husband. Kisan Govinda Rao in whose service Namdeo previously was, also used to go to the house of Laxmi to enquire about her children.

14. Vimal PW 19, is the daughter of Mathurabai, PW 3. According to her deposition she used to go to the house of Laxmi for sleeping during the absence of Namdeo. On 26th Feb. as Laxmi and her children used to call her for giving a company she took her meals and went to the house of Laxmi, on the day of occurrence. At that time Laxmi was busy preparing tea. Samadhan was sleeping inside the house and Manda had gone to fetch milk. The accused was also sitting there. The accused took a cup of tea without milk, as Manda had not returned till then. Laxmi and accused both proceeded towards the village. Laxmi asked her to go home.

15. She also like her mother admitted in cross-examination that the accused got

up from the house of Laxmi and went away in her presence. Laxmi thereupon asked her to come again for sleeping. According to her Kisan Govinda Rao also used to come to the house of Laxmi. She also like her mother Mathurabai belied the prosecution case of the accused being seen in the company of Laxmi while going towards the village at dinner time.

16. This leads us to the evidence of Satya Bhama PW 21, daughter of Patilbuwa, aged about 15 years. She deposed that at about dinner time she was standing on the terrace which is on the first floor of her house along with her brothers Ramesh and Khushal. From there she saw one female standing below the Neem tree. On enquiring the female said that she was the wife of Namdeo. Gambhir was also standing at a distance of 2 or 4 feet from her.

17. In cross-examination she admitted that her sister Rukhmini was married to the nephew of Kisanrao Sarpanch. She denied whether her father Patilbuwa had prosecuted Raja Ram and Himmat Rao for the offence of theft. The Neem tree according to her was at a distance of 25 feet from her house. It is difficult to see a person standing under a Neem tree from a distance of 25 feet even if it was a moonlit night. A person standing under a tree at night can see a person in the moonlit night but not vice versa.

18. In view of the close relationship between Patilbuwa, her father and Kisan Govinda Rao there is no wonder that this minor girl came to depose against the accused at the instance of Kisan Govinda Rao who is the moving spirit in the case. While discussing the evidence of Mathura Bai PW 3 and Vimal PW 19 the theory of accused going in the company of Laxmi from her house at dinner time has already been disbelieved and thus there was no occasion for his witness to see Laxmi and the accused under the Neem tree. Her evidence is too good to be relied upon.

19. On scrutiny the only thing established is that the accused and other persons used to visit the house of Laxmi during the absence of her husband and that he was again seen in the company of Laxmi on 26th Feb. in the night till before dinner time. This single circumstance by itself is too feeble to connect the accused with the murder of Laxmi and her children.

20. Now we take the evidence relating to various recoveries most of which are alleged to be on the pointing of the ac-

cused. These recoveries were made during the course of 4 days from 1st Mar. to 4th Mar. 1975. In Panchanamas regarding all these recoveries Kisan Govinda Rao is one of the witnesses including Ex. 27 on which his signature was subsequently appended by way of interpolation. At one stage the High Court felt suspicious about the Panchnama Ex. 27. It, therefore, directed the Sessions Court to take additional evidence of other Panches. Accordingly the evidence of Narain and Sukhdeo was recorded.

21. From the deposition of Kisan Govinda Rao P.W. 8, it appears that he was called by the police first on the night of 27th Feb. at 2.45 a.m. and Waman Janu was the other Panch. They were taken to the house of Namdeo. Some breads, vegetables and some utensils were lying in the Osari. The Panchnama Ex. 19 was drawn up. For the second time he was called along with Waman Janu, another witness of the Panchnama at 3 p.m. They were taken to the house of Namdeo. They climbed over the tin roof. The tin was removed from the roof. They could see the legs of a child after the removal of the clothes from the surface of a corn-bin. Panchnama Ex. 21 of the same was drawn up. He was called for the third time by the police on 1-3-1975 with two other Panchas Waman Janu and Sada Shiva Mhaske. Police took them and the dog and her master to the house of Namdeo. The dog was allowed to take the smell of the box which was lying open. The lock thereof was lying by the side. The dog then came out. Her master followed her and the Panchas followed the master. The dog stopped under the Neem tree on the way and took the smell. The dog then came at the back side of Raja Ram's house. She then again went to the house of the accused. The dog then went near the stone embankment near the tamarind tree. Eventually she went inside the house of the accused. Panchnama Ex. 22 of the same was drawn up. Kisan Govind Rao was called for the fourth time at 5 p.m. along with Rambhau Nandu and took them to the nala to the west of the bridge at about 10 feet. Four stones were found in the bed of the nala by the side of the stream. All these stones were stained with blood. They were sealed under a Panchnama Ex. 28.

22. He was called for the fifth time at 6 P.M. along with Waman Janu and Rambhau Nandu. Police took them to the house of Namdeo. Household utensils were lying scattered. Police Station In-charge asked Namdeo to verify whether

his cash and ornaments were missing or intact. Namdeo told that one box and one Bhagona were missing. Panchnama Ex. 29 of the scattered articles was drawn. Kisan Govind Rao was called for the sixth time on 2-3-1975 at 11 A.M. with Waman Janu, the other Panch. Police took them to the house of Namdeo. Police opened the door and asked Namdeo to tell which articles of his were missing. Namdeo on examining the articles said that a box and a blanket were missing. His cash and gold and silver ornaments were intact. Panchnama Ex. 30 of what happened there was drawn up.

23. For the 7th time he was again called at 1 p.m. at the school along with Janardan Shripat and Wamanrao Bhikanrao, other Panchas. The police asked them to hear what the accused had to say. Accused informed that he had kept the keys of the lock buried underground near the kud wall of Osari of Namdeo. The memorandum of his statement was recorded under the signature of the two panchas.

24. Kisan Govind Rao was called for the eighth time at 1 P.M. on 3rd March, 1975. Dashrath Yeduji was the other Panch at the school. Police asked them to hear what the accused was saying. The accused offered to show the well in which he had thrown the blanket and the box. The memorandum of his statement Ex. 33 was recorded.

25. Kisan Govind Rao was called for the ninth time on 4th Mar. 1975 at 3 or 3-30 p.m. at school. Waman Janu and Rambhau Nanduji were the other Panchas. Police asked them to hear what the accused was going to say. He said that a string containing black beads is contained below the stone behind his house. The memorandum of his statement was drawn up under the signature of the Panchas which is Ex. 34.

26. For the last time Kisan Govind Rao was called by the police at 5 P.M. at school and the other Panch was Waman Janu. Again they were asked to hear what the accused had to say and the accused said that he had kept one brass pot into the stone embankment of his Wadga. The accused offered to discover the same. The memorandum of his statement Ex. 36 was recorded.

27. The various recoveries made in various instalments most of them on the pointing of the accused appears to be suspicious. On 27th of February when the Investigating Officer along with the Panchas peeped inside the room after removing the tin roof they found foul smell coming out,

If the body had decomposed just within one day of the occurrence obviously much more foul smell would be coming out from the well, on 1st of March, where two corpses were lying. It has come in evidence that people used to go towards the well to ease themselves. They must have come to know about the foul smell specially when the dog squad was there and it would have been not at all difficult for the dog to locate the place where the foul smell was coming from. In our opinion this must have been known to all concerned that foul smell was coming out of the well and people must have tried to find the reason thereof. In such a situation it was not at all necessary for the accused to have pointed out the place where the dead bodies were lying.

28. Coupled with this fact we know that Kisan Govind Rao had been called as a Panch in respect of each and every recovery made during the course of four days. There is both oral and documents on the record to establish that there was a long standing enmity between Kisan Govind Rao on the one hand and the members of the family of the accused on the other.

29. The High Court has, however, ignored the documentary evidence including the judgment produced on behalf of the accused on the simple ground that they indicate enmity not with the father of the accused, but with his uncles, who were separate from the accused and his father and therefore, that enmity can be of no avail for the accused. His uncle may be living separately from the accused and his father, but that does not destroy the relationship of the members of the family. Blood is thicker than water. If the uncles of the accused were involved in criminal and civil litigation with Kisan Govinda, the evidence of Kisan cannot be safely relied upon.

30. This leads us to the medical evidence. The two doctors, Dr. Tapre, P.W. 14 and Dr. Koti, P.W. 12, who conducted the post-mortem examination could not give the probable time of death of the three deceased as the bodies were in a high state of decomposition. The High Court, however, tried to delve deep into the matter and after a long drawn-up reasoning came to the conclusion that the death of the three deceased had taken place late in the night on 26-2-1975. In this connection, the High Court made the following adverse remarks about the doctors: "We feel and regret that Dr. Tapre as well as Dr. Koti have failed to bring

the case in their notes and care and circumspection, and considerations which are patent and necessary before giving their opinion in regard to such a vital as to the probable time of death of the deceased..... he failed to do his duty by the profession which he professed to practice..... Dr. Koti who is an M.D. in General Medicine says that "no opinion could be given as to the probable cause of death (which appears to be a mistake for time) as the body was in high state of decomposition." The High Court came to its own opinion when the doctors failed to give opinion. The Court has to draw its conclusion on the basis of the materials supplied by the expert opinion. The High Court has tried to usurp the functions of an expert. Accepting that the accused was seen in the evening of 26th Feb. in the company of Laxmi, in the absence of any positive evidence about the probable time of death, it is difficult to connect the accused with the crime as there might be a long gap between the accused being seen in Laxmi's company and the time of the death of the three deceased. Many more persons might have come in between. Besides there is evidence on the record to show that other persons also used to visit Laxmi's house.

31. The last but not the least in importance is the question of motive. The motive alleged by the prosecution is of robbery or theft of the cash and the ornaments to the tune of Rs. 7,000. But curiously enough not a single item of cash or the ornaments was touched. The High Court had been impressed by the fact that the accused could not locate the place where the cash or the ornaments were kept. If the prosecution case is that the accused had been coming regularly to the house of Laxmi, it is too much to assume that he would commit the murder of Laxmi and her children without first ascertaining where the cash and valuables were kept. The Sessions Judge himself did not accept the prosecution case regarding motive and it is on this account that he chose to award lesser punishment of life imprisonment.

32. From the evidence discussed above, we find that the three conditions which are necessary to be satisfied before circumstantial evidence can be made the basis for conviction have not been fulfilled. There may be suspicion against the accused but the suspicion cannot take the place of evidence. The approach of the High Court in the appraisal of evidence is not at all satisfactory. The evidence on the record falls short of proving

the guilt of the accused beyond all reasonable doubt.

33. We accordingly allow the appeal set aside the conviction and sentence of the appellant and he is acquitted of the charge. He shall be set free forthwith.

Appeal allowed.

AIR 1982 SUPREME COURT 1163

(From: Andhra Pradesh)

O. CHINNAPPA REDDY AND

R. B. MISRA, JJ.

Criminal Appeal No. 247 of 1981, D/- 26-3-1982.

G. M. Morey, Appellant v. Govt. of Andhra Pradesh and another, Respondents.

Criminal P. C. (2 of 1974), Ss. 433-A, 432 (as introduced by Amendment Act 45 of 1978) — Life imprisonment on conviction prior to 18-12-78 — S. 433-A not applicable to them — G.O.Ms. No. 557 D/- 30-10-80 by Govt. of Andhra Pradesh — Accused undergoing more than five years' imprisonment on 31-10-81 — Life convicts would be entitled to benefit under cl. (a) para 2 of G.O. — Decision of Andhra Pradesh High Court, Reversed.

Where the accused persons who were convicted and sentenced to life imprisonment prior to 18-12-78, and, as such, were not governed by S. 433-A and they had undergone more than five years' imprisonment as on 31-10-1981, their cases would directly be attracted by cl. (a) para 2 of G.O.Ms. No. 557 dt. 30-10-80 issued by Govt. of Andhra Pradesh — Home (Prisons-C) Department remitting and reducing the sentences of various categories of prisoners in the State. Under cl. (a) all convicts who have undergone a total sentence of five years as on Oct. 31, 1981 except 'prisoners sentenced for life and who are governed by S. 433A' have to be released. This means that 'life convicts' who are governed by S. 433A are not to be released even if they have undergone a total sentence of five years as on Oct. 31, 1980. All others are to be released. Therefore, life convicts who were not governed by S. 433A and who had undergone a total sentence of five years would be entitled to be released. Decision of Andh. Pra. High Court, Reversed. (Para 2)

Further, it could not be said that the persons convicted of offences not punishable with life imprisonment had also been excluded from the benefit of G.O. and it would be anomalous if persons sentenced

to imprisonment for life were to get the benefit of G.O. and those sentenced to smaller terms of imprisonment were not to get the benefit of G.O. as there are several offences in the I.P.C. and elsewhere which are punishable with far greater severity than some of the offences mentioned in cl. 3 of para 3 of the G.O. But it cannot be contended that the G.O. does not apply to persons convicted of such offences. On the other hand, the very circumstance that offences like those punishable under Ss. 302, 304, 307 and 326 of I.P.C. which may be punished with imprisonment for life are not included in cl. 3 of para 3 shows that the benefit of the G.O. was intended to be extended to 'life convicts' also. (Para 3)

Cases Referred: Chronological Paras
AIR 1980 SC 2147: (1981) 1 SCR 1196:
1980 Cri LJ 1440 1, 2

CHINNAPPA REDDY, J.:— Dondaji, Ambadas, Pandu Rao, Vittal Rao, Buchiah, M. Ram Reddy and Sangaiah are convicts undergoing sentences of life imprisonment in the Central Jail, Hyderabad. All of them were convicted prior to December 18, 1978, the date on which Section 433A was introduced into the Criminal P. C. by Amendment Act 45 of 1978. S. 433A imposes a restriction on the powers of the Government under S. 432 to remit sentences. It provides that a person shall not be released from prison unless he has at least served fourteen years of imprisonment where the sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law or where a sentence of death imposed on a person has been commuted under S. 433 into one of imprisonment for life. A Constitution Bench of this court has held in *Maru Ram v. Union of India*, (1981) 1 SCR 1196: (AIR, 1980 SC 2147) that S. 433A is prospective in effect and "that the mandatory minimum of fourteen years actual imprisonment will not operate against those whose cases were decided by the trial Court before December 18, 1978." The seven convicts whose names have been mentioned earlier were convicted by the trial Court before Dec. 18, 1978 and therefore, they are not governed by S. 433A, Criminal P. C. On Oct. 30 1980 the Government of Andhra Pradesh, in order to commemorate the 25th Anniversary of the formation of the State of Andhra Pradesh and in exercise of its powers under S. 432, Criminal P. C. issued G.O.Ms. No. 557 dated October 30, 1980 — Home (Prisons-C) Department remitting and reducing the sen-

tences of various categories of prisoners in the State. Clauses (a), (b), (c) and (d) of paragraph 2 of the G.O. are as follows:

"(a) Except the prisoners sentenced for life who are government by Section 433A Cr. P. C., all other convicts who have undergone a total sentence of 5 years as on 31-10-1980 shall be released.

(b) all prisoners with a sentence of one year and above shall be granted a special remission of one month for each year of sentence awarded.

(c) all prisoners with a sentence below one year shall be granted a special remission of fifteen days.

(d) all prisoners other than life convicts over sixty years of age as on 31-10-1980 shall be released."

Paragraph 3 which is also relevant is as follows:

"The remission and reduction of sentence ordered in paragraph 2 above will also apply to prisoners, who have been convicted by courts situated within the State of Andhra Pradesh and are undergoing sentences in other States but shall not apply to the following categories of prisoners.

"(1) Prisoners convicted and sentenced by courts situated outside the State of Andhra Pradesh;

(2) prisoners convicted of offence against a law relating to matter to which the executive power of the Union extends; and

(3) prisoners convicted for offence under Sections 120B, 121 to 130, 359 to 377 and 395 to 402, I.P.C."

2. The seven convicts claim that they have undergone more than five years' imprisonment and that they are, therefore, entitled to be released in terms of the G.O. A writ petition filed on their behalf was dismissed by the Andhra Pradesh High Court on the ground that the G.O. had no application to 'life convicts'. The decision in *Maru Ram v. Union of India*, (AIR 1980 SC 2147) was brushed aside on the ground that the question in the present case was not whether S. 433A was prospective or retrospective in operation but whether a 'life convict' was entitled to the benefit of the G.O. The High Court was in obvious error in ignoring the decision of this Court in *Maru Ram v. Union of India*, on the ground that the question in present case was not whether S. 433A was prospective or retrospective, disregarding the real importance of the decision, for this case, which lay in the fact that S. 433A was held therein not to operate against those, like the present

seven convicts, whose cases were decided by the trial Court before Dec. 18, 1978. The learned counsel for the State of Andhra Pradesh had to concede this position before us. If these seven convicts are not governed by S. 433A their cases are directly attracted by cl. (a) of para 2 of the G.O. Under cl. (a) all convicts who have undergone a total sentence of five years as on Oct. 31, 1981 except 'prisoners sentenced for life and who are governed by S. 433A' have to be released. This means that 'life convicts' who are governed by S. 433A, Criminal P. C. are not to be released even if they have undergone a total sentence of five years as on Oct. 31, 1980. All others are to be released. Therefore, life convicts who are not governed by S. 433A Criminal P. C. and who have undergone a total sentence of five years are entitled to be released.

3. The submission of the learned counsel for the State was that if the whole of the G.O. was read together it will be clear that all 'life convicts' are to be excluded from the benefit of the G.O. Obviously not. If that was so there was no need to refer to those "who are governed by S. 433A", in cl. (a) of para 2 of the G.O. According to the learned counsel the expression 'who are governed by Section 433A, Cr. P. C.' was merely descriptive of prisoners sentenced to life imprisonment. We cannot agree. The word used in clause (a) is 'governed' and not 'described' or 'mentioned'. Again clause (d) while directing the release of all convicts over 60 years of age excludes 'life convicts'. If the intention of the G.O. was to exclude 'life convicts' from the benefit of the G.O. it was not necessary to separately exclude them from each of clauses (a) and (d) of paragraph 2. The purpose would have been better achieved by adding another category to the categories mentioned in paragraph 3 say, 'persons sentenced to imprisonment for life'. There was no need for the Government to express its intention in the circumlocutory manner suggested by the learned counsel. The learned counsel for the State referred us to clause 3 of paragraph 3 and submitted that persons convicted of offences not punishable with life imprisonment had also been excluded from the benefit of G.O. and it would be anomalous if persons sentenced to imprisonment for life were to get the benefit of G.O. and those sentenced to smaller terms of imprisonment were not to get the benefit of the G.O. We are unable to agree. There are several offences in the I.P.C. and elsewhere which are punish-

able with far greater severity than some of the offences mentioned in cl. 3 of paragraph 3 of the G.O. But it cannot be contended that the G.O. does not apply to persons convicted of such offenses. On the other hand, the very circumstance that offences like those punishable under Ss. 302, 304, 307 and 326 which may be punished with imprisonment for life are not included in cl. 3 of para. 3 shows that the benefit of the G.O. was intended to be extended to 'life convicts' also. We disagree with the conclusion of the High Court, allow the appeal and direct the seven convicts aforesaid to be released forthwith.

Appeal allowed.

AIR 1982 SUPREME COURT 1165

O. CHINNAPPA REDDY AND

R. B. MISRA, JJ.

Criminal Writ Petn. No. 8926 of 1981, D/- 26-3-1982.

Mrs. Saraswathi Seshagiri, Petitioner v. State of Kerala and another, Respondents.

(A) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 (1) — Detention under, for a single solitary instance of attempt to illegally export Indian currency — Held, in the facts and circumstances of the case, sufficient to warrant an inference that detenu will repeat his activity in future also — Detention proper.

Whether a single solitary act attributed to a person is sufficient to warrant an inference that he will repeat his activity in future also, will depend on the nature of the act and attendant circumstances. The past act of the person, in the circumstances, might be an index of his future conduct. AIR 1974 SC 816, Rel. on.

(Para 9)

In the present case the detenu tried to export illegally Indian currency to the tune of Rs. 2,88,900 to a foreign country in a planned and pre-meditated manner by clever concealment of it in several parts of his baggage. This fully justified the detaining authority in coming to the conclusion that the detenu might repeat his illegal act in future also and that his detention was necessary to preventing him from repeating the same in future.

(Para 9)

(B) Conservation of Foreign Exchange and Prevention of Smuggling Activities

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Act (52 of 1974), S. 3 (1) — Detention under, for attempt to illegally export Indian currency — Mere fact that detenu could be prosecuted under the Customs Act — Cannot be an absolute bar to an order of preventive detention. AIR 1982 SC 8, Rel. on. (Para 10)

(C) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 3 (1) — Detention under — Subjective satisfaction of detaining authority — Court cannot question whether the grounds given in detention order are sufficient or not for subjective satisfaction of the authority. (Constitution of India, Arts. 22 (5), 226, 32). (Para 11)

Cases Referred: Chronological Paras
AIR 1982 SC 8 : 1982 Cri LJ 150 10
AIR 1974 SC 816 : 1974 Cri LJ 699 8

MISRA, J.:— Shri T. R. Seshagiri Iyer has been in the Recruiting and Travel agency business for over a decade. He has an office at New Delhi, namely "Viswak Agencies" which is mainly acting as a Recruiting agent for some of the middle east countries in procuring skilled labourers from India for employment purposes in the gulf countries on a Commission basis.

2. In connection with his business he attempted to export illegally Indian Currency to the tune of Rs. 2,88,900 which was recovered from his possession while he was bound for Abu Dhabi by Air Indian flight on 19-7-1981 and for that offence he is liable for punishment under Ss. 132 and 135 of the Customs Act, 1962. He was arrested by the Inspector of Central Excise Air Customs, Trivandrum and later on released on conditional bail.

3. The Collector of Customs and Central Excise (Central Excise Wing) Cochin, made a report dated 13th of August, 1981, to the State Government that T. R. Seshagiri Iyer had made a genuine attempt to export Indian Currency of the value of Rs. 2,88,900 without permission of the authorities and in violation of the Foreign Exchange Regulation Act, 1973 and the Customs Act, 1962. He also appended the copies of the Mahazar dated 19th of July, 1981, relating to the seizure from the detenu, admission made by the detenu on 19th July before the Superintendent of Central Excise and Customs and the arrest Mahazar, dated 19th July. From the report and other materials placed before the Government by the custom authorities, the Government was satisfied that the detenu had tried to export large amount of Indian currency in a very planned and pre-meditated man-

ner by cleverly concealing the same in several parts of his baggage.

4. The Special Secretary (Home) Kerala, in exercise of the powers conferred upon him under S. 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, passed an order dated 22nd of Sept., 1981, directing that Shri T. R. Seshagiri Iyer be detained as it was necessary to do so to preventing him from smuggling goods. Pursuant to the order of detention he was arrested on 28th of Sept., 1981. Immediately after his arrest he was supplied the ground on which the order of detention was made.

5. The ground supplied discloses that on 19-7-1981 T. R. Seshagiri Iyer with a passport issued at Abu Dhabi was a passenger bound for Abu Dhabi by Air India Flight No. AI 935. He presented his luggage consisting of two brief cases and one suitcase for examination and clearance by custom authorities at Custom Export Examination Hall of the International Block of Trivandrum Airport. He had already undergone immigration formalities and was bound to board the Air Craft after custom clearance. Before commencing the custom examination the Custom Officers required him to give a true and complete declaration of the contents of the baggages for which custom clearance was sought, with specific reference to silver, gold, gold ornaments and foreign and Indian Currency. He declared that the baggages contained clothes, personal files, vegetables and fruits and he categorically denied having any Indian or foreign currency inside the said baggages. But in examination the Custom Officer recovered Indian Currency to the tune of Rs. 2,88,900/- in bundles of 50 Rupees and 100 Rupees from the leather folder kept in brief-case, the plastic bag, shoes and under the vegetables in the card board carton. He had no valid documents or permits in respect of the currency attempted to be exported. As he attempted to export out of India Indian currency illegally and by concealment, violating the provisions of the Foreign Exchange Regulation Act, 1973 and the provisions of the Customs Act, 1962, the custom authorities seized the aforesaid currency under a Mahazar of further action. In his voluntary statement giving in his own handwriting before the Superintendent of the Central Excise and Customs, Trivandrum he admitted the recovery of Rs. 2,88,900/- from his possession while he was attempting to ex-

port the same out of India. He has signed the Mahazar drawn for the seizure of the Indian Currency stating that all the details mentioned in this Mahazar are true and correct. He also admitted that he did not have any valid document or permit for export of Indian Currency.

6. The detenu made a representation dated 16th of Oct. 1981, which was received by the government on 17th of Oct. 1981. Immediately after the receipt of the representation, the government called for the comments from the Collector of Customs to the Government of India at Cochin on 19th of Oct. 1981 and received the comments from the Customs Department on 23rd of Oct. 1981. The Government rejected the representation by its order dated 28th of Oct. 1981. The Government had also referred the representation of the detenu to the Advisory Board by communication dated 28th of Oct. 1981. The Advisory Board by their order dated 21st of Nov. 1981, opined that there was sufficient cause for the detention of the detenu. Thereafter the Government confirmed the detention of the detenu and fixed the period of detention for one year with effect from 28th of Oct. 1981.

7. The wife of the detenu has filed the present petition under Art. 32 of the Constitution to challenge the order of detention. It was contended for the detenu that a single solitary instance of attempt to export Indian Currency to foreign countries is hardly sufficient to warrant an inference that the detenu will repeat his activity in future also and that his detention was necessary to prevent him from so doing in future.

8. In support of the contention reliance was placed on *Debu Mahto v. State of West Bengal*, AIR 1974 SC 816. The sole ground for detention in that case was that on 11th Aug. 1972, the petitioner with his associates was found removing three bales of empty jute bags after breaking a railway wagon in Naihati railway yard and when challenged by the local Railway Protection Force the petitioner and his associates fled away leaving the booty. A similar contention was raised in that case also as is being raised in the case in hand. This Court accepted the contention on the facts and circumstances of that case but made the following observation— "We must of course make it clear that it is not our view that in no case can a single solitary act attributed to a person form the basis for reaching a satisfaction that he might re-

peat such acts in future and in order to prevent him from doing so, it is necessary to detain him. The nature of the act and the attendant circumstances may in a given case be such as to reasonably justify an inference that the person concerned, if not detained, would be likely to indulge in commission of such acts in future. The order of detention is essentially a precautionary measure and it is based on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or of a series of acts. But whatever it be, it must be of such a nature that an inference can reasonably be drawn from it that the person concerned would be likely to repeat such acts so as to warrant his detention."

9. From the aforesaid observation it is evident that an inference in each case will depend on the nature of the act and the attendant circumstances. In the present case the detenu tried to export Indian Currency to the tune of Rupees 2,88,900/- to a foreign country in a planned and pre-meditated manner by clever concealment of it in several parts of his baggage. This fully justified the detaining authority in coming to the conclusion that he might repeat his illegal act in future also and that his detention was necessary to preventing him from repeating the same in future. His past act in the circumstances might be an index of his future conduct.

10. It was next contended for the detenu that detenu could be prosecuted under the Customs Act and as such his preventive detention was uncalled for. The counsel for the detenu in support of his argument strongly relied upon Smt. Hemlata Kantilal Shah v. State of Maharashtra, AIR 1982 SC 8. That case instead of supporting the detenu goes against him. This Court dealing with the point held— "Possibility of a prosecution or the absence of it is not an absolute bar to an order of preventive detention; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. What is required is that the detaining authority is to satisfy the Court that it had in mind the question

whether prosecution of the offender was possible and sufficient in the circumstances of the case. In some cases of prosecution it may not be possible to bring home the culprit to book as in case of a professional bully, a murderer or a dacoit, as witnesses do not come forward to depose against him out of fear, or in case of international smuggling it may not be possible to collect all necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt. The past conduct or antecedent history of a person can appropriately be taken into account in making a detention order. It is indeed largely from prior events showing tendencies or inclinations of a person that an inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of supplies and services essential to the community or his act of violation of foreign exchange regulations and his smuggling activities are likely to have deleterious effect on the national economy."

11. When the legislature has made only the subjective satisfaction of the authority making the order of detention; it is not for the court to question whether the grounds given in the order are sufficient or not for the subjective satisfaction of the authority.

12. We find ourselves unable to accede to either of the two contentions and the writ petition must fail. The writ petition is accordingly dismissed.

Petition dismissed.

AIR 1982 SUPREME COURT 1167

P. N. BHAGWATI AND V. B. ERADI, JJ.
Writ Petn. No. 5943 of 1980, D/- 6-5-1981.

Kadra Pahadiya and others, Petitioners
v. State of Bihar, Respondent.

**Constitution of India, Arts. 21 and 32
— Speedy trial — Right of — Remedy
in the event of denial of such right.**

A speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Art. 21 of the Constitution. Any accused who is denied this right of speedy trial is entitled to approach the Supreme Court for the purpose of enforcing such right and the Supreme Court in discharge of its constitutional obligation has the power to give

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necessary directions to the State Governments and other appropriate authorities for securing this right to the accused.

(Para 2)

Cases Referred : Chronological Paras
AIR 1979 SC 1360 1, 2

ORDER:— This writ petition has come up today before us for directions since there are a large number of prisoners in the State of Bihar who have been in jail for more than 12 months after the commitment of their cases to the court of session and there are also a considerable number of prisoners who have been in jail for more than 18 months without any enquiry or trial having commenced in the courts of Magistrates. We are glad to learn that the four petitioners whose case is set in motion have been acquitted after a trial which was derided to them for a period of 8 years. Their acquittal highlights the tremendous amount of misery and suffering which these four young boys who have been ultimately found to be innocent must have undergone in jail for a period of 8 years without anyone being there to look after them or to take care of their interest. We are indeed thankful to Dr. Miss Vasudha for having drawn our attention to the unfortunate case of these four petitioners. Now ordinarily, we would not have proceeded further with the matter after the immediate relief which was sought by the petitioners was obtained and they were acquitted but the statements which have been placed before us by the State of Bihar and the High Court disclose an alarming state of affairs so far as administration of justice in the State of Bihar is concerned. We had occasion to make observations in regard to the highly disturbing situation which prevails in the justice system in the State of Bihar when we made interim orders in Hussainara Khatoon's case (AIR 1979 SC 1360) last year but despite the observations made by us it does not seem that any improvement has taken place. The position continues to be very distressing and there are large number of prisoners still languishing in jail without their trial having commenced. The figures furnished by the State of Bihar and the High Court are sufficient to shock the conscience of any Judge or for that matter even of any citizen of this country because we find that 18133 sessions cases are pending in different sessions courts in the State of Bihar as on 31st December, 1980 where the commitment was made more than 12 months ago and the sessions trial have

not yet commenced. We are not mentioning here the number of prisoners who are awaiting enquiry or trial before the Magistrate in different courts in State of Bihar because the list is very long and the number is very large. We fail to understand why necessary steps are not being taken by the authorities concerned whether they be State Government or the High Court for the purpose of remedying this most unsatisfactory state of affairs. We asked Mr. Mudgal, learned advocate appearing on behalf of the petitioners to prepare a list giving the particulars of the prisoners whose cases have been committed to the courts of session prior to 31st December, 1976 and whose trials have not yet commenced. Mr. Mudgal has prepared such a list from the record furnished to us by the State Government and the High Court and we find from the list that 313 prisoners are rotting in jail awaiting trial though their cases have been committed to the court of session prior to 31st December, 1976; this list also includes a large number of prisoners whose cases have been committed even prior to 31st December, 1974. It is incomprehensible to our mind as to how sessions cases could remain pending in the sessions court in the State of Bihar for 5 to 7 years after commitment. Mr. Mudgal has also prepared another list from the record before the court giving the details of prisoners who are awaiting commitment since prior to 31st December, 1976. The number of these prisoners runs to 99 and some of them have been awaiting commitment since prior to 31st December, 1976. This list clearly shows that even committal enquiries have not been held in the cases of these 99 prisoners for about 5 to 7 years. They have been in jail for such a long period even before commitment and we shudder to think how much more they would have to remain in jail after commitment before trial is commenced and brought to an end. It is obvious that some drastic steps are necessary to be taken in order to set right this distressing state of affairs. We would, therefore, direct the sessions courts where these cases are pending trial after commitments made prior to 31st Dec. 1976 to take up these cases for trial at the earliest date and to proceed with the trial of the cases from day-to-day and dispose of these cases as early as possible and in any event not later than six months from today. Whatever steps are necessary to be taken by the prosecution for the purpose of day-to-day trial of these cases shall be adopted.

and the trial of these prisoners shall not be delayed on any such count. If any of these prisoners is unrepresented in court he shall be intimated that he is entitled to legal aid for the purpose of his defence and he shall be provided with a lawyer at State cost for which the State will put the court in funds. So far as the prisoners awaiting commitment since prior to 31st Dec. 1976 are concerned, the Magistrates before whom their cases are pending will immediately proceed with the enquiry against them in accordance with law and complete the proceedings within three months from today. These prisoners also will be provided with legal aid if they are not represented by a lawyer of their choice and the State will make the necessary funds available to the courts of Magistrates for this purpose.

2. We have already held in *Hussainara Khatoon's case* (AIR 1979 SC 1360) that speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Art. 21 of the Constitution and any accused who is denied this right of speedy trial is entitled to approach this court for the purpose of enforcing such right and this Court in discharge of its constitutional obligation has the power to give necessary directions to the State Governments and other appropriate authorities for securing this right to the accused. We would, therefore, in order to enable us to exercise this power and make this fundamental right meaningful to the prisoners in the State of Bihar request the High Court to inform us as to how many Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges are there in each district in State of Bihar and what is the number of cases yearwise pending before each of them. We should also like the High Court to inform us as to what are the norms of disposals which it has fixed for Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges and whether the disposal of Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges in the State conform to the norms of disposal laid down by the High Court and what steps, if any, are being taken by the High Court to ensure conformity with the norms. The High Court will also supply information to this court as to whether having regard to the pending files before the Sessions Judges, Additional Sessions Judges and

Assistant Sessions Judges and the norms of disposal fixed by the High Court there is need for any additional courts in any of the districts and if there is such need whether steps have been taken by the High Court for establishing such additional courts. If no steps have been taken so far, the High Court may immediately address a communication to the State Government stressing the need for creation of additional courts and requesting the State Government to take necessary action for setting up such courts and appointing Judges to man such courts and the State Government, we are sure, will take the necessary steps for this purpose. We hope and trust that this exercise will be carried out and necessary steps in that behalf will be taken before the writ petition comes up for further hearing on the reopening of the court after summer vacation.

3. We may also point out that in the statements which have been submitted to us by the State Government giving the names of prisoners who have been in jail for more than 12 months after committal of their cases to the court of session there are a large number of instances where the dates of admission to the jail have not been given and it is, therefore, not possible for the Court to find out as to how long they have been in jail before their cases were committed to the court of session. We would, therefore, direct the State Government to ascertain from each jail the date of admission of these prisoners whose names are given in the list and to inform us as to when they were admitted to the jail. We may also point out that so far as prisoners who are awaiting commitment since before 31st Dec. 1976 and whose particulars have been given to us by Mr. Mudgal in the list submitted by him are concerned, the Magistrates may consider whether they should not be released on bail in appropriate cases. This may be considered by the Magistrates when these prisoners are produced before them either for the purpose of remand or at the time of holding the enquiry. So also if there are any other undertrial prisoners who are awaiting commitment or against whom trials have not commenced in the courts of Magistrates the question of granting bail to them may also be considered suo motu by the Magistrates and if they are eligible to be released on bail in accordance with the principles laid down by this Court in *Hussainara*

Khatoun's case they may be released on bail. Action in this regard should be taken by the Magistrates at the time when such prisoners are next produced before the Magistrates. We hope and trust that the principles laid down and the directions given by us in the various judgments delivered in Hussainara Khatoun's case will be strictly and scrupulously observed by the Magistrates and Sessions Judges in the State of Bihar. We would suggest that copies of these judgments may be supplied to the Magistrates and Sessions Judges in the State of Bihar by the High Court with a direction that the law laid down in these judgments shall be followed by the Magistrates and Sessions Judges.

4. The writ petition will now stand adjourned to 3-8-1981.

Orders accordingly.

AIR 1982 SUPREME COURT 1170

(From : Allahabad)

O. CHINNAPPA REDDY

AND R. B. MISRA, JJ.

Writ Petn. (Criminal) No. 19 of 1982 and Petn. for Spl. Leave to Appeal CrI. No. 208 of 1982, D/- 23-4-1982.

Yousuf Abbas, Petitioner v. Union of India and others, Respondents.

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), S. 3 (1) — Detention under — Representation against, made by detenu through Supdt. of Jail rejected by Govt. after 29 days — Govt. offering no explanation for delay in considering representation within permitted time — Held Govt. had no explanation for the delay and as such the detenu was entitled to be set at liberty. (Para 3)

CHINNAPPA REDDY, J.:— Ali Abbas Jaafri was arrested on Sept. 8, 1981, pursuant to an order of detention made on July 26, 1980 under the COFEPOSA. The grounds of detention along with the documents necessary to enable the detenu to make a representation were served on him on Sept. 16, 1981. The detenu claims to have made a representation against his detention on Oct. 1, 1981. He has made an assertion to this effect in para 11 of the writ petition filed in this Court. While this is not expressly denied in the counter-affidavit filed on behalf of the Government, it is stated therein that an undated representation was received by the Government from the District Magistrate, Unnao on 23rd Oct. 1981. We

will come back to this later. The Advisory Board which met on Oct. 23, 1981, gave a personal hearing to the detenu and submitted its report on Oct. 26, 1981. Thereafter the Government rejected the representation of the detenu on Oct. 29, 1981. The representation, we may mention here, was admittedly not forwarded to the Advisory Board on the ground that it was received by the Government subsequent to the hearing by the Board.

2. The detenu filed a writ petition in the Allahabad High Court questioning the detention. The High Court upheld the detention and rejected the petition for the issue of the Writ of Habeas Corpus. The detenu has filed a petition for Special Leave to Appeal against the judgment of the Allahabad High Court under Art. 136 of the Constitution and has also filed a separate writ petition under Article 32 of the Constitution.

3. Several grounds including questions relating to the vires of the COFEPOSA were raised in the writ petition as well as in the special leave petition. Most of them were not argued. Some grounds were urged by the learned counsel, but almost all of them were without substance. However, there was one submission of the learned counsel which we found to be of some substance and on which we wanted some explanation from the respondents. As we said earlier, the detenu averred in his petition that he had made a representation to the detaining authority through the Superintendent of the Jail on Oct. 1, 1981. The submission of the learned counsel was that there was undue and unexplained delay in the consideration of the representation. The counter-affidavit filed on behalf of the respondents merely states that the representation of the detenu was received from the District Magistrate on Oct. 23, 1981 and was rejected by the Government on Oct. 29, 1981. No attempt was made to offer any explanation as to why the District Magistrate, Unnao did not forward the representation to the Government till Oct. 23, 1981. A letter addressed by the Superintendent, Central Jail, Varanasi to Yousuf Abbas, brother of the detenu, has been placed before us by the learned counsel for the detenu and it shows that the representation was forwarded by the Superintendent, Central Jail to the District Magistrate, Unnao on Oct. 20, 1981. Why the representation was detained with the Superintendent, Central Jail from Oct. 1, 1981 to Oct. 20, 1981 has not been explained by any one. We wanted a full and detailed explana-

tion from the respondents for the delay in the consideration of the representation by the appropriate authorities, after it was made by the detenu on Oct. 1, 1981. Shri Dalbir Bhandari, learned counsel for the respondents was unable to offer any explanation, but requested us to permit him to produce the relevant records. Arguments were concluded on Mar. 24, 1982 and we reserved judgment. We informed the learned counsel that he would be at liberty to produce the relevant records within a week from that date. Notwithstanding the fact that four weeks have elapsed, the records have not been produced before us. When asked about it, the learned counsel told us that though he had written to the Government of Uttar Pradesh that the records should be produced immediately, he has not received them so far. In the circumstances, we have no option, but to proceed on the basis that the respondents have no explanation to offer for the delay in considering the representation of the detenu. On that ground alone, the writ petition is allowed and the detenu is directed to be set at liberty forthwith. No orders are necessary in the special leave petition in view of our order in the writ petition.

Petition allowed.

AIR 1982 SUPREME COURT 1171

(From : Karnataka)

O. CHINNAPPA REDDY, A. P. SEN
AND BAHARUL ISLAM, JJ.

Criminal Appeal No. 221 of 1975, D/-
19-8-1980.

State of Karnataka, Appellant v. Marigowda, Respondent.

**Criminal P. C. (2 of 1974), S. 401 —
Revision against conviction — Interference with concurrent findings of fact — Propriety.**

Where the Secretary of a co-operative society was convicted for criminal breach of trust in respect of three sums of money by disbelieving his story that he had given the sums in question to the Executive Officer for depositing them in District Co-operative Society and they were in fact so deposited, and accepting the version of the Executive Officer that the identical sums credited with the District Co-operative Bank had come from other sources, the High Court must be deemed to have misdirected itself in

interfering with the concurrent findings of fact and acquitting the accused when the version of the Executive Officer as to sources of receipts was not challenged in his cross-examination and no suggestion was made to him. Acquittal was set aside but considering the lapse of time sentence of imprisonment was reduced to period already undergone. (Para 3)

JUDGMENT :— The respondent, Marigowda, was the Secretary of the Aladahalli Large-scale Co-operative Society, Mallipatna. He was convicted by the learned First Class Magistrate, Holenarasipura of an offence under S. 408, I. P. C. on a finding that he had committed criminal breach of trust in respect of three sums of money, namely, Rupees 1,500/-, Rs. 175/- and Rs. 100/-, belonging to the Society. In respect of these amounts, he had made entries in the cash book, Ex.P-9(a)P-9(c) and P-9(d) as if the amounts had been drawn from the society and credited into the District Co-operative Central Bank, Hassan. The defence of the respondent was that these amounts had been paid to PW 2, Executive Officer of the Bank, to be deposited with the Central Co-operative Bank. Advantage was sought to be taken of the circumstance that PW 2 had, in fact, deposited three identical sums of money with the Central Co-operative Bank, but, according to the evidence of PW 2, those amounts had been received by him not from the accused but from other persons. A sum of Rs. 1,500 had been received from Mallinathapura Co-operative Society, Mallinathpura and that society had also been given a receipt for that amount. The amount of Rs. 100 had been received by PW 2 from Koti Basave Gowda and not from the accused. The amount of Rs. 175/- was part of an amount of Rupees 600/- which had been received by PW 2 for being credited in the District Co-operative Central Bank, but the misappropriated amount was not part of this amount of Rs. 600/-. The evidence of PW 2 was not challenged in cross-examination. His evidence was also fully substantiated by the entries in the accounts of the District Co-operative Central Bank.

2. The trial court accepted the evidence of PW 2 and convicted the respondent as stated above. The conviction and sentence were confirmed by the learned Sessions Judge.

3. In revision the High Court interfering with concurrent findings of fact, acquitted the accused. A perusal of the

judgment of the High Court makes it obvious that the High Court had misdirected itself into thinking that the three amounts paid by PW 2 into the District Co-operative Central Bank pertained to the amounts which the accused was alleged to have misappropriated. PW 2 expressly stated that the amounts had been received by him from Mallinathapura Co-operative Society, etc., and his evidence was not challenged in cross-examination. No suggestion was made to him and there was no justification whatsoever for the High Court to reach the conclusion that these amounts were the very amounts which the accused was alleged to have misappropriated.

4. We are afraid that the judgment of the High Court cannot be sustained. It is, therefore, set aside and the conviction is restored. But having regard to the time that has elapsed, we do not think that it is necessary to send the respondent back to jail. In the circumstances of the case we reduce the sentence of imprisonment to the period already suffered by him but increase the fine imposed upon him by the trial court from Rs. 500/- to Rs. 1,750/-. If the amount of fine is realised, it will be paid to the Aladahalli Large Scale Co-operative Society. In default of payment of fine, the accused will undergo rigorous imprisonment for a period of three months.

Order accordingly.

AIR 1982 SUPREME COURT 1172

(From: Delhi)

D. A. DESAI AND

A. VARADARAJAN, JJ.

Civil Appeal No. 178 of 1982 in S.L.P. (Civil) No. 11080 of 1981, D/- 14-1-1982.

Kulwant Singh and another, Appellants v. Smt. Amar Kaur and others, Respondents.

Delhi Rent Control Act (59 of 1958), S. 25B (4) — Leave to defend — Suit for eviction on ground of bona fide requirement — Complete arrears of rent deposited — Leave to defend sought on plea that suit premises were let out both for residential and commercial purposes — Leave refused on prima facie finding culled out from affidavits that dominant purpose was residential — Held, leave to defend should be granted. Decision of Delhi High Court, Reversed. (Para 2)

JUDGMENT:— We have heard Mr. R. K. Garg, learned counsel for the ap-

pellants and Mr. G. L. Rawal, learned counsel for respondents. On an earlier occasion it was contended that the appellants have not deposited arrears of rent and are defaulters in a huge amount. Before extending any consideration to the appellants we wanted to be satisfied that the appellants have paid or deposited rent in arrears. We are assured today by an affidavit of Tej Singh S/o Shri Damodar Singh that the appellants have deposited balance arrears of rent till today in the court of Shri D. S. Sidhu, Additional Rent Controller, Delhi. A photostat treasury challan is annexed to this affidavit which shows that the appellants have deposited Rs. 8,400/-. We requested Mr. Rawal learned counsel for the respondents to check up this fact and after hearing him we have proceeded on the assumption that according to the affidavit all the arrears have been cleared out by making necessary deposit, but this deposit is accepted subject to the contentions in a cognate matter between the same parties. Any observation herein made is to have no impact as the dispute in the cognate matter and the parties will be at liberty to get that question adjudicated on proper evidence before the court before which the proceedings are pending unhampered by anything stated in this order.

2. This petition out of which the present appeal arises, is confined to the request of the respondents-landlord seeking eviction on the ground that they need the premises reasonably and bona fide for personal use and occupation. Inter alia the appellants-tenants sought leave to defend the action on the plea that the suit premises were let out both for residential and commercial purposes and therefore landlords would not be entitled to recover possession on the ground of personal requirement in view of the provisions of Delhi Rent Control Act. The Rent Controller declined to grant leave on a prima facie finding culled out from affidavits that the dominant purpose of letting was residential. High Court dismissed revision petition in limine by a brief speaking order which hardly touches the core problem raised in the lis between the parties. We are of the opinion that looking to rival contentions it was a fit case where leave to defend ought to have been granted. We accordingly allow this appeal, set aside the order of the Rent Controller and High Court and grant leave to defend to the tenant. The parties are directed to appear before Shri V. B. Gupta, 5th Addl.

Rent Controller, Delhi on 25th Jan. 1982. The Rent Controller will decide whether the requirement of landlord is bona fide and whether tenant proves that the purpose of letting was both residential and commercial and therefore the landlords would not be entitled to maintain an action on the ground of personal requirement after giving an opportunity to the defendants tenants to file their written statement. We allow the appeal in terms indicated above with no order as to costs. In view of the fact that landlord seeks possession on the ground of personal requirement and further leave to defend is being granted at this stage, it is just and proper that the matter should be disposed of as expeditiously as possible and not later than three months from today. No order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 1173

S. MURTAZA FAZAL ALI
AND R. B. MISRA, JJ.

Writ Petn. No. 5929 of 1980, D/- 25-11-1981.

Kamal Kumar Puri, Petitioner v. M/s. Bombay Marine Engineering Works (P) Ltd., Respondent.

Merchant Shipping Act (44 of 1958), S. 119 — Discharge of seaman — His service book should be returned to him immediately after discharge of service — Failure to do so — Damages cannot be awarded under Art. 32 as civil suit can be filed for that purpose. (Constitution of India, Arts. 32, 226, 11). (Civil P. C. (1908), S. 9). (Paras 1, 2)

FAZAL ALI, J.:— This petition under Art. 32 of the Constitution was filed by the petitioner, Kamal Kumar Puri, who was employed as Seaman Crew GP Rating in a private company known as Bombay Marine Engineering Works (P) Ltd. It appears that on his appointment respondents Nos. 2 and 3 issued Continuous Discharge Service Book (hereinafter referred to as 'Service Book') at the request of respondent No. 1. The ship was found to be defective on two occasions and ultimately on 23rd July, 1978 the service of the petitioner was terminated by the Company. Despite the termination of the service respondents 2 and 3 with-

held the service book and thus deprived the petitioner from seeking any employment in other companies because the production of the service book was a condition precedent before any appointment could be given to the petitioner in any other company. The petitioner, therefore, filed this writ petition for writ of mandamus directing respondents 2 and 3 to hand over the service book to him. Rule Nisi was issued and ultimately the service book was handed over to the petitioner while the petition was pending in this Court. Section 119 of the Merchant Shipping Act, 1958 may be extracted :

"119. (1) The master shall sign and give to a seaman discharged from his ship in India, either on his discharge or on payment of his wages, a certificate of his discharge in the prescribed form specifying the period of his service and the time and place of his discharge.

(2) The master shall also, upon the discharge of every certificated officer, whose certificate of competency has been delivered to and retained by him, return the certificate to the officer."

It clearly enjoins on the authorities concerned that the service book being the property of the petitioner should be returned to him immediately after his services are terminated or discharged. The respondents 2 and 3 ought to have given this service book to the petitioner soon after he was discharged. Anyway, as the respondent have already handed over the service book to the petitioner, the grievance made by the petitioner no longer survives.

2. It was, however, contended by the petitioner that since respondents 2 and 3 withheld the service book without any lawful excuse and thus deprived him of the chance of employment they are entitled to pay damages to the petitioner. Unfortunately, however, in proceedings under Art. 32 of the Constitution we cannot award damages for which the petitioner can file an appropriate civil suit if so advised. We, accordingly, dispose of this writ petition. As respondents 2 and 3 deprived the petitioner from getting employment for a pretty long time the petitioner is entitled to costs. We, therefore, dispose of this petition accordingly with costs assessed at Rs. 1,000/- to be paid to the petitioner within two months from today.

Order accordingly.

AIR 1982 SUPREME COURT 1174

(From : Gujarat)

O. CHINNAPPA REDDY AND**R. B. MISRA, JJ.**

Civil Appeal No. 2151 of 1972, D/- 29-3-1982.

Union of India, Appellant v. V. B. Raju, Respondent.

High Court Judges (Conditions of Service) Act (28 of 1954), S. 15, Sch. I, Part II, Cl. 2 (a) — Indian Civil Service Regulations, Regulation 561 (as amended on 12-6-56) — High Court Judge — Pension — Quantum — High Court Judge belonging to Indian Civil Service retiring on 10-2-69 — He would be entitled to pension of Rs. 13,333.33 and not £ 1,000 Sterling in addition to additional pension — Appeal against order of High Court allowing pension of £ 1000 Sterling passed in writ petition instituted prior to 29-8-72 — Maintainable. (Constitution of India, Articles 312A (3), 136; General Clauses Act (1897), S. 6). Decision of Gujarat High Court, Reversed.

Where the Judge of High Court who was a member of Indian Civil Service had joined as a Judge in 1959 he would be entitled to a pension of Rs. 13,333.33 and not to £ 1000 Sterling in addition to the additional pension. It cannot be said that Regulation 561 as it stood before it was amended in 1956 was incorporated by reference in the High Court Judges (Conditions of Service) Act, 1954, and therefore, the retired Judge was entitled to be paid £ 1000 Sterling and not Rs. 13,333.33. There is no such incorporation, by reference, of Regulation 561 in Part II of the 1st Schedule as it stood before the amendment in the High Court Judges (Conditions of Service) Act, 1954. All that Part II stipulates is that the pension which a High Court Judge who was a member of the Indian Civil Service was entitled to receive was the pension payable under the ordinary rules of the Indian Civil Service if he had not been appointed a Judge. If he had not been appointed a judge he would have been entitled to a pension of Rs. 13,333.33 and not £ 1000 Sterling. That is, therefore, what he would be entitled to get, in addition to the additional pension. Further, the appeal filed by the Union Govt. could not be said to be not maintainable due to Art. 312A (3) when the writ petition was filed before 29-8-72 against the order of High Court in writ petition allowing pen-

sion of £ 1000 Sterling as the action out of which the appeal arose was instituted prior to 29-8-72 and the Union of India had a vested right of appeal. Decision of Gujarat High Court, Reversed.

(Paras 1, 2)

Cases Referred : Chronological ParasAIR 1974 SC 2055 : 1974 Lab IC 1362 1
(1971) 12 Guj LR 938 : 1972 Serv LR 149 1

AIR 1957 SC 540 : 1957 SCR 488 2

O. CHINNAPPA REDDY, J.:— The respondent Shri V. B. Raju, was a member of the Indian Civil Service and was a Judge first of the Bombay High Court and later of the Gujarat High Court. He was a Judge from June 12, 1959 to Feb. 10, 1969 on which date he retired. He filed a Writ Petition in the Gujarat High Court claiming that he was entitled to be paid a pension of £ 1000 Sterling in addition to the additional pension payable under Part II of the 1st Schedule to the High Court Judges (Conditions of Service) Act, 1954. Following an earlier judgment of the same Court in *J. D. Kapadia v. Union of India*, (1971) 12 Guj LR 938, the Gujarat High Court allowed the Writ Petition and declared that the amount payable under Cl. 2 (a) of Part II of the first Schedule of the High Court Judges (Conditions of Service) Act 1954, was £ 1000 Sterling according to the official rate of exchange prevailing on the date when payment became due instead of the fixed sum of Rs. 13,333.33 ps. per annum. The Union of India has filed this appeal against the decision of the Gujarat High Court. The earlier judgment of the Gujarat High Court in *J. D. Kapadia v. Union of India* was reversed by this Court in *V. B. Raju v. State of Gujarat*, AIR 1974 SC 2055. In view of the judgment of this Court in *V. B. Raju v. State of Gujarat*, this appeal has to be allowed. It was however, argued by Shri V. B. Raju, in the case now before us, that in the earlier judgment of the Supreme Court there was no reference to the High Court Judges (Conditions of Service) Act 1954. According to Shri Raju S. 15 of the Act provided that every Judge who was a member of the Indian Civil Service shall, on his retirement, be paid a pension in accordance with the scale and the provisions in Part II of the 1st Schedule. Part II of the 1st Schedule provided that the pension which a Judge who was a member of the Indian Civil Service was entitled to receive was the pension to which

he was entitled under the ordinary rules of the Indian Civil Service if he had not been appointed a Judge and the additional pension in accordance with the prescribed scale. Shri Raju would say that under the ordinary rules of the Indian Civil Service he was entitled to a pension of £ 1000 sterling and not Rupees 13,333.33 ps. Under Regulation 561 of the Civil Service Regulations as it stood before 12-6-56 a member of the Indian Civil Service was entitled to receive a pension of £ 1000 Sterling. Regulation 561 was amended on 12-6-56 and instead of an annuity of £ 1000 Sterling an annuity of Rs. 13,333.33 ps. was substituted. Shri Raju argued that Regulation 561 as it stood before it was amended in 1956 was incorporated by reference in the High Court Judges (Conditions of Service) Act, 1954, and therefore, he was entitled to be paid £ 1000 and not Rupees 13,333.33. We see no force whatever in the submission. There is no such incorporation, by reference, of Regulation 561 in Part II of the 1st Schedule as it stood before the amendment in the High Court Judges (Conditions of Service) Act 1954. All that Part II stipulates is that the pension which a High Court Judge who was a member of the Indian Civil Service was entitled to receive was the pension payable under the ordinary rules of the Indian Civil Service if he had not been appointed a Judge. If he had not been appointed a judge he would have been entitled to a pension of Rs. 13,333.33 and not £ 1000 Sterling. That is, therefore, what he is entitled to get, of course, in addition to the additional pension.

2. Shri Raju raised a preliminary objection that in view of Art. 312A (3) of the Constitution which came into force w.e.f. 29-8-72 the present appeal by the Union of India was not maintainable. We see no force in the submission. The action out of which the appeal arises was instituted prior to 29-8-72 and the Union of India had a vested right of appeal (vide *Garikapati Veeraya v. N. Subbiah Choudhary*, 1957 SCR 488: (AIR 1957 SC 540)). The appeal is therefore allowed, and the Writ Petition in the High Court is dismissed.

3. There will be no order as to costs.

Appeal allowed.

AIR 1982 SUPREME COURT 1175

(From : Rajasthan)

S. MURTAZA FAZAL ALI AND
V. B. ERADI, JJ.

Criminal Appeal No. 210 of 1981, D/- 25-2-1981.

Shyam Sunder, Appellant v. State of Rajasthan, Respondent.

Criminal P. C. (2 of 1974), Ss. 374, 385 and 386 — Appeal pending in High Court Jodhpur Bench — Appeal transferred to Jaipur Bench without notice to accused-appellant and dismissed by Jaipur Bench without hearing accused — Though reasons were given for dismissing appeal, since appellant was not being represented, possibility of his having persuaded the High Court to take a different view could not be reasonably excluded—Appeal remanded to Jaipur Bench for fresh disposal. Decision of Rajasthan High Court, Reversed. (Para 1)

JUDGMENT:— This appeal in our opinion must succeed on a short point. The admitted facts are that the criminal appeal filed by the appellant before the Rajasthan High Court was initially presented in Jodhpur which is the headquarter of the High Court. A counsel from Jodhpur was engaged by the appellant to argue the appeal. While the appeal was pending in the Jodhpur Bench it was transferred to the Bench at Jaipur without serving any notice on the appellant. The appellant has stated in affidavit that even his counsel at Jodhpur did not inform him that the appeal had been transferred to Jaipur and will be heard there. In these circumstances, the appeal was heard by the Bench at Jaipur in the absence of the accused, as would appear from the judgment itself, counsel for the State of Rajasthan has not denied these facts and has conceded that as the appeal had been decided without hearing the accused he would not have any objection if the appeal is remitted to the High Court at Jaipur for rehearing in presence of the accused. Although the High Court at Jaipur has given reasons for dismissing the appeal the fact remains that as the accused was not represented the possibility of the appellant having persuaded the High Court to take a different view cannot be reasonably excluded. In these circumstances, therefore, we allow this appeal, set aside the judgment of the High Court Bench at Jaipur and remand

the appeal to the High Court at Jaipur for disposal in accordance with law after hearing the appellant as also the counsel for the respondent. The appellant will now immediately engage his counsel and appear before the High Court for further directions on the 16th of March, 1981. The High Court will fix a short date and dispose of the appeal as soon as possible.

2. The appellant will continue on bail.

Appeal allowed.

AIR 1982 SUPREME COURT 1176

(From: Delhi)

R. S. PATHAK AND E. S.
VENKATARAMIAH, JJ.

Civil Appeal No. 692 of 1971, D/- 24-11-1981.

Gurdeep Singh, Appellant v. Union of India, Respondent.

Constitution of India, Art. 311 — Suspension of employee after having been informed about dispensing of his services due to abolition of department in which he was serving — Departmental proceedings initiated against him dropped — Employee is not entitled to reinstatement as he cannot hold any post in such department that is to be abolished — He would, however, be entitled not only to arrears of pay and allowance before date of suspension but also to pay and allowances for the period subsequent to suspension till abolition of post and other benefits such as gratuity, permissible under the rules.

(Para 4)

JUDGMENT:— This appeal by certificate is directed against a judgment and decree of the High Court of Delhi allowing an appeal filed by the Union of India and in the result dismissing the suit filed by the appellant.

The appellant was serving as an Upper Division Clerk in the Directorate General of Resettlement and Employment, Ministry of Labour and Employment, a Department of the Government of India, when on 21st Sept. 1956 he was suspended for refusing to comply with an order transferring him to Ferozepur. On the next day he was served with a charge-sheet. However, before this a notice dated 27th July, 1956 had already been issued by the Government of India stating that it had been decided to transfer the day-to-day administration of the Employment Exchanges and Training Centres to State Governments and that in conse-

quent all the posts under the Government of India in the Employment Exchanges, Training Centres stood abolished. These posts include that of the appellant who was informed by the said notice that he was one of the officers whose services would be dispensed with on the abolition of the said Department and his services would not be required with effect from 1st Nov., 1956. It appears that the disciplinary proceedings initiated against the appellant did not proceed further. In the meanwhile, the appellant continued to make representations to the Government of India for the grant of relief. On 26th Aug., 1958 the Government of India made an order on the several representations from the appellant and recorded that the disciplinary action against him would be treated as closed. The order runs as follows:

"(1) In view of the fact that all the posts under the Central Govt. including that held by Shri Gurdip Singh were abolished and the appointment of Shri Gurdip Singh under the Central Government also terminated with effect from 31-10-1956 (A.M.), the disciplinary action taken against him has not been proceeded with and is treated as having been closed. In view of this Shri Gurdip Singh will be entitled to the following:—

(i) Pay and allowances, if any, due to him prior to the date of the orders placing him under suspension, i.e., 21-9-1956.

(ii) Subsistence allowance from 22-9-1956 to 31-10-1956 (A.M.)

(iii) Gratuity and other terminal benefits including payment of leave salary due to him according to the rules and regulations of Government, on formal application from him.

(iv) He will be treated as Central Government Discharged Employee with effect from 1st November, 1956."

2. The dues to Government from Shri Gurdip Singh by way of refund to Cycle Advance of Rs. 165 plus interest thereon, an amount of Rs. 252-14-00 representing the value of stores found short while he was Store-keeper and any other dues to Government will be recovered from him by adjustment of the amount to be paid to him as referred to in part (1) above.

3. The suspension order dated 21-9-1956 passed by the Regional Director will remain unaltered.

4. Shri Gurdip Singh should apply for final settlement of his dues to the Government of Punjab through the Director of Industries, Punjab.

Learned counsel for the appellant has urged before us that as the disciplinary proceedings initiated against the appellant have been dropped he is entitled to appointment to a post in the Government of India. We are of opinion that the claim is without substance. The appellant was employed in a Department of the Government of India, which has since been abolished and with the abolition of the Department his claim to hold any post in that Department must fail. However, having regard to the circumstance that the disciplinary proceedings have been dropped we think that the order dated 26th Aug. 1958 mentioned above must be modified. We are of opinion that in the interest of justice the appellant should be held entitled not only to the arrears of pay and allowances before the date of suspension but also to pay and allowances and other benefits in accordance with the rules for the period from 21st Sept., 1956 to 31st Oct., 1956 on the basis that no disciplinary proceedings had been taken against him. Any payment to be made in pursuance of this order shall be made after adjusting the amount found due from him. The suspension order is quashed.

The appeal is allowed accordingly. Having regard to the circumstances of the case, we direct the respondent to pay Rs. 1,000 as costs to the appellant.

Appeal allowed.

AIR 1982 SUPREME COURT 1177

P. N. BHAGWATI AND
A. VARADARAJAN, JJ.

Civil Appeal No. 1408/1981, D/- 10-4-1981.

Kesho Nath Khurana, Appellant v. Union of India and others, Respondents.

Practice and Procedure—Single Judge referring question of law arising in Second Appeal to Division Bench—Division Bench ought to send the matter back to the single Judge after deciding the question of law referred—It cannot proceed to dispose of it on merits. Division Bench decision of High Court, dt. 7-4-1980, Reversed. (Para 1)

BHAGWATI, J.—It appears from the record that the single Judge before whom Second Appeal No. 63 of 1969 came up for hearing referred the following question of law for the opinion of the Division Bench :

Q.—“Whether the order dt. Jan. 21, 1963 made by the Chief Settlement Com-

missioner was final and binding in the present appeal, and if so, what is its effect upon the point in controversy in the present appeal?”

It was this question which was referred by the single Judge to the Division Bench and the Division Bench disposed it of by its judgment dt. 7th April, 1980. The Division Bench held that the order dt. 21-1-1963 made by the Chief Settlement Commissioner was not final and binding in the civil proceeding and it did not exclude the jurisdiction of the Civil Court to decide whether there was any encroachment by the respondent on the property conveyed to the appellant under the sale certificate dt. 7th June, 1963 read with the corrigendum dt. 22nd Sept. 1964 issued by the District Rent and Managing Officer, Simla, pursuant to the auction sale held on 25th Sept. 1955. Now it is obvious that since only the aforesaid question of law was referred by the single Judge to the Division Bench, the Division Bench should have sent the matter back to the single Judge after deciding the question of law referred to them. But instead the Division Bench proceeded to dispose of the Second Appeal on merits and dismissed it with costs. We think that the Division Bench was in error in following this procedure. The Division Bench ought to have sent the appeal back to the single Judge with the answer rendered by them to the question referred by the single Judge and left it to the single Judge to dispose of the second appeal according to law.

2. We accordingly allow the appeal, set aside the order passed by the Division Bench dismissing the Second Appeal with costs and direct that the Second Appeal shall be disposed of by the single Judge of the High Court in accordance with law without being influenced by any observations made by the Division Bench on merits but on the basis that the order dt. Jan. 21, 1963 made by the Chief Settlement Commissioner was not final and binding on the parties. The single Judge will consider whether having regard to the boundaries and the area specified in the Sale Certificate dt. 7th June, 1963 read with the corrigendum dt. 22nd Sept. 1964, any portion of the property conveyed to the appellant was illegally in the possession of the respondents. There will be no order as to costs of the appeal.

Appeal allowed.

AIR 1982 SUPREME COURT 1178

O. CHINNAPPA REDDY, J.

Writ Petn. (Criminal) Nos. 271-272 of 1982, D/- 21-5-1982.

Phillippa Anne Duke, Petitioner v. State of Tamil Nadu and others, Respondents.

(A) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 11 — Representation to Central Govt. — Petitions and memorials presented to Prime Minister and Central Ministers on behalf of detenu is not such representation. (Constitution of India, Art. 22 (5).)

Diplomatic communications between one country and another cannot be treated as representations to the statutory authorities functioning under the Act, as representations which require immediate consideration by the statutory authorities and which, if not considered immediately, would entitle the detenus to be set at liberty. Nor is it possible to treat the countless petitions, memorials representations which are everywhere presented to the Prime Minister and other Ministers as statutory appeals or petitions, statutorily obliging them to consider and dispose of such appeals and petitions in the manner provided by statute. No doubt the Prime Minister and other Ministers, as leaders in whom the people have reposed faith and confidence, will deal with such appeals and petitions with due and deserved despatch. But quite obviously that will not be because they are discharging statutory obligations. It is not also possible to treat representations from whatever source addressed to whosoever officer of one or other department of the Government as a representation to the Government requiring the appropriate authority under the Act to consider the matter. (Para 2)

Where a *Bout de Papiere* was presented to the Prime Minister during her visit to Britain on behalf of detenus and a subsequent reminder was addressed to the External Affairs Ministry by the British High Commission in regard to that document they could not be said to be representations to the Central Govt. which were required to be dealt with in the manner provided by the Act. (Para 2)

(B) Conservation of Foreign Exchange and Prevention of Smuggling Activities

FZ/FZ/C540/82/SNV

Act (52 of 1974), S. 8 — Providing of legal aid to detenu before Advisory Board — It is in the discretion of Board.

Where the detenus were heard personally by the Advisory Board and after seeing and hearing them personally also, the Board did not feel it necessary to provide legal representation to them it could not be said that there was any illegality in the procedure adopted by the Board and the detention order was vitiated. Further, so far as representation by a friend was concerned when there was never any such demand by the detenus it was not for the Advisory Board to offer "friendly" representation to the detenus even if the latter did not ask for it. (Para 5)

(C) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 8 — Advisory Board only allowing some customs officers to be present in the corridor to enable them to produce the relevant files whenever required for perusal by the Board — There could not be said to be any inequality in treatment given to detaining authority and the detenu. (Constitution of India, Art. 14). (Para 6)

(D) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 8 — Hearing before Advisory Board — Board observing that there was sufficient cause for detention of detenus in its report — Not much time intervening between detention order and report — Report necessarily implied that the detention was found by the Board to be justified on the date of its report as also on the date of the making of the order of detention. (Para 7)

(E) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), S. 8 — Proceedings before Advisory Board — Procedure — Validity — Board carrying on correspondence with detenu through Govt. as Board had no separate administrative office of its own — It could not be alleged that detention was approved by Board at the behest of Govt. when Board was constituted by three Judges of High Court. (Para 8)

Cases Referred: Chronological Paras

AIR 1982 SC 710: 1982 Cri LJ 340 4

(1977) 1 QB 240: (1977) 1 All ER 64: 4

(1976) 3 WLR 711, *Maynard v. Osmond* 4

(1969) 1 QB 125: (1968) 2 All ER 545: 4

(1968) 2 WLR 1471, *Pett v. Greyhound Racing Association Ltd.* 4

Mr. Ram Jethmalani, Sr. Advocate and Miss Rani Jethmalani, Advocate, for Petitioner; Mr. R. K. Garg, Sr. Advocate and Mr. A. V. Rangam, Advocate, for Respondents.

ORDER:—Richard Beale & Paul Duncan Zawadzki, two British nationals, said to be friends and collaborators in smuggling enterprises are now under detention under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. Richard Beale arrived at Madras from Singapore on December 11, 1981. He brought with him a Mercedes Benz van. On examination by the customs authorities, the van was found to have secret compartments and hidden cavities. It was laced and lined, as it were, with all manner of electronic equipment and goods worth several lakhs of rupees. Richard Beale was interrogated and made a statement. He was arrested and produced before the learned Metropolitan Magistrate of Madras. His friend and collaborator Paul Duncan Zawadzki, who had separately arrived in India and who attempted to contact Richard Beale, was also interrogated, later arrested and produced before the Metropolitan Magistrate. Orders of detention under the COFEPOSA Act were made against both of them on Jan. 7, 1982 and grounds of detention were duly served on them. The detenus moved the High Court of Tamil Nadu for their release from detention, but their applications were dismissed. They have now come to this Court seeking Writs of Habeas Corpus under Art. 32 of the Constitution. The two petitions were argued together by Shri Jethmalani and they may be conveniently disposed of by a single order.

2. The first submission of the learned counsel was that the representation made by the detenus to the Central Government to revoke the orders of detention so long back as March, 1982 remained undisposed of till this day and on that ground alone, the detenus were entitled to be released. Shri Jethmalani drew my attention to S. 11 of the COFEPOSA Act which enables the Central Government to revoke or modify an order of detention made by the State Government or its officers and to the decisions of this Court laying down that delay by the Central Government in dealing with representations of the detenu would also entail the detention invalidating itself. Apart from the fact that there is no proper founda-

tion for the submission, I am not satisfied that there is any merit in the submission. The Writ Petitions were filed on March 12, 1982 and there was then no hint of this submission. The counter-affidavit on behalf of the State of Tamil Nadu was filed on April 5, 1982. Thereafter, the clerk of the learned counsel for the petitioners has sworn to an affidavit mentioning the facts giving rise to the present submission. It appears from the affidavit that when the Prime Minister of India was recently in England, a Bout De Papiere was presented to the delegation accompanying her, expressing concern about the detention without trial of Richard Beale and Paul Duncan Zawadzki and suggesting that the detention order might be 'lifted' and the detenus either released or charged and brought to trial without delay. It further appears that the British High Commission in India also addressed the Ministry of External Affairs, Government of India, and reminded them about the Bout De Papiere presented to the Prime Minister's delegation in Britain during her visit to that country. According to Shri Jethmalani, the Bout de Papiere presented to the Prime Minister's delegation in Britain and the subsequent reminder by the British High Commission constitute a representation to the Central Government demanding their immediate consideration in terms of the provisions of the COFEPOSA Act. We have no doubt that the Bout de Papiere and the reminder, diplomatic communications that they are between the Government of the two countries, will be attended to and answered through appropriate diplomatic channels in proper time and with necessary expedition. But I find it difficult to treat such diplomatic communications between one country and another as representations to the statutory authorities functioning under the COFEPOSA Act, as representations which require immediate consideration by the statutory authorities and which, if not considered immediately, would entitle the detenus to be set at liberty. Nor is it possible to treat the countless petitions, memorials and representations which are everywhere presented to the Prime Minister and other Ministers as statutory appeals or petitions, statutorily obliging them to consider and dispose of such appeals and petitions in the manner provided by statute. No doubt the Prime Minister and other Ministers, as leaders in whom the people have reposed faith and confidence, will deal with such appeals

and petitions with due and deserved despatch. But quite obviously that will not be because they are discharging statutory obligations. It is not also possible to treat representations from whatever source addressed to whomsoever officer of one or other department of the Government as a representation to the Government requiring the appropriate authority under the COFEPOSA Act to consider the matter. I do not consider that the *Bout de Papiere* presented to the Prime Minister during her visit to Britain and the subsequent reminder addressed to the External Affairs Ministry by the British High Commission are representations to the Central Government which are required to be dealt with in the manner provided by the COFEPOSA Act.

3. It was next submitted by the learned counsel that the Chief Minister, who according to the Rules of Business of the Government of Tamil Nadu, was required to deal with matters relating to preventive detention neither applied his mind to the making of the orders of detention, nor considered the representation of the detenus himself. The relevant files have been produced by the learned counsel for the State of Tamil Nadu and on perusing them, I find no substance in the submission of the learned counsel.

4. The submission which was most strenuously urged by the learned counsel was that the detenus had been denied the right to be represented before the Advisory Board by an Advocate or at least by a friend and that they were thus denied the right to make a proper and effective representation to the Advisory Board. This was sufficient, said the learned counsel, to vitiate the detention. The learned counsel urged that the detenus were foreign nationals and they were under a handicap being ignorant of the laws and procedures of this country. To deny legal representation to them was an unreasonable exercise of the discretion vested in the Advisory Board to permit or not to permit legal representation. According to the learned counsel, this was a clear case where legal representation should have been permitted. In any case, it was urged, the detenus ought to have been offered at least 'friendly' representation, if not legal representation. Reliance was placed upon the following observations of the Constitution Bench in *A. K. Roy v. Union of India*, AIR 1982 SC 710 (para 95):—

"Another aspect of this matter which needs to be mentioned is that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. A detenu, taken straight from his cell to the Board's room, may lack the ease and composure to present his point of view. He may be 'tongue-tied, nervous, confused or wanting in intelligence' (see *Pett v. Greyhound Racing Association Ltd.*, (1969) 1 QB 125), and if justice is to be done, he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts cishveilled. Just as a person who is dumb is entitled, as he must, to be represented by a person who has speech, even so, a person who finds himself unable to present his own case is entitled to take the aid and advice of a person who is better situated to appreciate the facts of the case and the language of the law. It may be that denial of legal representation is not denial of natural justice per se, and, therefore, if a statute excludes that facility expressly, it would not be open to the Tribunal to allow it. Fairness, as said by Lord Denning M. R., in *Maynard v. Osmond*, (1977) 1 QB 240, 253, can be obtained without legal representation. But, it is not fair, and the statute does not exclude that right, that the detenu should not even be allowed to take the aid of a friend. Whenever demanded, the Advisory Boards must grant that facility."

5. In the present case, the Advisory Board consisting of three Judges of the High Court of Tamil Nadu considered it unnecessary and inadvisable to allow legal representation to the detenus. It was a matter for the decision of the Advisory Board and I do not think I will be justified in substituting my judgment in the place of their judgment. The detenus were heard personally by the Advisory Board. After seeing and hearing them personally also, the Board did not feel it necessary to provide legal representation to them which they would certainly have done if they had thought that the detenus appeared to require such representation.

Regarding representation by a friend, there was never any such demand by the detenus. A 'friendly' representation would certainly have been provided if it had been so demanded. It was not for the Advisory Board to offer 'friendly' representation to the detenus even if the latter did not ask for it. Relying upon a sentence in the counter-affidavit of Shri Kiru Bhakaran that representation not only by a lawyer but by a friend was also considered not necessary by the Advisory Board, it was argued that the Advisory Board had, without warrant, refused even friendly representation. Shri Kiru Bhakaran was speaking for the State of Tamil Nadu and not for the Advisory Board. I have perused the file of the Advisory Board which was produced before me and I have also perused the communications addressed by the Advisory Board to the Government of Tamil Nadu and to the detenus. I do not find the slightest hint of a demand for 'friendly' representation or its denial anywhere. The Advisory Board was neither asked nor did the Board deny any 'friendly' representation.

6. A charge was made against the Advisory Board that there was inequality of treatment. It was said that while the detaining authority was allowed to be represented by its officers and advisers, the detenus were allowed no representation. There is no substance in this charge. From the affidavit of the Chairman of the Advisory Board. I find that all that happened was that some customs officers were allowed to be present in the corridor so as to enable them to produce the relevant files whenever required for perusal by the Board. The charge of inequality of treatment is, therefore, baseless.

7. Yet another submission of the learned counsel was that the Advisory Board failed to consider the question whether the detention continued to be justified on the date of the report of the Advisory Board, even if it was justified on the date of the making of the order of detention. The order of detention was made on 7-1-82 and the consideration by the Advisory Board was on 8-2-82. The passage of time was not so long nor had any circumstances intervened to justify any compartmentwise consideration of the justification for the detention on the date of the making of the order of detention and on the date of the report of the Advisory Board. In the circumstances of the

case, I think that the report of the Advisory Board that there was sufficient cause for the detention of Richard Beale and Paul Duncan Zawadzki necessarily implied that the detention was found by the Board to be justified on the date of its report as also on the date of the making of the order of detention.

8. A complaint was also made that the Advisory Board carried on its correspondence with the detenus through the Government. This, it was stated, gave rise to a suspicion that everything was done by the Board at the behest or in consultation with the Government. This complaint is wholly unjustified. As already mentioned by me, the Advisory Board consisted of three Judges of the High Court of Tamil Nadu and as explained by the Chairman in his affidavit, the correspondence etc. is carried on through the Government because the Board has no separate administrative office of its own. All the points urged on behalf of the detenus fail and the petition is, therefore, dismissed.

Petition dismissed.

AIR 1982 SUPREME COURT 1181

(From : 1982 Cri LJ 817 (Delhi))

V. D. TULZAPURKAR AND BAHARUL ISLAM, JJ.

Criminal Appeal No. 284 of 1982 (Arising out of S.L.P. (Crl.) No. 254 of 1982), D/- 4-5-1982.

Smt. Manju Gupta, Appellant (Accused No. 2) v. Lt. Col. M. S. Paintal, Respondent (Complainant).

Criminal P. C. (2 of 1974), Ss. 204 and 482 — Rent Control proceedings pending — Allegation that some forged rent receipts were filed in proceedings — Issue of process by Magistrate on basis of complaint by landlord — Legality. 1982 Cri LJ 817 (Delhi), Reversed.

Certain Rent Control proceedings were started against a School run by a Society and the appellant and her husband who were Secretary and Joint Secretary respectively of the society. The proceedings were pending between the parties regarding eviction and recovery of arrears. The landlord filed a complaint alleging that some rent receipts had been forged and

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filed in the rent control proceedings. This complaint was filed even before the issue whether the disputed receipts were forged or genuine was finally decided by the Rent Controller. On hearing the complainant and recording his evidence the Magistrate issued process by summoning appellant and her husband for offences under Ss. 467/471 read with S. 34, Penal Code. The appellant sought to get the Magistrate's order quashed under S. 482 but the application was rejected by the High Court.

It was in evidence that the appellant was not a party to the pending proceedings and her husband was conducting them. It was also not stated that the appellant took any part in bringing about the lease transaction between the school and the landlord.

Held, that no case was made out against the appellant for issuance of process and it deserved to be quashed. 1982 Cri LJ 817 (Delhi), Reversed. (Paras 3 and 5)

TULZAPURKAR, J.:— In this appeal the question raised is whether the process issued by Shri Om Prakash, Metropolitan Magistrate, New Delhi, against the appellant (Smt. Manju Gupta) for an offence under Ss. 467/471 read with S. 34, I.P.C. on a complaint filed by the respondent (Lt. Col. M. S. Paintal) should be quashed or not? The appellant's attempt to get it quashed under S. 482, Cr. P. C. failed before the Delhi High Court and hence this appeal. After hearing counsel on either side at great length we were satisfied that the said process should be quashed and by our order dated 26th April, 1982 we directed accordingly and observed that the reasons would follow. We are now indicating our reasons for the order.

2. The facts in brief are these : The complainant-respondent is the owner/landlord of premises bearing Municipal No. C-221, Sarvodaya Enclave, New Delhi; he had let out the ground floor of the said premises to South Delhi Public School through Surinder Nath (accused No. 1, being the husband of the appellant) at the monthly rent of Rs. 1,000, the school is run by a Registered Society known as Cosmopolitan Society of Education Research and Child Welfare of which the appellant and her husband Surinder Nath were at all material times the Secretary and the Jt. Secretary respectively. It appears that civil proceed-

ings are pending between the parties; one is an eviction petition filed by the respondent against Surinder Nath and the Society and another is a suit filed by him for recovery of arrears of rents against them and the complaint has arisen from what transpired in these civil proceedings. In substance the allegation of the respondent has been that this Surinder Nath in furtherance of the common intention of three accused (himself, his wife and the Society through its Chairman) had forged two rent receipts dated 7th June, 1976 and 18th October, 1977 and had filed them in the proceedings pending before the respective Rent Controllers with a view to show that no rent was due from the tenants and the case in the complaint is that these forged receipts had been fraudulently and dishonestly used by the accused as genuine. After registering the complaint, recording complainant's evidence and perusing the various documents filed by the respondent, the learned Magistrate issued process by summoning both the accused Surinder Nath and his wife (the appellant) for offences under Ss. 467/471 read with S. 34, I.P.C. The question is whether on the entire material on record any case for the commission of the offences could be said to have been made out by the respondent against the appellant for issuing the process?

3. Counsel for the appellant contended that even if all the allegations made in the complaint and the material produced by the respondent before the Magistrate are taken into account and accepted as true no case could be said to have been made out against the appellant. He urged that no specific allegation or any overt-act has been ascribed to the appellant in the matter of the commission of the offence of using forged documents as genuine in civil proceedings pending before the Rent Controllers and the respondent has dragged the appellant to criminal Court with a view to use the criminal process as a lever for pressurising the settlement of the civil dispute to his satisfaction. We find considerable force in this submission for the criminal process has been resorted to even when the civil proceedings are pending and even before the issue whether the disputed receipts are forged or genuine is finally decided by the Rent Controller.

4. Coming to the case against the appellant it was not disputed before us that

to none of the civil proceedings has the appellant been impleaded as a party-defendant and the proceedings are between the respondent as the plaintiff on the one hand and Surinder Nath, the school and the Society on the other. It was also not disputed that these civil proceedings have been and are being conducted by Surinder Nath on behalf of the school and the Society and the appellant has not participated in their conduct. Further in the entire complaint it has nowhere been stated that in the matter of bringing about the lease transaction the appellant had taken any part but it is stated that throughout the negotiations in that behalf it was Surinder Nath who was acting for and on behalf of the School and or the Society. Even in the matter of production of the alleged forged receipts in the Civil proceedings all that has been alleged is that these receipts were filed by accused Nos. 1 and 3 (Surinder Nath and the Society) acting for and on behalf of the School/Society and in fact, in para 10 of the plaint in Suit No. 7/1981 which was filed by the respondent a categorical averment has been made that it was Surinder Nath (defendant No. 1 in that suit) who had produced the forged and false rent receipts in the Court. In other words, in the matter of user of the forged documents as genuine the appellant was nowhere concerned and the only manner in which criminal liability is being foisted upon the appellant is by making the following averment in para 20. of the complaint:

"That accused No. 2 Smt. Manju Gupta, who is the Secretary of the said Society has been benefited from the said forgery and fraud."

Such an averment in our view, is clearly inadequate and insufficient to bring home criminality to the appellant in the matter of the alleged offences. On such basis even the other office-bearers of the Society such as the Chairman, Vice-Chairman, Treasurer or even the Members of the Managing Committee could be said to have been benefited by the alleged forgery and fraud and even such office-bearers or Members would become criminally liable which would be manifestly incorrect. Simply because the appellant was the Secretary of the Society it does not mean process must be issued against her unless her connection or complicity with the offences is at least *prima facie* indicated,

5. It may be pointed out that even the allegations in the complaint pertaining to the forgery of the rent receipts are vague and indefinite. The respondent is not sure as to whether the signatures appearing on the two receipts are not his and are forged or whether the forgery consists in lifting revenue stamps bearing his own signatures from earlier rent receipts issued in favour of the said School/Society and pasting the same on the disputed receipts and the respondent cannot possibly know as to who actually indulged in either one or the other activity and naturally in this regard no averment ascribing any overt-act to the appellant finds place in the complaint.

6. In the light of these aspects it is very clear to us that no case was made out by the respondent against the appellant for issuance of process in respect of the offences alleged and, therefore, the process issued by the Metropolitan Magistrate deserved to be quashed.

Appeal allowed.

AIR 1982 SUPREME COURT 1183

(From: Bombay)

O. CHINNAPPA REDDY AND

V. B. ERADI, JJ.

Criminal Appeals Nos. 445-446 of 1981, D/- 6-5-1982.

Jayappa Dattu Rajage and others, Appellants v. State of Maharashtra, Respondents.

Penal Code (45 of 1860), Ss. 304, Part II, 325 — Conviction under S. 304 Part II — Propriety — Held on facts that offence fell under S. 304 Part II and not under S. 325 — Conviction under S. 304 Part II as such was proper.

Deceased receiving injuries on head and on leg — Head injuries causing extensive haematoma while leg injuries resulting in fracture of all leg bones — Death due to shock and haemorrhage — Injuries even if insufficient in ordinary course of nature to cause death, acts of accused resulting in injuries done with knowledge to cause bodily injury likely to cause death — Offence falls under Section 304 Part II and not under S. 325 — Conviction of accused by High Court under S. 304 Part II held, proper. (Para 3)

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CHINNAPPA REDDY, J.— In this appeal, special leave was granted on the question of the nature of offence and sentence only. The learned Sessions Judge and the High Court have, concurrently, held that the four appellants were responsible for causing the injuries which were found on the person of the deceased, Mansur. While the learned Sessions Judge convicted the appellants under Section 325 read with S. 34, I.P.C. and awarded a sentence of 2 years' imprisonment, the High Court — there was an appeal by the State — convicted the appellants under S. 304 Part II read with Section 34, I.P.C. and sentenced each of them to suffer imprisonment for a period of seven years.

2. The evidence of the doctor who carried out the autopsy on the dead body of Mansur revealed two contused lacerated wounds over the right frontal and fronto parietal region of the skull, each measuring $1\frac{1}{2}'' \times \frac{1}{2}'' \times$ bone deep, one contused lacerated wound over the right eyebrow region measuring $1'' \times \frac{1}{4}'' \times$ bone deep, two contused lacerated wounds over the right leg measuring $2'' \times \frac{1}{2}'' \times$ bone deep and $\frac{1}{2}'' \times \frac{1}{4}'' \times$ bone deep and innumerable abrasions all over the body. The two contused, lacerated wounds over the right leg resulted in fractures of the radius and ulna, and the tibia and the fibula, respectively. There was haematoma all over under the scalp. There was also haematoma all over the brain over the frontal, temporal and occipital regions. The doctor opined that the deceased died as a result of shock and haemorrhage due to subdural haematoma and fractures of the bones. He further opined that the injuries were not sufficient to cause death in the ordinary course of nature, even cumulatively. He stated that the haematoma all over under the scalp might have been due to the contused, lacerated wounds over the right frontal and fronto parietal regions. In cross-examination, the doctor stated every head injury need not result in haematoma. He admitted that the post-mortem examination made by him showed that the deceased had consumed alcohol. He stated that the consumption of alcohol results in dilation of blood vessels and that if a person in a drunken condition sustained head injury, haematoma might occur because of dilation of blood vessels.

3. Thus the evidence of the doctor shows that there were three contused lacerated wounds on the head, two of which were on the frontal and fronto parietal region of the skull. There was extensive subdural haematoma and, having regard to the location of the wounds, haematoma was quite obviously due to the head injuries. All the bones of the right leg were broken. The opinion of the doctor was that death was due to shock and haemorrhage due to haematoma and the fractures. We do not see how it makes any difference that Mansur had consumed alcohol. That consumption of alcohol leads to dilation of blood vessels cannot undo the circumstance that the haematoma in the present case was obviously because of the injuries to the head. Even accepting the opinion of the doctor that the injuries were not sufficient in the ordinary course of nature to cause death, we are unable to see how the offence would only be under S. 325, I.P.C. The injuries were clearly of a nature likely to cause death. Even if the nature of the injuries was such that they were not sufficient in the ordinary course of nature to cause death, they could certainly be said to be the result of acts so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, so as to fall within the fourth limb of S. 300. We are not here concerned with the question whether the acts of the accused resulting in the injuries received by the deceased fall within the fourth limb of S. 300 as there is no appeal by the State to this Court. It can, however, be said, without any hesitation, that the acts of the appellants resulting in the injuries to the deceased were done with the knowledge that they would cause such bodily injury as was likely to cause death. The High Court was not in error in convicting the appellants under S. 304 Part II read with S. 34. We do not consider the sentences excessive. The appeal is, therefore, dismissed.

Appeal dismissed.